THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

CONTAINING ALL A.F.R. DECISIONS OF THE
HIGH COURT OF JUDICATURE AT ALLAHABAD

2023 - VOL. IV
(APRIL)

PAGES 1 TO 1526

PUBLISHED UNDER THE AUTHORITY OF THE GOVERNMENT OF UTTAR PRADESH
COMPOSED AT INDIAN LAW REPORTER SECTION, HIGH COURT, ALLAHABAD.

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(2023) 4 ILRA 9
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2023

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Crl. Misc. Bail Cancellation Application No. 302 of 2021
with
Crl. Misc. Bail Cancellation Application No. 188 of 2022
with
Crl. Misc. Bail Cancellation Application No. 207 of 2022
with
Crl. Misc. Bail Cancellation Application No. 255 of 2022

Nitesh Kumar Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajiv Kumar Singh, Sri Manish Tiwari, Sri Prabhakar Awasthi, Sri Surendra Kumar Chaubey, Vinay Kumar, Sri Pradeep Kumar Mishra, Sri Vinay Saran (Sr. Advocate)

Counsel for the Opposite Parties:
G.A., Sri Amrish Tiwari, Sri Vikram Bahadur Singh, Sri Satya Dheer Singh Jadon, Sri Rajiv Nayan Singh, Sri Krishan Murari Tripathi, Sri V.P. Srivastava (Sr. Advocate)

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 439(2) - Bail Cancellation - Indian Penal Code, 1860 - Sections 302 & 120B - cancellation of bail cannot be limited to the occurrence of supervening circumstances - Court has the inherent powers and discretion to cancel the bail of an accused even in the absence of supervening circumstances - grounds for cancellation of bail - interference or attempt to interfere with the due course of administration of Justice - evasion or attempt to evade the due course of justice - abuse of the concession granted to the accused in any manner - Possibility of accused absconding - Likelihood of/actual misuse of bail- Likelihood of the accused tampering with the evidence or threatening witnesses. (Para -30)

Offences of murder and criminal conspiracy - Opposite parties named in F.I.R. - committed conspiracy to kill - deceased made oral dying declaration before informant - involvement of opposite parties in incident - not taken into consideration by trial court - release on bail - another Case registered and charge sheet submitted - for offence of making threat of causing death or grievous hurt to witness of case - trial court overlooked that opposite parties were absconding soon after incident - eluded process of law.**(Para - 50)**

HELD:-Trial Court passed impugned bail orders based on incorrect facts without verifying the record. Material evidence was overlooked by trial Court. Impugned bail orders cannot be sustained hence set aside. **(Para -39,51,52)**

Bail Cancellation Application allowed. (E-7)

List of Cases cited:

1. Manoj Kumar Khokhar Vs St. of Raj. & anr. AIR (SC) 364

2. Pooran Vs Ramvilas & nr., 2001 CRI.L.J. 2566

3. Deepak Yadav VS St. of U.P. & anr., 2022 (8) SCC 559

4. Dolat Ram & ors. Vs St. of Haryana, (1995) 1 SCC 349

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Heard Sri Vinay Saran, Senior Advocate assisted by Sri Pradeep Kumar Mishra and Sri Surendra Kumar Chaube, learned counsel for the applicant-Nitesh Kumar Singh.

Sri V.P. Srivastava, Senior Advocate assisted by Sri Satya Dheer Singh Jadon, Sri Rajeev Nayan Singh, Sri Vikram Bahadur Singh and Sri Krishan Murari Tripathi learned counsel for the opposite parties-Sabal Singh @ Amritesh Singh, Hari Singh and Raj Narain Pandey.

Sri S. K. Ojha, learned AGA, Sri Suraj Singh, Sri Yogeshwar Rai, Ms. Reema Gupta, learned counsel for the State of U.P.

2. Applicant Nitesh Kumar Singh has filed Criminal Misc. Bail cancellation application Nos. 302 of 2021, 188 of 2022 and 207 of 2022 under Section 439(2) of Cr.P.C. seeking cancellation of bail granted to opposite parties namely Shabal Singh @ Amritesh Singh, Hari Singh and Raj Narayan Pandey in Case Crime No. 167 of 2021 u/s 302, 120B IPC relating to Police Station Bairiya, District Ballia.

3. Criminal Misc. Bail Cancellation Application No. 255 of 2022 is filed by the State of U.P. seeking cancellation of bail granted to opposite party/ accused Shabal Singh @ Amritesh Singh by the Additional Sessions Judge, Court No.3, Ballia vide its order dated 05.08.2021 in the above noted case passed in Bail Application No. 1426/2021.

4. Opposite parties/accused Hari Singh and Raj Narayan Pandey were granted bail by the learned In-charge Additional Session Judge, Ballia vide the order dated 28.04.2022 in the above noted case passed in Bail Applications No. 2324/2021 and 95/2022 respectively.

5. Since all the bail cancellation applications relate to same crime number and same set of facts, therefore, these applications are being decided by this common order.

6. The facts of the case are that the applicant/complainant Nitesh Kumar Singh lodged the first information report in Police Station Bairiya, District Ballia, on 07.07.2021 mentioning therein that on 07.07.2021, his elder brother Jaleshwar Singh @ Balbeer Singh along with Shabal Singh @ Amritesh Singh, who was known to him, was returning in his private vehicle after visiting his friend. At around 12.00 noon the car was stopped at the shop of Jauhar Mistri. Five persons riding two motorcycles came there and fired upon his elder brother. On receiving this information, the informant rushed towards the place of occurrence and found that his brother was still alive at that time. When he, along with some other persons, was taking his brother to Sonbarsa Hospital, his brother told him that Harish Paswan S/O Indradev Paswan, R/O Babubel, Police Station Haldi, Hari Singh S/O late Kedar Singh R/O Bairiya and Raj Narayan Pandey S/O late Singar Pandey R/O Bairiya accompanied by two unknown persons had shot him. His brother also told him that Shabal Singh @ Amritesh Singh committed conspiracy to kill him. As soon as he reached the hospital, the doctors declared his brother dead.

7. Learned counsel for the applicant and learned Government Counsel for the State of U. P. argued that on 14.08.2021 i.e. after the release on bail pursuant to impugned bail orders, the opposite parties namely Shabal Singh @ Amritesh Singh, Harish Paswan and Hari Singh gave threats of causing death or grievous hurt to Amit Kumar Varma, who is the witness of inquest proceedings of the deceased and also the Pairokar of the informant. First information report having crime No.207 of 2021 was registered on 15.08.2021 against them under Section 506, 507 of IPC at

Police Station, Bairiya District Ballia. A charge sheet came to be filed against them except Harish Paswan, since he was killed in the police encounter on 03.09.2021. This act of the opposite parties demonstrate that they had misused the liberty of bail granted to them. They would adversely affect the fair trial and they would tamper the evidence proposed to be produced against them during the trial. There is strong apprehension of killing of the applicant as well as the witnesses of the prosecution by these persons/opposite parties.

8. The learned trial Court while passing the impugned bail orders, completely ignored the credible evidence that the deceased before his last breath told the informant and his sister-in-law [Bhabhi]-Ranjana Singh that opposite parties Harish Paswan, Hari Singh, Raj Narain Pandey and two unnamed persons shot him and Shabal Singh @ Amritesh Singh committed criminal conspiracy. The statement of the informant was noted down by the Investigating Officer on 02.08.2021 which was available before the trial court on record at the time of granting bail to opposite party Shabal Singh @ Amritesh Singh vide order dated 05.08.2021. Similarly, the statement of Ranjana Singh-the sister in law [Bhabhi] of the deceased, who was also sitting in the same car in which the deceased was being taken to the hospital by the informant, and before whom also the deceased made his oral dying declaration indicating the involvement of the opposite parties in the incident, was also noted down by the Investigating Officer on 17.08.2021. The opposite parties Hari Singh and Raj Narain Pandey were granted bail by the learned trial court on 28.04.2022. The statements of the informant and Ranjana Singh were completely overlooked while granting bail to them by the learned trial court. This demonstrates that the impugned bail orders were passed without considering the record.

9. It is also vehemently argued that the learned trial Court while passing the impugned bail orders completely ignored the statement of Jauhar Ansari, the owner of Motor Garage, who was present at the time of the incident at the place of occurrence. This witness specifically denied that the opposite party Shabal Singh @ Amritesh Singh had any dues against him. It has been wrongly noted in the impugned bail order passed by the trial court in favour of the opposite party Shabal Singh @ Amritesh Singh that the statement of Jauhar Ansari was not recorded by the Investigating Officer since his statement was noted down on 02.08.2021 while the impugned bail order was passed by the trial court on 05.08.2021. Therefore it is clear that his statement was available on record before the trial Court at the time of granting bail to opposite party/ accused Shabal Singh @ Amritesh Singh.

10. It is further submitted that it was wrongly argued before the trial court that the opposite parties also received firearm injuries along with the deceased during the incident. It is not true since none of the opposite parties were medically examined and their medical reports were also not available on record. Thus, the trial Court was misled and it considered this argument without verifying the record. The learned trial Court had copied and pasted the bail order previously passed in subsequent orders. Thus, the impugned bail orders are not based upon true facts and are passed without verifying the record. The learned trial Court mentioned wrong facts in the bail orders passed in favour of opposite

parties namely Hari Singh and Raj Narain Pandey that they were also sitting in the same car along with the deceased and they committed conspiracy to eliminate Jaleshwar Singh @ Balbeer Singh, the deceased. It is factually incorrect since these opposite parties fired upon at Jaleshwar Singh @ Balbeer Singh with firearm weapons at the time and the place of occurrence but they are not assigned the role of committing conspiracy to kill Jaleshwar Singh @ Balbeer Singh. Thus the impugned order is patently wrong and is passed on the basis of incorrect facts.

11. It is also submitted that it was strongly argued on behalf of the applicant that the learned trial court while passing the impugned bail orders, has completely ignored and overlooked the criminal history of opposite parties namely Shabal Singh@ Amritesh Singh and Hari Singh.

12. The opposite party Shabal Singh @ Amritesh Singh had criminal history of two cases i.e. Case Crime No. 98/2015 under Sections 354-B, 506 of IPC Police Station Shivpuri District Varanasi and Case Crime No.49 of 2011 under Sections 147, 148, 323, 307, 342, 506 of IPC Police Station Shivpuri District Varanasi.

13. The opposite party Hari Singh had criminal history of four cases having Crime No.167/2021, under Sections 302/120B IPC, P.S. Bairiya, District Ballia, Case Crime No.207/2021 under Sections 506, 507 IPC, Crime No. 128/2010 under Sections 147, 148, 149, 307, 336, 427 IPC Police Station Dokati, District Ballia and Case Crime No.179/2006 under Sections 307, 302, 120B of IPC and Section 7 of Criminal Law Amendment Act, Police Station Bairiya, Distirct Ballia.

14. Both the opposite parties Shabal Singh @ Amritesh Singh and Hari Singh had concealed their criminal history to their credit and they were history sheeters, however, the learned trial Court wrongly observed otherwise.

15. It is further submitted that the learned trial court while granting bail to opposite parties namely Hari Singh and Raj Narain Pandey overlooked this fact that they were absconding soon after committing the murder of the brother of the informant. Non Bailable Warrants were issued against them. The process of Section 82 Cr.P.C was also issued against opposite party/ accused Hari Singh and it was served upon him. Thereafter, a reward of Rs. 25,000/- was also declared upon him to ensure his presence. Both these opposing parties have eluded the process of law.

16. It is also submitted that the bail granted to the co-accused Abhay Bharti by this Hon'ble Court has been cancelled by the Hon'ble Apex Court after consideration of all the facts and circumstances of this case vide its order dated 07.03.2022 passed in CRIMINAL APPEAL NO.374/ 2022 [SLP [CRL.] NO. 339/ 2022]

17. Learned counsel for the applicant placed reliance on **Manoj Kumar Khokhar Vs. State of Rajasthan & Anr. AIR (SC) 364.**

18. Per contra, learned counsel for the opposite parties-Shabal Singh @ Amritesh Singh, Hari Singh and Raj Narayan Pandey vehemently opposed the bail cancellation applications and argued that opposite parties have been falsely implicated in this case. The incident was caused by some unknown persons. As a matter of fact, the deceased himself was a history sheeter, having criminal history of as many as 13 criminal cases to his credit. Therefore, it

might be possible that he was killed by some other enemies who were not known to him. Opposite parties Shabal Singh and Hari Singh have been falsely implicated in Case Crime No. 207 of 2021 under Sections 506, 507 of IPC by Amit Kumar Varma. They did not threaten to cause death or grievous hurt to the witness. Amit Kumar Varma is not a witness of fact but he is only the witness of inquest proceedings.

19. It is further submitted that the non-disclosure of criminal history of the opposite party Shabal Singh @ Amritresh Singh was not a deliberate suppression because at the time of presentation of bail application he was in jail, therefore, the information about earlier criminal cases could not be brought on record and the pairokar had no knowledge about his criminal history.

20. He was falsely implicated in Case Crime No.98/2015 under Section 354B, 506 of IPC, Police Station Shivpur, District Varanasi in which the final report was submitted on 10.05.2015 which has been accepted by the court concerned on 27.04.2015.

21. In another case, he was falsely implicated which was registered as S.T. No. 133 of 2012 arising out of Crime No.49/2011, under Sections 147, 148, 323, 307, 342, 506 of IPC, Police Station Shivpur, District Varanasi. In this case, he has been acquitted vide judgement and order dated 22.11.2012 passed by the Additional Sessions Judge, Court No.8, Varanasi.

22. So far as the criminal history of opposite party Hari Singh is concerned, in two cases, Case Crime No.167/2021 is the present case, and in Case Crime No.207/2021 under Section 506, 507 IPC he has already been granted bail. In the third case, Crime No. 128/2010 under Section 147, 148, 149, 307, 336, 427 IPC, Police Station Dokati, District Ballia, he is discharged by the court concerned. In the fourth case having Crime No.179/2006, under Sections 307, 302, 120B of IPC and Section 7 of Criminal Law Amendment Act, Police Station Bairiya Distirct Ballia, he is acquitted by the trial Court.

23. It is further argued that the informant is not the eye witness of the incident and the alleged eye witness Jauhar Mistri had not taken the name of opposite parties Hari Singh and Raj Narain Pandey. The first information report is silent about the motive behind the murder of the deceased. The role of opposite parties Hari Singh and Raj Narain Pandey is quite different from the role of opposite party Shabal Singh @ Amritesh Singh and co-accused Abhay Bharti.

24. It is further submitted that the opposite party Raj Narain Pandey is not named as accused in Crime No. 207 of 2021 under Section 506, 507 of IPC. No charge sheet is filed against him in this case. He never made any threat to any witness of the case. He is a retired person from the Army having no rivalry with the deceased. The deceased had criminal history of 13 cases and the deceased was trying to grab his landed property. The deceased had attempted to murder his son Suryakamal Pandey therefore, an FIR was lodged against him and other co-accused namely Maniram Singh and Amit Varma having Case Crime No.173 of 2019, under Section 307, 147, 148, 149 IPC Police Station Bairiya , District Ballia. Rajnarayan Pandey and his wife lodged NCR No.37 of 2019, 67 of 2019 and 125 of 2019. Only for

this reason he has falsely been roped in the present case.

25. It is vehemently argued that as per the postmortem report of the deceased Jaleshwar Singh @ Balbeer Singh, he sustained as many as 13 firearm injuries. During the postmortem, blood was found to be present in both the nostrils and the mouth of the deceased. Closed bloodstains were present over the face and clothes. Both the lungs of the deceased were found to be punctured and right lower ventricle of the heart was found to be punctured. In view of the above fire arm injuries and findings, the deceased could not have spoken even a word and hence, there could be no occasion of making dying declaration by him before the informant and Ranjana Singh. The alleged dying declaration is not a credible evidence and it cannot be proved during the course of the trial.

26. It is also submitted that the bail granted to the co-accused Abhay Bharti by this Hon'ble Court was cancelled by the Hon'ble Supreme Court for the reason that he was previously convicted and sentenced for imprisonment for life under Section 302 and 506 IPC in earlier FIR No.467 of 1998. The opposite parties Shabal Singh @ Amritesh Singh and Hari Singh are not previously convicted and their criminal history is properly explained. The impugned bail order was passed by the learned trial Court after considering all the material available on record. The present Bail Cancellation Applications deserve to be dismissed.

27. Learned counsel for the opposite parties placed reliance in **Pooran Vs. Ramvilas & Anr., 2001 CRI.L.J. 2566** and submitted that setting aside the unjustified illegal and perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation.

28. I have perused the record.

29. Section 439 (2) in The Code Of Criminal Procedure, 1973 provides :-

"(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

30. The Hon'ble Apex Court in **Deepak Yadav VS. State of U.P. & Anr., 2022 (8) SCC 559** referred the grounds for cancellation of bail as laid down by the two Judge bench in **Dolat Ram And Others Vs. State of Haryana, (1995) 1 SCC 349 :**

"...
(i) interference or attempt to interfere with the due course of
administration of Justice
(ii) evasion or attempt to evade the due course of justice
(iii) abuse of the concession granted to the accused in any manner
(iv) Possibility of accused absconding
(v) Likelihood of/actual misuse of bail
(vi) Likelihood of the accused tampering with the evidence or threatening witnesses."

31. Based on the above grounds, the Hon'ble Apex Court in **Deepak Yadav (supra)** further observed that:

"33. It is no doubt true that cancellation of bail cannot be limited to the

occurrence of supervening circumstances. This Court certainly has the inherent powers and discretion to cancel the bail of an accused even in the absence of supervening circumstances. Following are the illustrative circumstances where the bail can be cancelled :-

33.1 Where the court granting bail takes into account irrelevant material of substantial nature and not trivial nature while ignoring relevant material on record.

33.2 Where the court granting bail overlooks the influential position of the accused in comparison to the victim of abuse or the witnesses especially when there is prima facie misuse of position and power over the victim.

33.3 Where the past criminal record and conduct of the accused is completely ignored while granting bail.

33.4 Where bail has been granted on untenable grounds.

33.5 Where serious discrepancies are found in the order granting bail thereby causing prejudice to justice.

33.6 Where the grant of bail was not appropriate in the first place given the very serious nature of the charges against the accused which disentitles him for bail and thus cannot be justified.

33.7 When the order granting bail is apparently whimsical, capricious and perverse in the facts of the given case."

32. Perusal of the impugned bail order, granting bail to opposite party /accused Shabal Singh @ Amritesh Singh dated 05.08.2021 passed by the learned Additional Sessions Judge, Court No.3, Ballia relating to Bail application No.1426 of 2021, goes to show that in the argument paragraph, advanced on behalf of the accused, it is mentioned that *"Kathit Ghatna me mratak Jaleshwar ke sath aawedak ko bhi fire arms ki choten aayi hain"* (Applicant also sustained firearm injuries during the incident along with the deceased Jaleshwar).....uska koi apradhik itihas nahi hai" (he has no criminal history to his credit).

33. On the basis of the record it is found that opposite party/ accused Shabal Singh @ Amritesh Singh did not sustain any firearm injury during the incident. He was not medically examined and no medical report is available on record. The learned trial Court did not confirm this with the record but considered this argument while granting bail to the opposite party. So far as the criminal history of the opposite party accused Shabal Singh @ Amritesh Singh is concerned, it is brought on record that he had criminal history of two cases at the time of granting of bail to him. One was case crime no.98/2015 under Section 354B, 506 IPC P.S. Shivpur, District Varanasi and another was Case Crime No.49 of 2011, under Sections 147, 148, 323, 307, 342, 506 IPC P.S. Shivpuri District Varanasi. This criminal history is not controverted by opposite party no.2/Accused Shabal Singh @ Amritesh Singh. Through his counter affidavit he explained the criminal history to his credit that in the first case, final report was submitted and in another case he was acquitted after trial by the trial court. It may be considered as criminal history is explained but its existence is not denied. The argument raised on behalf of the opposite party/accused Shabal Singh @ Amritesh Singh cannot be accepted that non disclosure of the criminal history on his part was not deliberate since he was confined in jail and these facts were not within the knowledge of his pairokar. Therefore, it is clear that opposite party/accused Shabal Singh @ Amritesh Singh had criminal history at the time of presentation of bail application which was

concealed by him. Learned trial Court believed this contention and it was one of the grounds for granting the bail to the accused Shabal Singh @ Amritesh Singh.

34. So far as the impugned order granting bail to opposite parties Hari Singh and Raj Narain Pandey is concerned, similar narration is found in the argument paragraph quoted by the trial court, advanced on behalf of these opposite parties that they also sustained firearm injuries during the incident alongwith the deceased Jaleshwar Singh @ Balbeer Singh and opposite party Hari Singh did not have any criminal history to his credit.

35. The criminal history of opposite party Hari Singh is brought on record which are as follows:

(i) Case Crime No. 167/2021, under Section 302, 120B IPC PS. Bairiya, District Ballia

(ii) Case Crime No. 207/2021, under Section 506, 507 IPC , P.S. Bairiya, District Ballia

(iii) Case Crime No.128/2010, under Section 147, 148, 149, 307, 336, 427 IPC, P.S. Dokati, District Ballia

(iv) Case Crime No. 179/2006 under Section 307, 302, 120B of IPC, Section 7 of Criminal Law Amendment Act, P.S. Bairiya, District Ballia.

36. Opposite party/ accused Hari Singh through his counter affidavit has explained the aforesaid criminal history.

37. It is observed that the existence of criminal history of opposite party/ accused Hari Singh is not controverted by him. Merely offering an explanation does not mean that it may be considered as having no criminal history.

38. So far as mentioning of the argument that during the incident opposite parties Hari Singh and Raj Narain Pandey also sustained firearm injury alongwith deceased Jaleshwar Singh @ Balbeer singh is concerned, it is not supported by the record. It was also wrongly argued that there were allegation of committing conspiracy by the opposite parties Hari Singh and Raj Narayan Pandey whereas in the first information report they were assigned a specific role of firing at deceased Jaleshwar Singh @ Balbeer Singh and they were named in the FIR as shooters. It is apparent that learned trial court did not verify this fact from the record and it appears that in a routine manner this argument was cut and pasted from the previous bail order passed in favour of Shabal Singh @ Amritesh Singh. Suffice to mention here that learned trial court in its observation has mentioned that the allegation of conspiracy to kill deceased Jaleshwar Singh @ Balbeer Singh has been made against opposite parties Hari Singh and Raj Narain Pandey. As discussed, the observation of the learned trial court is not based upon the record and also not based upon the facts of the case.

39. Perusal of the case diary goes to show that the statement of Jauhar Mistri was noted down by the Investigating Officer on 02.08.2021. Bail was granted by the learned trial Court to opposite party/ accused Shabal Singh @ Amritesh Singh on 05.08.2022. It is incorrectly observed by the trial court that the statement of Jauhar Mian was not recorded in case diary by the Investigating Officer because at the time of hearing of bail application and passing of impugned order granting bail to Shabal Singh @ Amritesh Singh, his statement was very much available in the case diary. It appears that learned trial court did not

consult the record in proper manner and made observation otherwise. The witness Jauhar Mistri specifically stated in his statement given to the Investigating Officer that the opposite party Shabal Singh @ Amritesh Singh had no dues against him. He further stated that at the time of the incident Shabal Singh @ Amritesh Singh was sitting in the car next to Jaleshwar Singh @ Balbeer singh. When firing took place, he opened the door of the car and ran away but he returned to close the door and then again ran away. The conduct of the opposite party/ accused Shabal Singh @ Amritesh Singh got corroboration from the CCTV footage. This material evidence was overlooked by the learned trial Court.

40. The incident of the present case Crime No.167 of 2021 under Section 302/120B of IPC is said to have been occurred on 07.07.2021. Amit Kumar Varma, the witness of inquest proceedings and alleged pairokar of the informant, lodged First Information Report with Police Station Bairiya under Section 506, 507 IPC naming Harish Paswan, Hari Singh and Shabal Singh @ Amritesh Singh with the allegation that they threatened and restrained him on 14.08.2021 from doing pairvi on behalf of the informant Nitesh Kumar Singh failing which he would also face dire consequences. This threat was given by Harish Paswan on a call made on the mobile of Sameer Thakur. On receiving this threat he promptly informed the Superintendent of Police, Ballia that he apprehended causing of death or grievous hurt by the said persons. After the investigation, a charge sheet came to be filed against these persons. Therefore, it is apparent that after releasing on bail pursuant to impugned bail orders, opposite parties Shabal Singh and Hari Singh made threat to witness Amit Kumar Varma of causing him death or grievous hurt.

41. The informant in his first information report mentioned that when he was taking his brother to Sonbarasa Hospital along with some persons, his brother told him that Harish Paswan S/O Indradev Paswan, R/O Babubel, Police Station Haldi, Hari Singh S/O late Kedar Singh R/O Bairiya and Raj Narayan Pandey S/O late Singar Pandey R/O Bairiya and two unknown persons had shot him. His brother also told him that Shabal Singh @ Amritesh Singh committed conspiracy to kill him.

42. It is to be noted here that the statement of the informant Nitesh Kumar Singh was noted down by the Investigating Officer on 16.07.2021 while the impugned bail order granting bail to opposite party Shabal Singh @ Amritesh Singh was passed on 05.08.2021. Therefore, the statement of the informant Nitesh Kumar Singh that deceased before his last breath made an oral dying declaration was available on record while passing the impugned bail order dated 05.08.2021 but it was not taken into consideration by the trial court. Similarly, the statement of Ranjana Singh-sister in law (bhabhi) of the informant, was noted down by the Investigating Officer on 17.08.2021 wherein she stated that when Jaleshwar Singh @ Balbeer Singh was being taken to the hospital by the informant after the incident she was also sitting in the same car and that she was also the witness of the said oral dying declaration.

43. The statements of the informant and Ranjana Singh were available on record before the trial court but while

passing the impugned bail orders dated 28.04.2022 granting bail to opposite parties Hari Singh and Raj Narain Pandey, these statements were not considered by the trial Court. Therefore, it can be said that the credible evidence was not taken into consideration by the trial Court.

44. Opposite parties Hari Singh and Raj Narayan remained absconded soon after the incident. Process of non bailable warrants were issued against both of them. Opposite party/accused Raj Narain Pandey was arrested on 29.12.2021. Process of section 82 Cr.P.C. was issued by the competent court against opposite party/ accused Hari Singh. A reward of Rs.25,000/- was also declared on him to ensure his presence during the investigation. Pursuant to this process he surrendered before the trial Court on 15.12.2021. This aspect was also not taken into consideration while granting bail to Hari Singh and Raj Narain Pandey by the learned trial Court.

45. One important aspect to be taken into consideration is that the co-accused Abhay Bharti, who was identified through CCTV footage, was granted bail by this Court. His bail order was challenged before the Hon'ble Apex Court by the informant/ Applicant in Criminal Appeal No.374/2022 (@SLP (Crl.) No.339/2022) and the bail granted to him was cancelled by the Hon'ble Apex Court vide order dated 07.03.2022.

46. The argument is advanced on behalf of the opposite parties that the bail of co-accused Abhay Bharti was cancelled by the Hon'ble Apex Court since he was already convicted and sentenced for imprisonment of life under Section 302/506 IPC in another case, however, none of the contesting opposite parties have earlier been convicted.

47. This argument cannot be accepted since there is no denial that the opposite parties Shabal Singh @ Amritesh Singh and Hari Singh had criminal history to their credit which was concealed by them and they misled the trial court into believing that they had no criminal history to their credit. Moreover, the criminal history to the credit of opposite parties are not controverted by them.

48. The Hon'ble Apex Court in its order date 07.03.2022 observed that it was second case against co-accused Abhay Bharti under Section 302 IPC. In the present matter also this is a second case under Section 302 IPC against opposite party/ accused Hari Singh. The order of cancellation of bail granted to the co-accused Abhay Bharti was also not considered by the trial Court while passing the impugned order dated 28.04.2022.

49. The learned trial Court while granting bail to Shabal Singh @ Amritesh Singh vide order dated 05.08.2021 overlooked the oral dying declaration made by the deceased Jaleshwar Singh @ Balbeer Singh about involvement of opposite parties/accused who were accompanied by two unknown persons. Similarly, while passing the impugned bail order dated 28.04.2022 the learned trial Court completely overlooked the statements of the informant and Ranjana Singh as noted down by the Investigating Officer in which the oral dying declaration of the deceased was narrated.

50. On the basis of the above discussion it is concluded that:

(i) Opposite parties Shabal Singh @ Amritesh Singh, Hari Singh and Raj Narain Pandey were named in the first information report. Opposite party Shabal Singh @ Amritesh Singh committed conspiracy to kill Jaleshwar Singh @ Balbeer Singh. Opposite parties Hari Singh

and Raj Narain Pandey were assigned the role that they open fired with firearm weapon at the Jaleshwar Singh @ Balbeer Singh which resulted in his death.

(ii) The deceased before his last breath made oral dying declaration before the informant and Ranjana Singh about involvement of these opposite parties in the incident. These statements were noted down by the Investigating Officer and were available on record before the trial Court while passing of the impugned bail orders. This evidence was completely overlooked by the trial court.

(iii) Opposite parties Shabal Singh @ Amritesh Singh and Hari Singh had criminal history to their credit which were concealed by them before the trial Court.

(iv) Bail granted to the co-accused Abhay Bharti has been cancelled by the Hon'ble Apex Court considering the facts and circumstances of the case.

(v) The statement of Jauhar Mistri was not taken into consideration by the trial Court while it was already available on record.

(vi) Pursuant to impugned bail order after their release on bail another Case Crime No. 207 of 2021, under Section 506, 507 IPC was registered against opposite parties Shabal Singh @ Amritesh Singh and Hari Singh and a charge sheet has been submitted against them for the offence of making threat of causing death or grievous hurt to the witness of the case.

(vii) The learned trial Court wrongly mentioned that opposite parties Hari Singh and Raj Narain Pandey were sitting in the same car with the deceased and they also received firearm injury and they committed conspiracy whereas a specific role of firing with firearm weapons at deceased were assigned to them and neither they were medically examined nor any medical report was available on record.

(viii) It was wrongly considered by the trial court that opposite party Shabal Singh @ Amritesh Singh also received firearm injury but it was not supported by any medical report. The observation made by the learned trial court is factually incorrect.

(ix) The learned trial court while passing impugned bail order dated 28.04.2022 also overlooked the aspect that opposite parties Hari Singh and Raj Narain Pandey were absconding soon after the incident and they eluded the process of law.

51. The learned trial Court passed the impugned bail orders taking into consideration the incorrect facts of the case, therefore, all the bail cancellation applications deserve to be allowed.

52. Having considered the facts and circumstances of the case, the material available on record and the observations made above, the Court is of the opinion that the impugned bail orders dated 05.08.2021 and 28.04.2022 passed by learned trial Court cannot be sustained. Accordingly, all the aforesaid bail cancellation applications are allowed and the impugned bail orders dated 05.08.2021 and 28.04.2022 are hereby set aside.

53. Opposite parties Shabal Singh @ Amritesh Singh, Hari Singh @ Hare Ram Singh and Raj Narain Pandey are hereby directed to surrender within a week before the court concerned.

54. Any observation made above shall not be treated as any finding on the merit and shall not prejudice the trial.

55. Registrar (compliance) is also directed to communicate this order to District Judge concerned for necessary compliance.

(2023) 4 ILRA 20
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.04.2023

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Crl. Misc. Bail Application No. 4824 of 2023

Jeetan Lodh @ Jitendra ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Pradyumn Shukla, Qasim Abbas Zaidi

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 376, 452 & 506 - The Protection of Children From Sexual Offences Act, 2012 - Section 3/4, Section 33 (8) - Special Court may pay compensation to children for any physical or mental trauma for rehabilitation, The Protection of Children from Sexual Offences Rules, 2020 - Rule 9 - Compensation, The Code of criminal procedure, 1973 - Section 164 - Prosecutrix became hostile - denied allegation of rape against applicant. **(Para -8)**

HELD:-If victim became hostile and does not support prosecution case, amount of compensation given to the victim or family member should be recovered by the authorities concerned who have paid the compensation. State Government should pass orders and issue directions to the authorities to recover compensation.**(Para -11,12)**

Bail application allowed. (E-7)

(Delivered by Hon'ble Brij Raj Singh, J.)

1. Sri Arvind Mishra has filed his power on behalf of O.P. No.2, complainant which is taken on record.

2. Heard learned counsel for the applicant, learned counsel for the complainant and Sri Rajesh Kumar Singh, learned A.G.A.-I for the State.

3. This bail application has been filed by the applicant with a prayer to enlarge him on bail in Case Crime No.225 of 2022 under Section 376, 452, 506 IPC and Section 3/4 of POCSO Act, PS Gangaghat distt. Unnao.

4. Learned counsel for the applicant has submitted that PW-2 prosecutrix has not supported the prosecution case in cross-examination. She has deposed before the Court that she could not identify the person who committed rape against her. She has further stated that she had not seen the face of the person who committed rape. She has further stated that there is no enmity between her family and the applicant. It has been submitted that prosecutrix has totally denied version of FIR as well as the version of 164 CrPC before the Court. Once she has denied the version under Section 164 CrPC and the FIR, at the moment the applicant may not be held guilty and he is liable to be granted bail. He has further submitted that the PW-1 brother who is complainant has also not supported the prosecution case. The brother has stated that some other person had written FIR and he cannot read Hindi language, therefore, he could not come to know how the FIR was lodged. He has submitted that the applicant has no criminal history and he is in Jail since 20.5.2022.

5. On the other hand, Sri Arvind Mishra learned counsel for the complainant and Sri Rajesh Kumar Singh learned AGA-I have opposed the bail and submitted that version of FIR and statement under Section 164 CrPC are intact and in examination-in-chief, the prosecutrix reiterated the version of FIR as well as statement under Section 164 CrPC, therefore, the bail prayer be rejected.

6. Considering the over all facts and circumstances of the case, particular the cross-examination version of the prosecutrix PW-2, who deposed before the Court that she could not identify the person who committed rape against her and the version of the brother who is complainant, who has also not supported the prosecution case, it is a fit case for bail.

7. Let the applicant Jeetan Lodh @ Jitendra be released on bail in the above case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Court concerned with the following conditions :-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

8. Before parting with the case, Sri Rajesh Kumar Singh learned AGA-I for State has pointed out that in rape cases as well as sexual offence against minor, the victim and her family is provided financial assistance. He has submitted that in the present case, the prosecutrix has become hostile and she has denied the allegation of rape against the applicant. Thus, the compensation amount if any, paid to the victim or her family should be recovered back. He has invited attention of this Court towards Section 33 (8) of the Protection of Children from Sexual Offences Act, 2012 which is quoted below:-

"(8) In appropriate cases, the Special Court may, in addition to the

punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child."

9. Sri Rajesh Kumar Singh learned AGA-I has further invited attention of this Court towards Rule 9 of the Protection of Children from Sexual Offences Rules, 2020 which is quoted below:-

"9. Compensation.--*(1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.*

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical or mental health or on both;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine such child's need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure, 1973 or any other law for the

time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6 Nothing in these rules shall prevent a child or child's parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government."

10. It has further been submitted by the learned AGA that in compliance of the aforesaid Act and Rules, various Government orders have been issued by the State Government of U.P. i.e., on 9.4.2014, 7.6.2016 and 14.6.2016. The last Government order for paying compensation is issued by the State Government of U.P. on 14.6.2016. The Government order dated 14.6.2016 has been passed whereby the earlier Government order dated 9.4.2014 has been amended for providing compensation to the victim of the categories mentioned in the Government order dated 7.6.2016. The relevant portion of the said Government order dated 14.6.2016 is quoted below:-

1), Rs.3,00,000/- for the victim of rape;

2) Rs. 1,00,000/- for the victim suffering from loss or injury causing severe mental agony to the victim of the crime (under Section 325, 326, 333, 394, 429, 435 and 436 IPC;

3) Rs.5,00,000/- to the victim of corrosive substance i..e, acid attack etc.;

4) Rs.1,50,000/- on death (non-earning member).

5) Rs.2,00,000/- on death (earning member).

6) Rs.2,00,000/- to the victim of human trafficking.

7) For offences under Section 4, 6, 7, 9, 11 and 14 of the Protection of the Children from Sexual Offences Act, 2012:-

(a) Rs.2,00,000/- to the victim of penetrative sexual assault (Section 4).

(b) Rs.2,00,000/- to the victim of aggravated penetrative sexual assault (Section 6).

(c) Rs.1,00,000/- to the victim of sexual assault (Section 7).

(d) Rs.1,50,000/- to the victim of aggravated sexual assault (Section 9).

(e) Rs.1,00,000/- to the victim of sexual harassment (Section 11).

(f) Rs.1,00,000/- to the victim of using child for pornographic purpose (Section 14).

8) Rs.2,00,000/- to the victim of burns affecting greater than 25% of the body (excluding acid attack cases).

9) Rs.50,000/- to the victim of sexual assault (excluding rape).

10) Rs.50,000/- to the victim of loss of foetus.

11) Rs.1,50,000/- to the victim of loss of fertility.

12) Rs.2,00,000/- to the victim of permanent disability (80% or more).

13) Rs.1,00,000/- to the victim of partial disability (40% to 80%).

14 Women victims of cross border firing:-

(a) Rs. 2,00,000/- victim of death or permanent disability (80% or more).

(b) Rs.1,00,000/- to the victim of partial disability (40% to 80%).

11. Now, the question has cropped up before me as to whether, the prosetrix who has become hostile is entitled to retain the

amount of compensation. In my opinion, if the victim has become hostile and does not support the prosecution case at all, it is appropriate to recover the amount if paid to the victim. The victim is the person who comes before the Court and during trial if she denies the allegation of rape and becomes hostile, there is no justification to keep the amount of compensation provided by the State Government. The State Exchequer cannot be burdened like this and there is all possibility of misuse of the laws. Therefore, in my opinion, the amount of compensation given to the victim or the family member, is liable to be recovered by the authorities concerned who have paid the compensation.

12. Therefore, considering the above aspect of the matter, it is directed that the State Government will pass appropriate orders and issue necessary directions to the authorities concerned to recover the amount of compensation if paid, in the cases, where the victim has become hostile during trial and not supported the prosecution. Let necessary exercise be done within a period of three months.

13. The Senior Registrar of this Court is directed to send a copy of this order to the Chief Secretary of Government of Uttar Pradesh for necessary compliance.

14. List this case in the second week of August and learned AGA will submit progress report.

(2023) 4 ILRA 24
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.03.2023

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. 2nd Bail Application No. 30489 of 2022

Neeraj ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Ali Hasan, Sri Deepak Kumar Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, Section – 439 - Indian Penal Code, Sections 328, 376 & 506 - Protection Of Children From Sexual Offences (POCSO) Act, Sections 3 & 4 - Second Bail Application - FIR - offence of Rape, threat and dire consequences – court finds that, applicant is in jail since second day of incident but, trial has not been concluded - charges were framed since informant and victim are not traceable therefore case could not be produced for trial - applicant does not have any criminal history - Held, Case as well as keeping in view the nature of the offence, evidence, complicity of the accused and submissions of learned counsel for parties, this Court is of the opinion that applicant has made out a case for bail - hence, bail application is hereby allowed - directions issued for compliance, accordingly. (Para – 18, 19, 22, 23, 26)

Bail Application Allowed. (E-11)

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

1. The prosecution case commenced on the basis of first information report lodged by Khushi Ram, who is the brother of the victim (hereinafter referred to as 'the first informant') on 22.6.2016 against the applicant Neeraj to the effect that on 21.6.2016 when his family members were sleeping, the applicant entered the house and caused them to smell certain intoxicant, due to which they became unconscious. Thereafter, the applicant committed rape on

her minor sister aged about 15 years (hereinafter referred as 'the victim') and also threatened her of dire consequences.

2. On the basis of the aforesaid report, a case was registered against the accused Neeraj at case crime No. 369 of 2016, under Sections 328, 376, 506 IPC and ¾ of POCSO Act, police station Sardhana, district Meerut. After lodging of the FIR, the law set into motion and the investigating officer arrested the applicant and after completing all the formalities thereof, submitted charge sheet against him. Vide order dated 06.1.2017, the learned Additional Sessions Judge, Court No. 7/Special Judge, POCSO Act, Meerut framed the charges against the applicant under the aforesaid sections.

3. Perusal of order sheet of the lower court shows that after submission of the charge sheet, neither the first informant nor the victim is appearing before the trial court and the accused has been in jail since 23.6.2016.

4. In the year 2017, the applicant filed first bail application (Criminal Misc. Bail Application No. 38021 of 2017), which was dismissed by the Coordinate Bench of this Court vide order dated 24.9.2019 as none appeared on behalf of the applicant to address the Court. However, after a lapse of about five years, in the year 2022, this second bail application has been filed on behalf of the applicant.

5. By means of this second bail application under Section 439 of Cr.P.C., applicant, who is involved in Case Crime No. 369 of 2016, under Sections 328, 376, 506 IPC and ¾ of POCSO Act, police station Sardhana, district Meerut, seeks enlargement on bail during the pendency of trial.

6. Since, the matter relates to the POCSO Act, notice was issued to the first informant vide order dated 16.2.2023. The Station House officer, Police Station Sardhana, district Meerut, in whose jurisdiction, the first informant and victim reside, was also directed to ensure service of notice upon the opposite party No. 2 and to file an affidavit in this regard by the next date fixed in the matter, i.e. 03.03.2023. However, neither the notice was served upon opposite party No. 2 nor the SHO concerned filed any affidavit.

7. On 20.3.2023, when this case was taken up, Shri Virendra Kumar Maurya, learned Additional Government Advocate made a statement at the Bar that the order of this Court dated 16.2.2023 was communicated to the Station House Officer, police station Sardhana, district Meerut through the Senior Superintendent of Police, Meerut on his email ID on 22.2.2023 and the same had been received in his office, but no heed has been paid by the S.S.P. Meerut and the SHO, police station Sardhana, district Meerut to the order of this Court. However, by order dated 20.3.2023, learned Additional Government Advocate was granted a week's time to get the order dated 16.2.2023 complied with. The Senior Superintendent of Police, Meerut and Station House Officer, Sardhana, district Meerut were also directed to show cause as to why the order dated 16.2.2023 has not been complied with by them. They were also directed to produce the victim of the instant case before this Court, failing which they have to appear before this Court on 28.3.2023.

8. As the aforesaid officers failed to produce the victim, they appeared before this Court in person.

9. So far as the order of this Court dated 20.3.2023 is concerned, it speaks in two volumes. Firstly, in spite of the order of this Court 16.2.2023, which was communicated to the Station House Officer, police station Sardhana, district Meerut through the Senior Superintendent of Police, Meerut on his email ID on 20.3.2023 and the same having been received in his office, why no response to the said order has been given and secondly, pursuant to the order of this Court dated 20.3.2023, victim has not been produced.

10. Pursuant to the order of this Court dated 20.3.2023, Shri Rama Kant Pachauri, presently posted as Inspector, police station Sardhana, district Meerut has filed his personal affidavit stating therein the steps taken to search the victim. He has stated in his affidavit that the victim was living in a rented house at Mohalla Cantonment, Police Station Sardhana, district Meerut. When the police personnel went to the aforesaid address, the landlord told that she had already left the house and that he does not have any information about the victim. Thereafter, the police visited the permanent address of the informant at Narnaul, Haryana where his brother told the police that neither the first informant is living in the village nor does have any relation about him and that his father has dispossessed the first informant from his property. Thereafter, the police contacted the Sarpanch of the village, who also told the police that Khushi Ram (informant) left the village about 4-5 years back. The Sarpanch of the village has also given a certificate to this effect. Thereafter, the SHO sent one SI Param Lal Singh at Tariza Nagar, Dhariwal, police station Dhariwal, district Gurdaspur, where he was told that informant of this case sold out his movable and immovable properties and left the village about 19-20 years back. In view of the above circumstances, the victim could not be traced out.

11. Shri Rohit Singh Sajwan, presently posted as Senior Superintendent of Police, Meerut submits that the order of this Court dated 16.2.2023 was communicated to his office, but Head Constable Nishant Chawla, who is dealing with the matter, did not forward the same to the Station House Officer, Sardhana, district Meerut to ensure compliance thereof. Therefore, they could not forward any information to the learned Additional Government Advocate. He further submits that as soon as he came to know about the lapse on the part of Head Constable Nishant Chawla in complying with the orders of this Court dated 16.2.2023 and 20.3.2023, he immediately suspended him for his dereliction in duties. He tenders his unconditional apology for the inconvenience caused to this Court for non-compliance of the order dated 16.2.2023.

12. Shri Rohit Singh Sajwan, Senior Superintendent of Police, Meerut also submits that he has discussed the matter with the senior officers of the department in respect of issuance of general guidelines regarding taking ID, mobile number, Adhar number, undertaking of the informant and the victim, who are living in a rented house that in case they shift to another house, they shall inform the police station concerned etc. at the time of lodging of FIR and to take other suitable steps in order to ensure the presence of the informant/victim before the trial court at the time of their examination.

13. The Senior Superintendent of Police, Meerut assures the Court that the aforesaid guidelines shall be issued by the higher authorities within three months. This Court has no reason to doubt the bona fide of the officer concerned.

14. The personal appearance of Shri Rohit Singh Sajwan, Senior Superintendent of Police, Meerut and Shri Rama Kant Pachauri, Inspector, police station Sardhana is dispensed with.

15. Since the applicant has been in jail since 23.6.2016, therefore, this Court proceeds to decide the prayer of bail of the applicant on its merits.

16. Heard learned counsel for the applicant and learned Additional Government Advocate representing the State.

17. By means of this second bail application under Section 439 of Cr.P.C., applicant, who is involved in Case Crime No. 369 of 2016, under Sections 328, 376, 506 IPC and ¾ of POCSO Act, police station Sardhana, district Meerut, seeks enlargement on bail during the pendency of trial.

18. The main substratum of argument of learned counsel for the applicant is that the applicant has been in jail since 23.6.2016, but the trial has not been concluded. This Court vide order dated 10.1.2023 had called for a report from the trial court through the District Judge, Meerut. Purusant to the said order, the learned Additional Sessions Judge/Special Judge, (POCSO Act), Meerut submitted his report dated 20.1.2023 mentioning there that in this case charge sheet was submitted on 14.9.2016 and charges were framed against the applicant on 06.1.2017, but in spite of best efforts, informant and victim of the case could not be produced for trial. Statements of formal witnesses have already been recorded. In spite of best efforts, the informant and the victim are not traceable.

19. It is submitted by the learned counsel for the applicant that there is no chance of the applicant fleeing away from the judicial process or tampering with the prosecution evidence. The applicant does not have any criminal history and is languishing in jail since 23.6.2016 and in case, he is released on bail, he will not misuse the liberty of bail and cooperate with the trial.

20. Per contra, learned Additional Government Advocate opposed the prayer for bail of the applicant, but could not dispute the above factual aspect of the matter.

21. Having heard learned counsel for the parties and examined the matter in its entirety, I find that the victim and informant are not traceable and that the applicant is languishing in jail since 23.6.2016.

22. Considering the facts and circumstances of the case as well as keeping in view the nature of the offence, evidence, complicity of the accused and submissions of the learned counsel for the parties, this Court is of the opinion that the applicant has made out a case for bail. Hence, the bail application is hereby allowed.

23. Let the applicant Neeraj, be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the

satisfaction of the court concerned with the following conditions:

(i) That the applicant shall cooperate in the expeditious disposal of the trial and shall regularly attend the court unless inevitable.

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

(iii) That after his release, the applicant shall not involve in any criminal activity.

(iv) The identity, status and residential proof of sureties will be verified by court concerned before the release of the applicant.

24. In case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail of the applicant.

25. Copy of this order shall be communicated to the Senior Superintendent of Police, Meerut by the learned Government Advocate for onward transmission to the authorities concerned.

26. The Registrar (Compliance) of this Court is directed to send a copy of this order to the Director General of Police, U.P. Lucknow and Legal Remembrancer, U.P. Lucknow for compliance.

27. Although this bail application has been disposed of, but the same shall be listed before this Court on 14.7.2023 for limited purpose of compliance of the order in respect of issuance of necessary guidelines as discussed above by the authorities concerned.

(2023) 4 ILRA 28
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.03.2023

BEFORE

THE HON'BLE SAMEER JAIN, J.

Crl. Misc. First Bail Application No. 57731 of 2022
Connected With
Crl. Misc. Bail Application No. 60061 of 2022

Mohd. Tufail ...Applicant
Versus
U.O.I. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anil Kumar Srivastava

Counsel for the Opposite Parties:
A.S.G.I., Sri Krishna Agarawal, Sri Vinay Kumar Singh

Criminal Law – Criminal Procedure Code, Section – 439 - Custom Act, 1962 - Sections 2(33), 11, 104, 104(6), 104(7), 108, 111, 125, 135(1)(A) & 135(1)(B) - Narcotic Drugs and Psychotropic Substances Act,1985 - Section – 67 - Bail Application - intelligence input about smuggling of Foreign Origin Gold by the accused applicants - recovering of total 2548.5 gm gold from the possession of applicants - Whether value of individually recovered gold should be considered or value of combined recovered gold should be considered - Held, According to prosecution gold was recovered from possession of applicants which was liable for confiscation Section 111 of Customs Act and as per Section 125 Customs Act authority concerned may levy fine in lieu of confiscation and therefore, it appears from provisions of Section 11 of Customs Act gold is not prohibited goods but it is restricted goods and as per Section 125 Customs Act in lieu of confiscation fine may be levied - As import of

gold is not prohibited but restricted subject to prescribed payment of duty, thus alleged recovered gold is not prohibited goods Section 2(33) Customs Act, but, it is restricted goods in view of judgment of three Judges Bench of Apex Court in case of 'Atul Automation' - Alleged offence committed by the applicants is Bailable one, hence, they are entitled to be released on bail - Bail Application allowed - directions accordingly. (Para – 39, 40)

Appeal Dismissed. (E-11)

List of Cases cited:

1. Air Customs Vs Begaim Akynova, Writ Petition (Criminal) No.1974 of 2021, decided on 3.1.2022

2. Toofan Singh Vs St. of T.N., 2021 (4) SCC 1

3. Satender Kumar Antil Vs Central Breau of Investigation & anr., (2021) 10 SCC 773

4. Om Prakash Bhatia Vs Commissioner of Customs, Delhi, AIR 2000 SC 581

5. Sheikh Mohd. Omer v Commissioner of Customs, Calcutta & ors., 1970 (2) SCC 728

6. Commissioner of Customs Vs Atul Automation Pvt. Ltd., (2019) 3 SCC 539

(Delivered by Hon'ble Sameer Jain, J.)

1. Since both the instant bail applications have arisen out of Case No.2 of 2022, under Sections 135(1)(A) and 135(1) (B) of Customs Act, 1962 (in short the Act) through Directorate of Intelligence, therefore, both the bail applications are being decided by common order.

2. Heard Sri N.I.Jafri, learned Senior Advocate assisted by Sri Ali Jamal Khan and Sri Anil Kumar Srivastava, learned counsels for the applicants, Sri Krishna Agarwal, learned counsel for DRI-opposite party no.2, Sri Vinay Kumar Singh, learned counsel for the Union of India and Sri Tanay Kumar, learned AGA, for the State.

3 The instant applications have been moved on behalf of the applicants with the prayer to release them on bail in Case Crime No.02 of 2022, under Sections 135(1)(A) and 135(1)(B) of Customs Act, 1962, through Directorate of Intelligence, during pendency of the trial.

BRIEF FACTS:

4. According to the prosecution, on 6.11.2022 an intelligence input was received by DRI that some persons, who were travelling in Train No.22422 in Coach-B-5 at Seat No.2, 3,54 and 56 are smuggling the foreign origin gold and they boarded in the Train from Jodhpur, Rajasthan and are going to deliver smuggled foreign origin gold in Rampur, Uttar Pradesh. Thereafter on 6.11.2022 Team of DRI Officers arrived at Rewari Junction Railway Station and when train arrived at the Junction at about 8.20 PM then Officers found that on the above mentioned seats applicants and two others were sitting and from the possession of applicant Mohammad Alam 549.5gm. gold in form for rods and from the possession of applicant Mohammad Tufail 526gm. gold in paste form were recovered. It is further alleged that from the possession of rest of accused persons, namely, Ishrat Ali 947.5gm gold and from the possession of Mohammad Naeem 525.5gm gold were recovered. Thus, as per DRI total 2548.5gm gold were recovered from the possession of applicants and two others. Thereafter, the extracted weight of alleged gold recovered from the possession of applicant Mohammad Tufail was ascertained and weight of extracted gold was ascertained as

448.50gm. As the gold recovered from the possession of applicant Mohammad Alam was already in solid form , therefore, it was not made part of extraction process.

5. According to the DRI, the market value of the total gold recovered from the possession of the applicants and two others was Rs. One Crore Thirteen Lacs Twenty Four Thousand Six Hundred and Eight and market value of the gold recovered from the possession of applicant Mohammad Alam and applicant Mohammad Tufail was Rs.27,98,054/- and Rs.22,83,762/- respectively. It is further alleged that the statements of applicants and other co-accused persons were recorded by the Custom Officers under Section 108 Customs Act and they confessed their guilt and stated that the alleged recovered gold was smuggled gold of foreign origin and they purchased it from Dubai.

6. All the accused persons including applicants also stated that they are known to each other and they collectively indulged in smuggling of gold of foreign origin.

7. After panchnama applicants were arrested on 9.11.2022 and investigation was commenced and after investigation on 5.1.2023 DRI filed criminal complaint against applicants and two others in the court of Special Chief Judicial Magistrate (Economic Offences) Meerut.

SUBMISSIONS ON BEHALF OF THE APPLICANTS :

8. Learned counsels for the applicants submit, entire allegation made against the applicants are totally false and baseless and applicants never indulged in smuggling of alleged gold of foreign origin. They further submitted that applicants and two others were forcibly apprehended by Officers of DRI from the Train on 6.11.2022 and thereafter by cooking up false story and planted recovery of gold they have been implicated in the present matter. He further submits, applicant were arrested on 9.11.2022, i.e., after about three days from the date of alleged seizure of gold.

9. Learned counsels for the applicants further submitted that as individually the alleged gold recovered from the possession of applicants is having value of less then Rs. One Crore, therefore, in view of Sections 104 and 135 of Customs Act, the offences alleged to have been committed are bailable. They further submitted, value of combined gold recovered from the possession of all accused persons including applicants can not be considered.

10. They placed reliance on the judgment of Delhi High Court in the case of **Air Customs Vs. Begaim Akynova** decided on 3.1.2022 in Writ Petition (Criminal) No.1974 of 2021.

11. Learned counsel for both the applicants further argued that from the train applicants and two others were taken to DRI Office, NOIDA and thereafter search was made and after three days they were made accused in the present matter after showing their formal arrest in the present case therefore, the procedure adopted by the DRI Officers is totally illegal and cannot be approved under the law as at the time when applicants were apprehended then neither search was taken at spot nor they were immediately arrested and thus applicants were under illegal custody of DRI for almost three days, i.e., from 6.11.2022 to 9.11.2022.

12. Learned counsels for the applicants further submit that statements

recorded under Section 108 Customs Act are not admissible in view of the law laid down by the Apex Court in the case of **Toofan Singh Vs. State of Tamilnadu, 2021 (4) SCC1.**

SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES.:

13. Learned counsel for the DRI as well as learned AGA and learned counsel appearing on behalf of Union of India submitted that from the combined possession of applicants and two others gold of foreign origin valuing more than Rs. One Crore was recovered and, therefore, considering the provisions of Sections 104 and 135 Customs Act alleged offences are non-bailable and although maximum punishment provided is seven years but as the present offence is economic offence under Special Act, therefore, even in view of the law laid down by the Apex Court in the case of **Satender Kumar Antil Vs. Central Breau of Investigation and another,** reported in **(2021) 10 SCC 773** the bail applications of applicants should be considered on merit.

14. Learned counsel for the DRI further submits that on the specific intelligence input applicants were apprehended from the train while they were travelling from Jodhpur, Rajasthan to Rampur Uttar Pradesh and from their possession smuggled gold of foreign origin was recovered and although from individual possession of both the applicants gold valuing less than Rs.One Crore was recovered but total value of the gold recovered from the possession of applicants and two other co-accused persons was more than Rs. One Crore, therefore, considering the provisions of Customs Act applicants committed non-bailable offences.

15. Learned counsel for the DRI further submits that statements of accused recorded under Sections 108 Customs Act is admissible and the Apex Court in the case of **Toofan Singh (supra)** also held that Custom Officers are not Police Officers and, therefore, statements recorded under Section 108 Customs Act cannot be equated with the statements recorded under Section 67 NDPS Act as officers acted under NDPS Act are Police Officers therefore, in view of law laid down in **Toofan Singh (supra)** statements of applicants recorded under Sections 108 Customs Act are admissible.

16. He next submits that from the statementS of applicants it appears that they collectively smuggled the recovered gold and they were known to each other and, therefore, considering the fact that they as a team indulged in smuggling of gold of foreign origin, the entire recovery made from all the accused persons including applicants should be considered for the purpose of Section 135 Customs Act and as value of entire recovered gold is more than Rs.One Crore, therefore, applicants and others committed non-bailable offences.

17. He further submits that as all the accused persons including applicants were well aware that all of them were carrying gold, therefore, they are all having conscious possession over entire recovered gold and it cannot be said that they acted individually and as they committed alleged offence as a team therefore, total value of recovered gold should be considered.

18. Learned counsel for the DRI further submits that the recovered gold is prohibited goods as its import or export is subject to certain prescribed condition, therefore, as per Section 104 Customs Act, the offence committed by applicants is non-bailable and according to Section 135 Customs Act maximum punishment for such offence is 7 years.

19. He placed reliance on the judgment of the Apex Court in the case of **Om Prakash Bhatia Vs. Commissioner of Customs, Delhi, AIR 2000 SC 581.**

20. He further submits that applicant Mohammad Aalam was earlier also involved in act of smuggling with regard to foreign currency of US Dollar and Euros in the year 2020. He further submits that applicant Mohammad Tufail was also booked in three cases of smuggling and out of three cases, two cases were of the the years 2019 and 2022 and both cases related to smuggling of gold and another case was of the year 2021 which related to cigarettes valuing about Rs.3,18,000/-and, therefore, considering the antecedents of applicants, severity of punishment and manner of commission of instant crime, applicants are not entitled to be released on bail.

CONCLUSION:

21. I have given my anxious consideration to the rival submissions and perused the record of the case.

22. From perusal of the complaint and panchnama of the case it appears that from the possession of the applicants and two others total gold of the value of Rs.1,13,24,608/- was recovered and from the possession of the applicant Mohammad Aalam gold valuing Rs. 27,98,054/- and from the possession of applicant Mohammad Tufail gold valuing Rs. 22,83,762/- was recovered respectively , therefore, from the individual possession of both the applicants gold less than Rs. One Crore was recovered.

23. Applicants have been challaned under the provisions of Section 135 Customs Act which runs as follows:

*"**135. Evasion of duty or prohibitions.**--(1) Without prejudice to any action that may be taken under this Act, if **any person**--*

(a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or

(emphasis supplied)

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 or Section 113, as the case may be; or

(c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under Section 113; or

(d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods or

(e) obtains an instrument from any authority by fraud, collusion, wilful mis-statement or suppression of facts and

such instrument has been utilised by such person or any other person,

he shall be punishable,--

(i) in the case of an offence relating to,--

(A) any goods the market price of which exceeds one crore of rupees; or

(B) the evasion or attempted evasion of duty exceeding fifty lakh of rupees; or

(C) such categories of prohibited goods as the Central Government may, by notification in the Official Gazette, specify; or

(D) fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to in clause (d), if the amount of drawback or exemption from duty exceeds fifty lakh of rupees,

(E) obtaining an instrument from any authority by fraud, collusion, wilful mis-statement or suppression of facts and such instrument has been utilised by any person, where the duty relatable to utilisation of the instrument exceeds fifty lakh rupeees, with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than one year;

(ii) in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both.

(2) If any person convicted of an offence under this section or under sub-section (1) of section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for less than one year.

(3) For the purposes of sub-sections (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than one year, namely:--

(i) the fact that the accused has been convicted for the first time for an offence under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;

(iv) the age of the accused.

Explanation.- For the purposes of this section, the expression "instrument" shall have the same meaning as assigned to it in the Explanation 1 to Section28-AAA"

24. From the perusal of Section 135 Customs Act it appears that if any person acquires possession or the possession in any way is concerned in carrying any goods liable to be confiscated and market price of the goods exceeds Rs. One Crore then he may be punished with imprisonment for the term which may extend upto seven years along with fine.

25. Section 104 Customs Act deals with the power of arrest and it runs as follows:

*"**104. Power to arrest**.--(1) If an officer of customs empowered in this behalf by general or special order of the Principal Commissioner of Customs or Commissioner of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.*

(2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a magistrate.

(3) Where an officer of customs has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898).

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence relating to--

(a) prohibited goods; or

(b) evasion or attempted evasion of duty exceeding fifty lakh rupees; or

(c) fraudulently availing of or attempting to avail drawback or any exemption from duty provided under this Act, where the amount of drawback or exemption from duty exceeds fifty lakh rupees; or

(d) fraudulently obtaining an instrument for the purpose s of th is Act or the Foreign Trade (Development and Regulation) Act, 1992(22 of 1992), and such instrument is utilised under this Act, where duty relatable to such utilisation of instrument exceeds, fifty lakh rupees, shall be cognizable.

(5) Save as otherwise provided in sub-section (4), all other offences under the Act shall be non-cognizable.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974) an offence punishable under section 135 relating to--

(a) evasion or attempted evasion of duty exceeding fifty lakh rupees; or

(b) prohibited goods notified under section 11 which are also notified under sub-clause (c) of clause (i) of sub-section (1) of section 135; or

(c) import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or

(d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees or,

(e) fraudulently obtaining an instrument for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992(22 of 1992), and such instrument is utilised under this Act, where duly relatable to such utilisation of instrument exceeds fifty lakh rupees, shall be non-bailable.

(7) Save as otherwise provided in sub-section (6), all other offences under this Act shall be bailable.

Explanation.- For the purposes of this section, the expression "instrument" shall have the same meaning as assigned to it in Explanation 1 to section 28-AAA. "

26. According to Section 104 (6) Customs Act an offence punishable under Section 135 Customs Act relating to prohibited goods notified under Section 11 of Customs Act which are also notified under sub-clause (c) of Clause (i) of sub-section (1) of Section 135 Customs Act, or import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds Rs. One Crore shall be non-bailable and as per Section 104(7) Customs Act all the other offences are bailable except provided in sub-section (6) of Section 104 Customs Act.

27. Therefore, from the perusal of Section 104 Customs Act it is evident that if import or export of any goods have not been declared as per the provisions of the Customs Act and market price of such recovered goods exceeds Rs.One Crore then offence will be non-bailable and similarly the offence committed with regard to prohibited goods also would be non-bailable.

28. In case at hand, from the individual possession of both the applicants gold valuing less than Rs. One Crore was recovered, however, value of total gold recovered from the possession of applicants and two others was more than Rs. One Crore.

29. Therefore, question arises whether value of individually recovered gold should be considered or value of combined recovered gold should be considered.

30. In Section 135 Customs Act, term "any person" has been used and, in my view, it denotes to an individual. The term "any person" cannot be interpreted as a group of persons. From the plain reading of Section 135 Customs Act it appears that it refers to an individual.

31. Delhi High Court also in the case of **Air Customs Vs. Begaim Akynova (supra)** observed that punishment which is to be imposed on the accused should correspond to the gold that has solely been recovered from his possession and each person should be made answerable for the recovery of gold found in his possession.

32. Therefore, in my view, for the purpose of Section 135 Customs Act value of individually recovered gold should be considered and not the value of combined recovered gold.

33. The next question in the case at hand is whether alleged recovered gold was prohibited goods as if it was prohibited goods then by virtue of Section 104 (6) and 135 Customs Act, the alleged offence committed by the applicants would be non-bailable and maximum punishment provided for such offence is seven years.

34. Prohibited goods has been defined under Section 2 (33) Customs Act which reads as under:

2 (33) —"prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

35. From the perusal of Section 2(33) Customs Act it appears that every good is prohibited if its import or export is subject

to an prohibition under the Customs Act or any other law for the time being in force.

36. The two Judges Bench of the Apex Court in the case of **Om Prakash Bhatia (supra)** observed that prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods and if conditions are not fulfilled, it may amount to prohibited goods.

37. The Apex Court in the case of **Om Prakash Bhatia (supra)** relied upon its earlier two Judges Bench judgment in the case of **Sheikh Mohd. Omer Versus Commissioner of Customs, Calcutta and others, 1970 SCC (2) 728** in which it was held that any restriction on import or export is to an extent prohibition and any prohibition whether it is complete or partial is the prohibition and as held by the Apex Court in the case of **Sheikh Mohd Omer (supra)** "any prohibition" means "every prohibition".

38. Therefore as per the judgments of **Sheikh Mohd. Omer (supra)** and **Om Prakash Bhatia (supra)** of the Apex Court even if the goods are not prohibited but if there is some restriction on its import or export then it will be prohibited goods but both the above noted judgments of Apex Court were delivered by two Judges, recently three Judges Bench of the Apex Court in the case of **Commissioner of Customs Vs. Atul Automation Private Limited, (2019) 3 Supreme Court Cases 539** with regard to multi function device observed that MFDs were not prohibited but restricted items for import and further observed that there will exist fundamental distinction between what is prohibited and what is restricted. Therefore, from the case of **Atul Automation (supra)** it appears that on the basis of restriction on import a good cannot be said to be prohibited good in terms of Section 2 (33) Customs Act .

39. In case as hand, according to the prosecution, gold was recovered from the possession of the applicants which was liable for confiscation under Section 111 of the Customs Act and as per Section 125 Customs Act the authority concerned may levy fine in lieu of confiscation and, therefore, it appears from the provisions of Section 11 of Customs Act gold is not prohibited goods but it is restricted goods and as per Section 125 Customs Act in lieu of confiscation fine may be levied. Therefore, as import of gold is not prohibited but restricted subject to prescribed payment of duty, thus alleged recovered gold is not prohibited goods under Section 2(33) Customs Act but it is restricted goods in view of the judgment of three Judges Bench of the Apex Court in the case of **Atul Automation (supra)**.

40. Therefore, from the discussions made above, it appears that applicants committed offence under the provisions of Customs Act for which maximum punishment is three ye/ars and as their case does not fall under Section 104 (6) Customs Act, therefore, by virtue of Section 104(7) Customs Act the alleged offence committed by applicants is bailable one, therefore, they are entitled to be released on bail.

41. Accordingly, without expressing any opinion on the merits of the case, both the instant bail applications are **allowed.**

42. Let the applicants-**Mohd. Tufail and Mohammad Alam** be released on bail in the aforesaid case on furnishing a personal bond and two sureties each in the

like amount to the satisfaction of the court concerned with the following conditions:-

(i) The applicants shall appear before the trial court on the dates fixed, unless their personal presence is exempted.

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

(iii) The applicants shall not indulge in any criminal and anti-social activity.

43. In case of breach of any of the above condition, the prosecution will be at liberty to move an application before this Court for cancellation of the bail of the applicants.

(2023) 4 ILRA 37
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.03.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Crl. Misc. First Bail Application No. 59154 of 2022

Kamaruddin ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Sushil Kumar, Sri Mukul Yadav

Counsel for the Opposite Party:
G.A.

(i) Criminal Law - Criminal Procedure Code, 1973 - Sections 161 & 164 - Indian Penal Code, 1860 - Sections 306, 354, 354(ka), 366, 376, 376(d), 504 & 506 - Application for Bail – Rape - accused person threaten the deceased - also tortured, abetted and recorded the illicit video clips of the incident - victim commit suicide - Application of Bail - ground taken that, that in the other connected matter to this case co-accused have been released on Bail - court finds that, Incarceration in Jail has no significance and no element in society can act in a manner by consequence of which life or liberty of others is Jeopardised - held, it is not universal rule that bail should be granted to the co-accused n the ground of parity - Parity cannot be the sole ground of Bail - accordingly, bail application rejected. (Para – 12, 13)

Bail Application Rejected. (E-11)

List of Cases cited:

1. Sanjay Chandra Vs C.B.I., A.I.R. 2012 (SC) 830,

2. Ash Muhammad Vs Shiv Raj Singh, (2012) 9 S.C.C. 446,

3. Bhagat Singh Vs St. of U.P., 2009 (66) A.C.C. 859 (Alld.),

4. Ravi Khandelwal Vs St. of U.P., 2009 (67) A.C.C. 148 (Alld.)

5. Rajesh Ranjan Yadav Vs Pappu Yadav Vs C.B.I., A.I.R. 2007 (SC) 451

6. Amar Nath Yadav Vs St. of Punjab & Haryana, 2009 (67) (A.C.C.) 534 Alld

7. Shah Narain Vs St. of U.P., 2009 (66) A.C.C. 189 Alld.

8. Ajmer Singh Vs St. of Har., 2010 (5) S.C.J. 451

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

1. Heard Sri Sushil Kumar, alongwith Sri Mukul Yadav, learned counsel for the

applicant, learned A.G.A for the State and perused the record.

2. Applicant Kamaruddin is the main accused in Case Crime No. 594 of 2020 (S.T. No. 355 of 2021), under Section 306 I.P.C, Police Station Anoopshahar, District - Bulandshahr.

3. The applicant has moved bail application supported with an affidavit and Annexures, stating therein that on 16.11.2020 at about 01:00 p.m. in the noon informant's daughter committed suicide after closing the door of the room hanging upon a Kunda of room, leaving a suicide note on the place of occurrence alleging that the present accused-applicant and co-accused Mobin and Abrar are the reason behind her suicidal death.

4. Earlier also F.I.R in Case Crime No. 549 of 2020, U/s 366, 376 and 354 I.P.C was lodged by the deceased against them.

5. After inquest, during the postmortem ligature mark in size of 29 c.m x 2 c.m present around the neck was found. The Doctor opined that the deceased had died due to Asphyxia arised out of ante-mortem hanging. The first informant has reiterated the version of the F.I.R in his statement under Section 161 Cr.P.C. In suicide note it was stated that the deceased was B.A and was the student of LL.B (Ist Year) and applicant - accused Kamaruddin used to come to her frequently. On 03.10.2020, when she went to the Bank, all the accused persons carried her in a vehicle and tried to rape her for which she had lodged F.I.R. Later on when the applicant made an apology and proposed that if she gives favourable statement, he would marry with her. Thereafter, the deceased had given statement in favour of the applicant. On 16.10.2020, after receiving the message of the applicant, she came out of the village at about 04:00 p.m. wherefrom she was forcibly taken by the accused persons and on the pretext of marriage, the applicant committed rape with her and Mobin and Abrar made a illicit video clips of the incident and after describing fear of video they both also committed rape with her and left her in Kasba Chhata and also threatened that if she lodged any case, they would viral that video.

6. The applicant has taken ground that there is no iota of evidence that the applicant had tortured and abetted the applicant. In case crime No. 505 of 2020 under Sections 506, 366 & 354 I.P.C, the victim had denied the allegations in her statement recorded under Section 164 Cr.P.C. The applicant met to the deceased on 03.10.2020 and thereafter an F.I.R in Case No. 549 of 2020 under Sections 366, 376, 354 I.P.C had been lodged in which the applicant has been released on bail by this Court on 11.11.2022 in Criminal Misc. bail Application No. 29731 of 2022. The present case is connected with the above two cases, except these cases, there is no any criminal history to his credit. The statement of the deceased-victim P.W. 1 in the previous case is contrary to her statement under Section161 Cr.P.C. After meeting between the deceased and accused on 03.10.2020, the deceased had committed suicide on 16.11.2020, therefore no case of abetment to commit suicide is made out. Co-accused Abrar and Mobin have been released on bail by the Apex Court and this Court respectively by orders dated 21.11.2022 and 28.11.2022. His bail application has been illegally rejected by the Sessions Judge, Bulandshahr vide order dated 15.03.2022. He is in jail since 17.11.2020. He is a peace loving and law

abiding citizen, there is no likelihood of his abscondance and tempering with the prosecution evidence, he is ready to follow all the conditions of bail and is ready to fully cooperate in the trial, therefore the bail application be allowed.

7. The learned A.G.A opposed the bail application and argued that since long the accused persons were committing the crime with the deceased and had made her life worse and hell. They used to rape her repeatedly by showing fear of making the video viral. For an offence of abetment to commit suicide, now-a-days, it is not necessary to abet such offence physically or personally, but it can be made through Whats-app, Face-book, E-mail etc. or through any other way. In this case after meeting with the deceased on 03.10.2022, the accused-applicant used to threat her and abated her for committing suicide, therefore, having no any alternative, for the sake of her dignity, respect and honour, the deceased committed suicide. The applicant is the main accused, therefore no parity of grant of bail can be tendered to the applicant.

8. After hearing the argument and after perusal of the papers, it reveals that firstly a case under Sections 366, 354 and 506 I.P.C in Case Crime No. 520 of 2020 was registered in P.S. Anoopshahar, District Bulandshahar against applicant-Kamruddin, in which after getting assurance of the marriage, the deceased had given a hostile statement under Section 164 Cr.P.C. Later on, again an F.I.R in Case Crime No. 549 of 2020 under Sections 366, 354-Ka, 504 and 376-D I.P.C was registered against the applicant and the co-accused persons in the same Police Station, in which the co-accused Abrar and Mobin had been granted bail by another Bench of this Court and on the basis of parity the present applicant had also been granted bail on 11.11.2022 by Court No. 54 of this Court through Bail Application No. 29731 of 2022. At the time of allowing the bail, the period of languishment in jail was also considered, at that time the present applicant was in jail since 17.11.2020. By that order several conditions were imposed upon the applicants.

9. Learned A.G.A pointed out that conditions imposed by this Court were not complied with by the applicant and he was continuously tendering false promise of marriage and by alluring her all the accused persons raped her again and again thereafter the deceased came in delirious conditions. The accused persons had threatened the deceased that if she told anyone about this incident, they would make her porno-graphical videos viral. According to the informant the deceased had told him and her mother about the incident that had happened with her when she recovered.

10. Learned A.G.A also argued that there was no enmity or ground to falsely implicate the applicant-accused. In suicide note the deceased has written that she was the student of LL.B Ist Year, the accused Kamruddin was the resident of her village, who used to come to her house and used to talk with her. After sometime they both started talking through mobile as well. Taking advantage of this, on 3.10.2020, when she was going to Bank, Kamruddin alongwith his friends took her in his car and tried to forcibly rape her. Later on, he apologized and started weeping and said that if she did not give statement in his favour, the matter will escalate. He will marry with her, thereafter she stated in his favour, after that on 16.10.2020 accused-

Kamruddin sent a message at 04:00 "O' Clock in the morning and called her on the road, outside of the village, where other two persons were also present. He took her in a car and there Kamruddin made a relationship with her on the pretext of marriage and said that now she might go right now. Now none of them would do anything, she might go anywhere. No one would harm her, go somewhere and die. Instead of Kamruddin, Anwar and Mobin, these three persons also raped her and ruined her life, left her nowhere to show her face, ruined her carrier and her future and forced her to die and also threatened that if any action was taken, her video would go viral, if they would have gone to jail. The family members and the police no one trusts her. She had no any other way to assure the parents. In the last line the deceased has written that she was committing suicide and for this Kamruddin, Anwar and Mobin were responsible. The police was also not doing anything. Pardon her, mom and dad SABA (deceased).

11. Learned A.G.A argued that if Kamruddin would not have done wrong, she would not have committed suicide. The role of rest two accused is much lesser and different than the role of present accused-applicant Kamruddin. In this case the informant has lost his young daughter and earlier instances show that the applicant-accused succeeded in getting the hostile statement from the deceased under the pressure and in the subsequent case under Sections 366, 376, 364-B I.P.C, the conditions imposed regarding the enlargement of bail have been mis-utilised by the accused. ***(Sanjay Chandra Vs. C.B.I A.I.R 2012 (S.C) 830.)*** Except this case the accused-applicant is also the prime accused in rest crime numbers 594 of 2020 and 505 of 2020.

12. In ***Ash Muhammad Vs. Shiv Raj Singh (2012) 9 S.C.C 446,*** considering the criminal antecedent, the Apex Court cancelled the bail granted by the High Court and observed that the concept of personal liberty of the person is not realm of absolutism, but is restricted one. Incarceration in Jail has no significance and no element in society can act in a manner by consequence of which life or liberty of others is Jeopardised.

13. In ***Bhagat Singh Vs. State of U.P. 2009 (66) A.C.C 859 (Alld.)*** in ***Ravi Khandelwal Vs State of U.P. 2009 (67), A.C.C 148 (Alld.)***, and in ***Rajesh Ranjan Yadav Vs. Pappu Yadav Vs. C.B.I A.I.R 2007 (S.C) 451,*** similar view has been taken by the Apex Court in ***Amar Nath Yadav Vs. State of Punjab & Haryana 2009 (67) (A.C.C) 534 Alld, Shah Narain Vs. State of U.P. 2009 (66) A.C.C 189 Alld***. and ***Ajmer Singh Vs. State of Haryana (2010) (5) S.C.J. 451,*** that it is not the universal rule that bail should be granted to the co-accused on the ground of parity. Parity cannot be the sole ground of bail, as judge is not bound to grant bail on the ground of parity.

14. On the basis of above discussion, this Court finds the bail application without any merit and is accordingly **rejected.**

(2023) 4 ILRA 40
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SURENDRA SINGH-I, J.

Criminal Misc. Writ Petition No.10924 of 2019

Sanjay Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Murlidhar Misra, Sri Akash Mishra

Counsel for the Respondents:
G.A.

(A) Criminal Law – Constitution of India, 1950 - Article - 72, 161, 162, 172, 226 - Arms Act, 1878 - Section - 25, - Cable Trespass Act - Section 24 - U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 - Sections 2, 3 & 3(1) - Indian Penal Code, 1860 - Sections 148, 149, 307, 448, 427, 323, 504, 332, 302 & 120-B - Writ Petition – filed by petitioner who was fatally injured in the related Session Trial in which respondent no. 5 was convict and sentenced - seeking writ of certiorari for quashing the impugned order passed by Governor of the St. has remitted the remaining part of sentence of respondent no. 5 - Session Trial by which sentence of the convict respondent no. 5 was remitted – court finds that, respondent no. 5 who has a criminal history of 26 criminal cases which was not brought to the notice of the Governor - it is settled law that, the by-product order cannot get the approval of law and in such cases, judicial hand must be stretched to it - hence, respondent no. 5 was not entitled to remission of sentence - thus, impugned order is liable to be set-aside - issue directions accordingly.
Para - 22, 23, 24, 25, 26)

Writ Petition Allowed. (E-11)

List of Cases cited:

1. Satpal Vs St. of Har., (2000) 5 SCC 170,

2. Bikas Chatterjee Vs U.O.I.& anr., (2004) 7 SCC 634,

3. Epuru Sudhakar & anr. Vs Govt. of A.P. & ors., (2006) 8 SCC 161,

4. Narayan Dutt & ors. Vs St. of Pun. & anr., (2011) 4 SCC 353,

5. Maru Ram Vs U,O,I. AIR 1980 SC 2147,

6. Swaran Singh Vs St. of U.P. (1998) 4 SCC 75,

7. Gopal Vinayak Godse Vs St. of Mah., AIR 1961 SC 600

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Akash Mishra, holding brief of Sri Murlidhar Misra, learned counsel for the petitioner and Sri Ratan Singh, learned A.G.A. for the State of U.P.

2. Vide order dated 25.04.2019, learned counsel for the petitioner was permitted to implead Man Singh, S/o Jardan Singh. Pursuant to the aforesaid order, Man Singh was impleaded as respondent no. 5 and notice was issued against him.

3. Vide order dated 16.03.2023, the Court held about the service of notice on respondent no. 5 as follows :-

"We find that notices were issued to the respondent no.5-Man Singh vide order dated 25.04.2019 and as per office report dated 01.05.2019 notices were issued to him by registered post A.D. fixing 20.05.2019. As per office reports dated 18.05.2019 and 24.07.2019 neither acknowledgement nor undelivered cover has been received back. Till date no one has put in appearance on behalf of the respondent no.5.

Accordingly, service upon respondent no.5 is deemed to be sufficient."

4. This writ petition has been filed by the petitioner, Sanjay Verma who was fatally injured in the related Sessions Trial No. 41/2007 in which convict respondent no. 5, Man Singh's sentence was remitted. The petitioner has prayed to :

(i) issue a writ, order or direction in the nature of certiorari quashing the

impugned Government Order dated 01.02.2019 (Annexure No. 1 to the writ petition) passed by Vishesh Sachiv, Karagar Prashashan Evam Sudhar Anubhag-2, Uttar Pradesh Shashan, Lucknow;

(ii) issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case;

(iii) award the cost of the petition to the petitioners.

5. The Governor of the State of U.P. has remitted the remaining part of the sentence of Man Singh exercising his power under Article 161 of the Constitution of India. The Special Secretary, Jail Administration & Reforms has issued impugned order no. 314/22-2-2019-17(150)/2019, Lucknow dated 01.02.2019 granting aforesaid remission to convict respondent no. 5, Man Singh, son of Jardan Singh, lodged in Central Jail, Agra, who was convicted and sentenced with life imprisonment in S.T. No. 41/2007 u/s 148, 307/149, 302/149 I.P.C. and 25 of Arms Act by Additional Sessions Judge, Jhansi vide order dated 20.08.2009 and whose conviction was upheld by this Court vide judgement and order dated 12.09.2017.

6. It has been submitted by learned counsel for the petitioner that released convict respondent no. 5, Man Singh, has a criminal history of 27 cases which were not taken into consideration while impugned order granting remission to respondent no. 5, Man Singh, was passed. The criminal history is as follows :-

(i) Case Crime No. 204/1985 u/s 147, 148, 307, 323 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(ii) Case Crime No. 257/1987 u/s 147, 148, 149, 307, 448, 427 I.P.C. and 24 of Cable Trespass Act, Police Station- Seepari Bazar, District- Jhansi.

(iii) Case Crime No. 259/1990 u/s 452, 323, 504 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(iv) Case Crime No. 299/1990 u/s 452, 323, 504 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(v) Case Crime No. 257/1990 u/s 147, 148, 149, 307, 332 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(vi) Case Crime No. 70/1991 u/s 307, 302 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(vii) Case Crime No. 150/1992 u/s 147, 148, 149, 302, 506 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(viii) Case Crime No. 205/1992 u/s 302, 120-B, 148 I.P.C. (Aajeevan Karavas) 09.09.03, Police Station- Seepari Bazar, District- Jhansi.

(ix) Case Crime No. 208/1992 u/s 3(1) Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station- Seepari Bazar, District- Jhansi.

(x) Case Crime No. 719/1993 u/s 323, 504, 506 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(xi) Case Crime No. 39/1994 u/s 147, 148, 149, 302, 307, 504, 506, 427 I.P.C. and S.C/S.T. Act, Police Station- Seepari Bazar, District- Jhansi.

(xii) Case Crime No. 190/1998 u/s 302, 34 I.P.C. (Aajeevan Karavas) 11.08.04, Police Station- Kotwali, District- Jhansi.

(xiii) Case Crime No. 304/1999 u/s 147, 148, 149, 302, 307, 504, 506, 427 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(xiv) Case Crime No. 425/2002 u/s 3 of U.P. Goondas Act, Police Station- Seepari Bazar, District- Jhansi.

(xv) Case Crime No. 686/2002 u/s 2/3 Uttar Pradesh Gangsters and Anti-

Social Activities (Prevention) Act, 1986, Police Station- Seepari Bazar, District- Jhansi.

(xvi) Case Crime No. 687/2002 u/s 2/3 Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station- Seepari Bazar, District- Jhansi.

(xvii) Case Crime No. 807/2003 u/s 110 of Cr.P.C., Police Station- Seepari Bazar, District- Jhansi.

(xviii) Case Crime No. 828/2003 u/s 147, 148, 149, 307, 504, 506 I.P.C. & 7 of Criminal Law Amendment Act, Police Station- Seepari Bazar, District- Jhansi.

(xix) Case Crime No. /2004 u/s 41, 102 Cr.P.C. and 411 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(xx) Case Crime No. 413/2004 u/s 379 I.P.C., Police Station- Seepari Bazar, District- Jhansi.

(xxi) Case Crime No. 167/2004 u/s 110 Cr.P.C., Police Station- Seepari Bazar, District- Jhansi.

(xxii) Case Crime No. 172/2002 u/s 107/116 Cr.P.C., Police Station- Seepari Bazar, District- Jhansi.

(xxiii) Case Crime No. 1463/2006 u/s 147, 148, 149, 307, 302 I.P.C. & 7 of Criminal Law Amendment Act (Aajeevan Karavas date 26.08.2009), Police Station- Kotwali, District- Jhansi.

(xxiv) Case Crime No. 85/2006 u/s 452, 323, 506B, 294, 227 I.P.C. and 25/27 Arms Act, Police Station- Tharet, District- Datiya (M.P.).

(xxv) Case Crime No. 1538/2006 u/s 25 Shastra Act, Police Station- Kotwali, District- Jhansi.

(xxvi) Case Crime No. 1591/2006 u/s 2/3 Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station- Kotwali, District- Jhansi.

(xxvii) Case Crime No. 75/2007 u/s 3(2) of National Security Act, Police Station- Kotwali, District- Jhansi.

7. It has also been submitted by learned counsel for the petitioner that due to indiscriminate firing by respondent no. 5, Man Singh and other convicts, the petitioner, Sanjay Verma received grievous injuries and his bodyguard, Ajay Goswami died of gunshot wounds. It has also been submitted that convict respondent no. 5, Man Singh was previously convicted in four sessions trials u/s 302 I.P.C. with life imprisonment and in one case under Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, for 10 years imprisonment. The impugned U.P. Government Order dated 01.02.2019 has concealed these facts. The S.L.P. No. 1144/2018 filed by respondent no. 5, Man Singh against his conviction and sentence was dismissed by Hon'ble Supreme Court vide order dated 05.03.2018.

8. In the counter affidavit filed on behalf of the State, it has been admitted that respondent no. 5, Man Singh has been released vide G.O. No. 314/22-2-2019-17(150)/2019, Lucknow dated 01.02.2019 passed by Special Secretary granting remission to the petitioner. It has also been submitted that the impugned order dated 01.02.2019 has been passed by the Government of U.P. in accordance with the policy dated 01.08.2018. It has also been submitted that the power of remission is vested in the Governor under Article 161 of the Constitution of India for premature release of the convict persons and the impugned order was validly passed under Article 161 of the Constitution of India. In paragraph no. 9 of the counter affidavit, it has been admitted that at the time of release, respondent no. 5, Man Singh was confined in Central Jail, District- Agra. He was forwarded to Central Jail, Agra with two conviction warrant i.e. S.T. No. 41 of 2007 relating to Case Crime No. 1463 of

2006 u/s 148, 307/149, 302/149 I.P.C. and 25 Arms Act, P.S.- Kotwali, District- Jhansi where he was undergoing life imprisonment as awarded to him vide order dated 20.08.2009 and the second conviction warrant was with regard to G.S.T. No. 89 of 2007 in connection with Case Crime No. 1591 of 2006 u/s 3(1) of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, P.S.- Kotwali, District- Jhansi wherein vide judgement and order dated 01.09.2017, convict respondent no. 5, Man Singh was awarded 10 years of imprisonment by the trial court. In paragraph no. 10 of the counter affidavit, the criminal history of respondent no. 5, Man Singh as given in the writ petition has been admitted. In paragraph no. 11 of the counter affidavit, it has been submitted that respondent no. 5, Man Singh, has been validly released after grant of remission in compliance of Clause 2-C of policy dated 01.08.2018 as mentioned in G.O. No. 564/2018/1106/22-02-2018-07G/2018 as he had undergone the sentence of 12 years 2 months without remission and 14 years 6 months and 10 days with remission. The Medical Board had given an opinion that the convict is having "congestive heart failure". It has also been submitted that convict Man Singh, was qualified to be released under Clause 2-C of policy dated 01.08.2018 and he was rightly released by the impugned order dated 01.02.2019. In the counter affidavit, Government Order dated 01.08.2018 issued by the Karagar Prashashan Evam Sudhar Anubhag-2, Uttar Pradesh Shashan, Lucknow has been attached as Annexure No. 1. The relevant provisions of Government Order under which convict respondent no. 5, Man Singh, has been released is as follows :

2 (ग) आजीवन करावास की सजा से दंडित ऐसे सिद्धदोष बंदी जिनका अपराध आगे धारा-3 में वर्णित प्रतिबंधित श्रेणी में इंगित किसी भी उपनियम से अच्छादित नहीं है तथा जो निम्न में से किसी बीमारी से ग्रसित हो एवम जिनके संबंध में उत्तर प्रदेश जेल मैनुअल के विवरण संख्या 195 में प्रवेशित मेडिकल बोर्ड द्वारा उक्त बीमारी से गंभीर होने का प्रमाण पत्र दिया गया हो और जिनके द्वारा विचाराधीन अवधि सहित 10 वर्षा की अपरिहार सजा तथा 12 वर्षा की सपरिहार सजा व्यतीत कर ली गई हो :

1- Advanced bilateral pulmonary tuberculosis

2- Incurable malignancy

3- Incurable Blood diseases

4- Congestive heart failure

5- Chronic epilepsy with mental degeneration

6- Advanced leprosy with deformities and trophic ulcer

7- Total blindness of both eyes

8- Incurable paraplegias and hemiplegics

9- Advanced Parkinsonism

10- Brain Tumor

11- Incurable Aneurysms.

12- Irreversible Kidney failure.

3. प्रतिबंधित श्रेणी (Prohibited Class which is applicable to respondent no. 5, Man Singh is) :

(x) ऐसे सिद्धदोष बंदी जिन्हें एक से अधिक आपराधिक प्रकरणों में आजीवन कारावास के दंड से दंडित किया गया है |

9. According to the aforesaid government notification, respondent no. 5, Man Singh's remaining period of sentence was remitted by the Governor under Article 161 of the Constitution of India as Man Singh had fulfilled the following requirements as per the provisions mentioned in the G.O. :-

(i) he had undergone the sentence of 12 years 2 months without remission;

(ii) the medical board had given an opinion that the convict is suffering from "congestive heart failure' which is one of the disease mentioned in the G.O.

10. The provisions regarding grant of pardons, etc., by Governor of a State is given in Article 161 of the Constitution of India which is as follows :-

161. Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.- The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter of which the executive power of the State extends.

11. Under this Article, the Governor has the power to grant pardons etc., and to suspend, remit or commute the sentence of any person convicted of any offence against any law "relating to a matter to which the executive power of the State extends".

12. According to Article 162 of the Constitution of India, the executive power of the State extends to matters with respect to which the Legislature of a State has power to make laws.

13. The exercise or non-exercise of pardon power by the President or Governor, as the case may be, is not immune from judicial review. The grounds for judicial review has been laid down in **Satpal Vs. State of Haryana, (2000) 5 SCC 170** which has been referred to with approval by the Constitution Bench in **Bikas Chatterjee Vs. Union of India and Another (2004) 7 SCC 634** wherein it was held as under :-

9. In a Division Bench decision of this Court in Satpal Vs. State of Haryana (2000) 5 SCC 170, these very grounds have been restated as: (i) the Governor exercising the power under Article 161 himself without being advised by the Government; or (ii) the Governor transgressing his jurisdiction; or (iii) the Governor passing the order without application of mind; or (iv) the Governor's decision is based on some extraneous consideration; or (v) mala fides. It is on these grounds that the Court may exercise its power of judicial review in relation to an order of the Governor under Article 161, or an order of the President under Article 172 of the Constitution, as the case may be.

14. In **Epuru Sudhakar and Another Vs. Govt. of A.P. and Others (2006) 8 SCC 161**, it was held as under :-

34. The position, therefore, is undeniable that judicial review of the order of the President or the Governor underArticle 72orArticle 161, as the case may be, is available and their orders can be impugned on the following grounds:

(a) that the order has been passed without application of mind;

(b) that the order is mala fide;

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

(d) that relevant materials have been kept out of consideration;

(e) that the order suffers from arbitrariness.

15. The same view was reiterated in **Narayan Dutt and others Vs. State of Punjab and another, (2011) 4 SCC 353.**

16. In **Maru Ram Vs. Union of India, AIR 1980 SC 2147**, the Apex Court expressly stated that the power of pardon, commutation and release under Article 72 (also under Article 161) cannot run riot and must keep sensibly to a steady course and

that public power "shall never be exercisable arbitrarily or malafide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power."

17. In **Swaran Singh Vs. State of U.P., (1998) 4 SCC 75** where the Governor grants remission of sentence to a convict in ignorance of the fact that several other criminal cases were pending against him. The court invalidated the remission and observed that if the power under this article "was exercised arbitrarily", malafide or in absolute disregard of the finer canons of the constitutionalism, the byproduct order cannot get the approval of law and in such cases, the judicial hand must be stretched to it." Thus, the exercise of Governor's power under Article 161 is subject to judicial review.

18. This is an admitted fact that respondent no. 5, Man Singh has been convicted in S.T. No. 41 of 2007 relating to Case Crime No. 1463 of 2006 u/s 148, 307/149, 302/149 I.P.C. and 25 Arms Act and sentenced vide judgement and order dated 26.08.2009 u/s 302/149 I.P.C. for life imprisonment and a fine of Rs.1,00,000/-.

19. In **Gopal Vinayak Godse Vs. State of Maharashtra, AIR 1961 SC 600,** the Apex Court has held "a sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment of the whole of the remaining period of the convicted persons natural life."

20. The respondent no. 5, Man Singh was remitted the remaining period of his life imprisonment after a period of 12 years and 2 months by the Governor under Article 161 of the Constitution of India. The rules mentioned in the G.O. for remitting sentence of a convict requires fulfilment of following conditions :-

(i) the convict had undergone imprisonment for a period of 10 years without remission;

(ii) he was suffering from one of the disease mentioned in the G.O.;

(iii) his case is not covered by any of the provisions mentioned in the prohibited class of convicts;

The clause (x) of the prohibition class in the aforesaid G.O. dated 01.08.2018 mentions that the convict should not have been convicted in more than 1 criminal case with the sentence of life imprisonment.

21. Although the convict Man Singh fulfils the requirement relating to period of sentence undergone by him and his suffering from one of the disease "congestive heart failure" mentioned in the G.O., but his sentence cannot be remitted as his case is covered under clause (x) of the exempted class of convicts. Respondent no. 5, Man Singh has been convicted and sentenced to life imprisonment in following two S.T. cases :

(i) S.T. No. 41 of 2007 and

(ii) S.T. No. 26 of 1995, State of U.P. Vs. Sardar Singh and Others u/s 302, 120-B, 149 I.P.C. relating to P.S.- Seepari Bazar, District- Jhansi. The petitioner has filed the judgement of the 2nd S.T. at pages 107 to 154 of Annexure No. 10 of the writ petition.

22. Thus, respondent no. 5, Man Singh was not entitled for remission of sentence under the provisions of the impugned order issued under G.O. dated 01.08.2018 passed under Article 161 of the Constitution of

India. Apart from this, in the impugned order by which the respondent no. 5, Man Singh has been granted remission in his sentence, there is no notice of the fact that he has a criminal history of 26 other criminal cases against him. As it has been held by the Apex Court in **Swaran Singh (supra)** that where the Governor granted remission of sentence to a convict in ignorance of the fact that several other criminal cases were pending against him, the byproduct order cannot get the approval of law and in such cases, judicial hand must be stretched to it.

23. From the above mentioned facts and circumstances of the case, we are of the considered opinion that respondent no. 5, Man Singh was not entitled to remission of sentence as this case was covered by the prohibition no. (x) mentioned in above G.O. dated 01.08.2018 and while granting remission, his 26 other criminal cases was not brought to the notice of the Governor.

24. Thus, the impugned order dated 01.08.2018 by which respondent no. 5, Man Singh was granted remission of sentence was without authority of law and is liable to be set-aside.

25. Accordingly, the writ petition stands allowed. The aforesaid impugned order no. 314/22-2-2019-17(150)/2019, Lucknow dated 01.02.2019 granting remission to respondent no. 5, Man Singh is hereby quashed and set-aside.

26. The respondent no. 5, Man Singh shall surrender before the Sessions Judge, Jhansi within 30 days from today and he will be sent to Central Jail, Agra, to undergo the remaining part of his sentence. In case, the respondent no. 5, Man Singh does not surrender within the aforesaid period, the Sessions Judge, Jhansi will take coercive measure to ensure his appearance before the court and send him to Central Jail, Agra for undergoing his remaining sentence.

27. Copy of the order be sent to Sessions Judge, Jhansi for necessary compliance.

(2023) 4 ILRA 47
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2023
BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 4365 of 2022

Yogendra & Anr. ...Revisionists
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Sanjeev Kumar Rai

Counsel for the Opposite Party:
G.A., Sri Devi Prasad Singh

Criminal Law – Criminal Procedure Code, 1973 - Section – 227 - Indian Penal Code,1860 - Sections 308, 323, 324 & 506 - Criminal Revision - Challenging the order impugned by which the application of revisionist for discharging the accused was rejected - FIR u/s 323, 324 of IPC - allegation of physically assault - after investigation, charge sheet was filed u/s 308, 324, 504 & 506 of IPC - Revisionists are aggrieved by order for framing charges u/s 308 of IPC in addition - plea taken by the revisionists that injuries sustained by the injured persons were not fatal in nature - Evaluation of Evidence - court finds that, from the contents of the FIR coupled with medical evidence, prima facie offence u/s 308 IPC is made out - at the stage of framing of charge no in depth enquiry into evidence or credibility thereto is required - hence, no any illegality or incorrectness in order so as to justify

interference by Revisional court - Revision is dismissed. (Para – 6, 7)

Criminal Revision is dismissed. (E-11)

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

01. **None responds for the revisionists.** Learned A.G.A. for the State is present.

02. This criminal revision has been filed against the order dated 06.09.2022 by which the application moved under Section 227 Cr.P.C. for discharging the accused persons for offence under Section 308 I.P.C. was dismissed and case was posted for framing of charge.

03. The material facts are as below:-

The F.I.R. against the applicants and two more has been filed under Section 323 and 324 I.P.C. with the allegations that the accused persons were raising construction to encroach upon the land of Gram Samaj. The first informant and his brother protested. Irked over such interference accused persons physically assaulted the first informant Sanjay Tiwari and his brother causing them injuries. After investigation chargesheet has been filed under Sections 308, 323, 504 and 506 I.P.C.

04. Perusal of the revision memo shows that the revisionists are aggrieved by order for framing charge under Section 308 I.P.C. in addition and rejection of discharge application. The only ground taken by the revisionist is that injuries sustained by the injured persons were not fatal in nature. There was not a single fracture on vital part of the person of any of the injured.

05. I went through material on record. Papers show that there were three injured persons namely Ramashankar Tiwari who sustained seven injuries on his person and four out them were above neck, Chandan Tiwari who sustained five injuries, with one on the head and the X-ray showed soft tissues shadow, mildly increased over vault of skull. The third Umashankar Tiwari sustained three injuries.

06. It is settled position that number of injuries or nature of injuries are not the sole factor to decide upon whether any and if so what offence affecting human body is made out. The intention or knowledge as the case may be and even attending facts and circumstances may be of even greater significance.

07. In my view, nature of the injuries, seat of injuries and number thereof may be material but are not everything to decide upon the fact as to which charge is made out. However, in this case from the contents of the F.I.R. coupled with medical evidence , prima facie offence under Section 308 I.P.C. is made out. At the stage of framing of charge no in depth enquiry into evidence or credibility thereto is required. I do not find any illegality or impropriety or incorrectness in the order so as to justify interference by revisional court.

08. The criminal revision is **dismissed at the stage of admission.**

(2023) 4 ILRA 48
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.04.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SURENDRA SINGH-I, J.

Habeas Corpus Writ Petition No. 221 of 2023

Ahzam Ahmad & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Sri Abhishek Kumar Mishra, Sri Khan Saulat Hanif, Sri Ravindra Sharma, Sri Shadab Ali, Sri Vijay Mishra, Sri D.S. Mishra (Sr. Advocate).

Counsel for the Respondents:
G.A.

Civil Law - Constitution of India, 1950 - Article 21, 22(1), 22(5), 226, - Indian Penal Code, 1860 Sections 34, 120-B, 147, 148, 149, 302, 307 & 506 - Criminal Law Amendment Act, 2013 - Section 7 - Criminal Procedure Code,1973 - Sections 50 & 97 - Juvenile Justice (Care & Protection of Children) Act, 2015 - Sections 37, 37(1)(a), 37(1)(b), 37(1)(c), 37(1)(d), 37(1)(e), 37(1)(f), 37(1)(g) & 37(1)(h) - National Security Act,1980 - Section - 3(2), 4 - Explosive Act, 1884 - Section - 3 - Writ of Habeas Corpus - petitioners are in Child Protection Home - petitioners are minor sons - police forcibly arrested them in illegal custody - through natural guardian mother of petitioners seeks direction in nature of writ of Habeas corpus commanding respondents to produce corpus and set them liberty forthwith - preliminary objection with regards to maintainability of a writ of Habeas Corpus on the ground of alternative remedy - they have availed effective statutory remedy by invoking provisions of section 97 of Cr.P.C. and thus, have put criminal administration of justice into motion - Held, as per the settled law writ of habeas corpus cannot be issued to set same at knot by simultaneously invoking extra-ordinary remedy under Article 226 - Moreover, when corpus are in Child Protection Home, petition would not be maintainable - petition stands dismissed.
(Para - 38, 39, 40)

Writ Petition Dismissed. (E-11)

List of Cases cited:

1. Rachna & anr. Vs St. of UP & ors., AIR 2021 ACR 109 (FB),

2. Smt. Icchu Devi Choralia Vs U.O.I. & ors., (1980) 4 SCC 531,

3. Ayya @ Ayub Vs St. of U.P. & ors., (1989) 1 SCC 374

4. Bhim Sen Tyagi Vs St. of U.P. through D.M. Mahamaya Nagar, 1999 (2) JIC (All) (FB),

5. Chairman Railway Board & ors. Vs Chandrima Das (Mrs) & ors., (2000) 2 SCC 465,

6. Whirlpool Corp. Vs Registrar of Trade Marks, Mumbai & ors., (1998) 8 SCC 1,

7. In the matter of Mdhu Limaye & ors. (1969 (1) SCC 292),

8. Sunil Batra (II) Vs Delhi Administration, (1980) 3 SCC 488),

9. Dushyant Somal Goyal Vs Smt. Sushma Somal & anr. (1981 vol. 2 SCC 277),

10. Vinayak Goyal Vs Prem Prakash Goyal & ors., 1981 AWC 457

11. Ram Manohar Lohia Vs Superintendent, Central Prison, Fatehgarh, 1954 (0) Supreme(All) 149

12. Munshi Singh Gautam (D) & ors. Vs St. of M.P., 2004 (0) Supreme(SC) 1416

13. Prabhu Dayal Deorah etc. Vs District Magistrate, Kamrup & ors., 1973 (0) Supreme(SC) 320

14. Raman Lal Rathi Vs Commissioner of Police 1951 o Supreme (Cal) 209,

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri D.S. Mishra, learned Senior Counsel assisted by S/Sri Ravindra Sharma, Shadab Ali and Abhishek Kumar Mishra, learned counsel for the petitioners and Sri Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Sand, learned A.G.A. appearing for the State respondents.

2. Present petition has been filed with the following prayers:-

]

"(i) Issue a writ, order or direction in the nature of writ of Habeas Corpus commanding and directing the respondents to produce the corpus before this Hon'ble Court and set them at liberty forthwith.

(ii) Issue a writ, order or direction in the nature of writ of Habeas Corpus commanding and directing the respondents may also be directed to satisfy this Hon'ble Court for the illegal detention of the petitioners."

3. The petition has been filed by minor sons (corpus) of Ateek Ahmad, Ex. MP under the guardianship of their natural guardian and real mother Shaishta Parveen. It is claimed that the petitioner no. 1-Ahzam Ahmad and the petitioner no. 2-Aaban Ahmad are student of Class-XII and Class-IX respectively and at present both the petitioners are minor. It has been disclosed in the petition that father of the petitioners, namely, Ateek Ahmad is in jail since 2017 and real uncle of the petitioners, namely, Khalid Azeem @ Ashraf is also in district jail Bareilly since 2020. The minor sons (corpus) are living with their mother. It is alleged that on 24.2.2023 at about 06:00 P.M. police of Police Station Khuldabad, Dhoomanganj and Puramufti came to the house of the petitioners without lady police and forcibly and illegally entered in the house of the petitioners by breaking the doors arrested the petitioners without showing any summon, warrant or any other document and police personnels also misbehaved with the petitioners as well as with their mother. The allegation is that the police personnels of Police Station Dhoomanganj, Puramufti and Khuldabad forcibly arrested the petitioners and have taken them in their illegal custody without disclosing any reason for their arrest and that the petitioners are innocent and are not wanted in any criminal case. The allegation is that the police authorities have illegally detained the petitioners without any authority since 24.2.2023. It is also alleged that the petitioners are in detention till today i.e. 3.3.2023 (till the date of filing of the present petition). It is alleged that the petitioners are being kept in some undisclosed location by the police and are being mentally and physically tortured without any authority of law or any other reason and thus, the petitioners are being deprived of their personal life and liberty provided under Article 21 of the Constitution of India, which clearly provides that the same cannot be affected except in accordance with the procedure established by law.

4. Fact regarding lodging of the first information report dated 25.2.2023 being Case Crime No. 0114 of 2023, under Sections 147, 148, 149, 302, 307, 506, 34 and 120-B IPC, Section 3 of Explosive Act and Section 7 of Criminal Law Amendment Act, Police Station Dhoomanganj, District Prayagraj regarding incident of murder of one Umesh Pal, who was eye witness in the murder case of Raju Pal, wherein father of the petitioners Ateek Ahmad and real uncle Khalid Azeem @ Ashraf are main accused has also been disclosed with a categorical statement that the petitioners are not accused in the aforesaid crime and copy of the first information report has been annexed as Annexure-1 to the petition.

5. A supplementary affidavit was filed on 23.3.2023 annexing therewith several documents. It has been stated that the police authorities have arrested the petitioners without any warrant in the night of 1.3.2023, however, we find that in paragraph 9 of the petition it has been

stated that the petitioners were arrested on 24.2.2023 at 06:00 P.M. Annexure-1 to the supplementary affidavit is a copy of the application dated 27.2.2023 filed by the mother of the petitioners Shaishta Parveen before the Chief Judicial Magistrate, Allahabad regarding alleged illegal detention of the petitioners, namely, Ahzam Ahmad and Aaban Ahmad and prayed that a report be summoned from the Police Station Dhoomanganj in respect of the petitioners as to whether the petitioners are named in any crime so that necessary legal action may be taken. Annexure-2 to the supplementary affidavit is the report dated 2.3.2023 submitted by the Police Station Dhoomanganj that there is no GD entry in respect of the petitioners in the said police station and the alleged first information report being Case Crime No. 0114 of 2023 is being investigated by In-charge Inspector Dhoomanganj, who is out of the police station. Annexure-3 to the supplementary affidavit is a copy of the orders dated 28.2.2023, 3.3.2023 and report dated 4.3.2023 submitted by the In-charge Inspector Police Station Dhoomanganj to the effect that the applicant Shaishta Parveen is named in the first information report dated 25.2.2023 in a triple murder case and her sons petitioner nos. 1 and 2 herein were found in Chakia Kasari Masari area and they have been sent to Child Protection Home on 2.3.2023. Annexure-4 to the supplementary affidavit is a copy of the application moved by Shaishta Parveen on 6.3.2023, wherein prayer was made that Police Station Dhoomanganj be directed to inform about the report from the Child Protection Home. A copy of the order-sheet of the court of Chief Judicial Magistrate, Allahabad from 28.2.2023 to 20.3.2023 has been annexed as Annexure-5 to the supplementary affidavit. A copy of the order dated 21.3.2023 passed by this Court in Criminal Misc Writ Petition No. 4003 of 2023 (Khalid Azeem @ Ashraf vs. State of U.P. and others) is also annexed, which to our mind, is not relevant for the purpose of considering present petition in hand as the same relates to the relief that were being claimed by the petitioner-Khalid Azeem @ Ashraf (real uncle of the petitioners) exclusively for himself only.

6. Perusal of Annexure-1 to the petition reflects that the mother of the petitioners, namely, Shaishta Parveen, who has filed present petition as natural guardian and real mother of the petitioners, is also one of the accused along with father and uncle of the petitioners named above. It is further reflected that contrary to the statement made in the petition at Sl. Nos. 6 and 7 sons of Ateeq Ahmad have also been arrayed as accused. Specifically, at Sl. No. 6 accused is "Ateek Ahmad ka Putra" (i.e. son of Ateek Ahmad) whereas at Sl. No. 7 accused specified are "Ateek Ahmad ke anya Putra". Therefore, clearly, even without giving specific names other sons of Ateek Ahmad have also been arrayed as accused in the above mentioned FIR.

7. During course of arguments it also transpired that Shaishta Parveen, mother of the petitioners, through whom this petition had been filed, is absconding and is also carrying award of Rs. 25,000/- on her head.

8. It is alleged in the petition that the police authorities have arrested the petitioners without any warrant and are being detained illegally without there being any order of competent court / Magistrate and there is a clear violation of Section 50 Cr.P.C. in the present case. Crux of submission of learned counsel for the petitioners is that the detention of the

petitioners is clear violation of their constitutional as well as statutory rights.

9. A preliminary objection was raised by Sri Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Sand, learned A.G.A.-I that the present petition is not maintainable as the petitioners have already invoked provisions of Section 97 Cr.P.C. and have approached the competent court i.e. the court of Chief Judicial Magistrate, Allahabad and the corpus are in Child Protection Home. Submission, therefore, is that as the petitioners have already invoked the alternative effective statutory remedy, and moreso, when the stand taken by the police authorities that the petitioners are in Child Protection Home, therefore, on the ground of already invoked effective statutory remedy and also in view of Full Bench decision in the case of ***Rachna*** **and another vs. State of UP and others, AIR 2021 ACR 109 (FB),** the present Habeas Corpus petition is not maintainable.

10. Replying to the same, learned counsel for the petitioners Sri D.S. Mishra, learned Senior Counsel submitted that as there is a violation of Article 21 of the Constitution of India, therefore, existence of alternative remedy would not be a bar.

11. Learned counsel for the petitioners has placed reliance on judgments of **Smt. Icchu Devi Choralia vs. Union of India and others (1980) 4 SCC 531 (paragraph 4), Ayya @ Ayub vs. State of U.P. and others (1989) 1 SCC 374 (paragraph 11), Bhim Sen Tyagi vs. State of U.P. through D.M. Mahamaya Nagar 1999 (2) JIC (All) (FB) (paragraph 21), Chairman Railway Board and others vs. Chandrima Das (Mrs) and others (2000) 2 SCC 465 (paragraphs 7 to 11), Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 1 (paragraphs 14 to 20), In the matter of Madhu Limaye and others 1969 (1) SCC 292 (paragraphs 10 to 14), Sunil Batra (II) vs. Delhi Administration (1980) 3 SCC 488 (paragraphs 20, 21, 26, 27, 30, 31, 40, 42), Capt. Dushyant Somal vs. Smt. Sushma Somal and another (1981) 2 SCC 277 (paragraphs 5 and 7), Vinayak Goyal vs. Prem Prakash Goyal and others 1981 AWC 457 (paragraphs 8 to 11), Ram Manohar Lohia vs. Superintendent, Central Prison, Fatehgarh 1954 0 Supreme (All) 149, Munshi Singh Gautam (D) and others vs. State of M.P. 2004 0 (Supreme (SC) 1416, Prabhu Dayal Deorah etc. vs. District Magistrate, Kamrup and others 1973 0 Supreme(SC) 320 and Raman Lal Rathi vs. Commissioner of Police 1951 0 Supreme (Cal) 209.**

12. During course of argument, Sri D.S. Mishra, learned Senior Counsel submitted that the provisions of Section 97 Cr.P.C. would not be applicable in the present case.

13. On a pointed query by this Court that if this argument is to be raised, he must specify under which provision the mother of the petitioners Shaishta Parveen has moved an application before the Chief Judicial Magistrate, Allahabad, which is being pursued, wherein several orders have already been passed, if the said application has not been filed under Section 97 Cr.P.C.? We specifically note that no reply to the said question was given by the learned Senior Counsel.

14. In any case, we find that it is a settled law that mention of incorrect provision or non-mentioning of the

provision by itself does not render the proceedings invalid and therefore, preliminary objection that the petitioners have already approached the competent court under Section 97 Cr.P.C. by filing effective statutory remedy is upheld.

15. Before proceeding further it would be relevant to take note of Article 21 of the Constitution of India, which is quoted as under:-

"21. Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty *except according to procedure established by law."*

(emphasis supplied)

16. Article 21 clearly provides that no person shall be deprived of his life or personal liberty except "according to procedure established by law".

17. It is also relevant to take note of meaning of "habeas corpus' as provided under Law of Writs by V.G. Ramachandran Seventh Edition at page 5, which is quoted as under:-

"Habeas Corpus Meaning

"Habeas corpus" is a Latin term. It means "have the body", "have his body" or "bring the body". By the writ of habeas corpus, the court directs the person (or authority) who has arrested, detained or imprisoned another to produce the latter before it (court) in order to let the court know on what ground he has been arrested, detained, imprisoned or confined and to set him free if there is no legal justification for the arrest, detention, imprisonment or confinement.

According to the dictionary meaning, "habeas corpus" means "have the body", "bring the body-person-before us". Habeas corpus is a writ requiring a person to be brought before a judge or a court for investigation of a restraint of the person's liberty, used as a protection against illegal imprisonment.

It is a writ to a jailer to produce a prisoner in person, and to state the reasons of detention.

Habeas corpus is a writ requiring a person to be brought before a judge or court for investigation of a restraint of the person's liberty, used as a protection against illegal imprisonment.

Habeas corpus is a writ requiring a person under arrest to be brought before a judge or into court to secure the person's release unless lawful grounds are shown for his or her detention.

18. For ready reference, Section 97 Cr.P.C., which provides effective statutory remedy, is also quoted as under:-

"97. Search for persons wrongfully confined.- If any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper."

19. We have carefully gone through the judgments cited by learned counsel for the petitioners and we find that none of the

judgments so cited support the submission of learned counsel for the petitioners made in reply to the preliminary objection.

20. In **Smt. Ichhu Devi Choralia (supra)** order of detention passed under the provisions of Conversation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 was under challenge and also on the ground of violation of Article 22(5) of the Constitution of India. In paragraph 4 as relied on by learned counsel for the petitioners it has been laid down that the practice evolved by this Court is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Such questions are not involved in the present case, and aforesaid case also does not deal with preliminary objection as raised in the present case therefore, the case is not relevant for the purpose of dealing with preliminary objection involved herein.

21. Reliance on paragraph 7 of the **Ayya @ Ayub (supra)** has been placed to assert that the personal liberty protected under Article 21 of the Constitution of India is sacrosanct and high in the scale of constitutional values. There is no quarrel about this proposition of law. However, it may be noted that in this case also the order of detention of the petitioner under Section 3(2) of the National Securities Act, 1980 was under challenge and therefore, this case is also not relevant for the purpose of disposal of issue of preliminary objection.

22. There can be no dispute that the question of interpretation of Article 21 of the Constitution of India and its applicability is not before this Court at this stage.

23. **Madhu Limaye (supra)** is also not on the issue of availability of alternative remedy and thus, does not address the preliminary objection raised by the State, where Madhu Limaye, Ex-MP and several other persons were arrested and question in relation to the compliance of Article 22(1) of the Constitution of India was raised. This case also does not provide any reply to the issue of preliminary objection.

24. In **Sunil Batra (supra)** right of a detenue in jail was under consideration, therefore, the same is also not relevant for the purpose of preliminary objection issue.

25. Similarly, in **Re Keshav Singh 1964 0 Supreme (SC) 238** the paragraph relied on by learned counsel for the petitioners are on the question of grant of bail in habeas corpus matter, which again is not relevant for replying the issue of preliminary objection.

26. The judgments of **Capt. Dushyant Somal (supra) and Vinayak Goyal (supra)** are on the child custody and they are also not relevant on preliminary objection.

27. **Munshi Singh Gautam (supra)** is also not relevant as it is on the custodial death and thus, is not relevant in the present case on preliminary objection.

28. In **Prabhu Dayal Deorah (supra)** the detention order under the Maintenance of Internal Security Act, 1971 was under challenge and therefore, this case also does not address the preliminary objection issue.

29. Similarly, in **Raman Lal Rathi** (supra) the detention order under the Preventive Detention Act, 1950 was under challenge and is also not relevant. In the said case also the question of Article 22(5)

of the Constitution of India was involved, which is not so in the present case.

30. In **Ram Manohar Lohia (supra)** the petitioner was arrested and scope of habeas corpus petition was considered and challenge to the constitutionality of the Act was also raised, however, we find that the same also does not provide any specific reply to the preliminary objection.

31. We find that in **Whirlpool Corporation (supra)** the question of maintainability of the writ petition under Article 226 of the Constitution of India was considered and it was held that power to issue alternative writs under Article 226 of the Constitution of India is plenary in nature and is not limited by any other provision of Constitution and this power can be exercised by the High Court not only for issuing writs for the enforcement of any of the fundamental rights contained in Part-III of the Constitution but also for "any other purpose'. It was held that under Article 226 of the Constitution of India, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition but the High Court imposed upon itself certain restrictions one of which is that if an alternative effective remedy is available, the High Court would not normally exercise its jurisdiction but the alternative remedy has been consistently held by this Court not to operate as a bar. However, in three contingencies, namely, for enforcement of any fundamental rights or in violation of principles of natural justice or where the order proceedings are wholly without jurisdiction or the vires of an Act is under challenge it was held that alternative remedy would not operate as an absolute bar. The said judgment is being consistently relied on till now.

32. In **The Chairman, Railway Board (supra)** while the question of invoking jurisdiction under Article 226 of the Constitution on India was whether the same can be invoked to get relief otherwise available under the private law.

33. In **Bhim Sain Tyagi (supra)** the question of challenge to notice issued under U.P. Control of Goondas Act, 1970 was involved and in this case judgment of **Whirlpool Corporation (supra)** on alternative remedy was relied on, which has already been discussed above.

34. We find that there is no quarrel with the law regarding invoking the jurisdiction of High Court under Article 226 of the Constitution of India that availability of alternative remedy is not an absolute bar. However, equally settled is the law that Courts ought to be extremely slow in exercising its extraordinary jurisdiction if effective alternative statutory remedy is available. In the present case, we find that the petitioners have already invoked the provisions of Section 97 Cr.P.C., which is an effective statutory remedy, therefore, it is not the question where preliminary objection is being raised solely on the ground that effective statutory remedy is available. In fact, preliminary objection is that admittedly, the effective alternative statutory remedy has already been availed of by the petitioners, which is still pending and is being pursued by the petitioners. Therefore, reply to the preliminary objection that effective statutory remedy has already been availed of, merely by asserting that the alternative remedy is not an absolute bar, in our opinion, is of no help to the petitioners as admittedly the same has already been availed of. On this admitted fact, the

preliminary objection is liable to be sustained.

35. We further find that a clear stand taken by the State is that the petitioners have been lodged in Child Protection Home, therefore, prima facie, a genuine presumption can be raised that the machinery under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 has been put into motion. Therefore, present petition would not be maintainable in view of the judgment of Full Bench of this Court in the case of ***Rachna*** (supra). The questions referred to the Full Court and the answers thereto as given in para 79 of the said judgement are quoted as under:

*"**79.** We accordingly come on our conclusions in respect of question nos. 1, 2 and 3 for determination as follows:*

***Question No. 1:** "(1) Whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee appointed under Section 27 of the Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home?*

***Answer:** If the petitioner corpus is in custody as per judicial orders passed by a Judicial Magistrate or a Court of Competent Jurisdiction or a Child Welfare Committee under the J.J. Act. Consequently, such an order passed by the Magistrate or by the Committee cannot be challenged/assailed or set aside in a writ of habeas corpus.*

***Question No. 2:** "Whether detention of a corpus in Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home pursuant to an order (may be improper) can be termed/viewed as an illegal detention?*

***Answer:** An illegal or irregular exercise of jurisdiction by a Magistrate or by the Child Welfare Committee appointed under Section 27 of the J.J. Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home cannot be treated an illegal detention.*

***Question No. 3:** Under the Scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015 the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and as such, the proposition that even a minor cannot be sent to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home against his/her wishes, is legally valid or it requires a modified approach in consonance with the object of the Act?"*

***Answer:** Under the J.J. Act, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and the Magistrate/Committee must give credence to her wishes. As per Section 37 of the J.J. Act the Committee, on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the orders mentioned in Section 37(1)(a) to (h)."*

36. Much emphasis was given by learned counsel for the petitioners while replying to the preliminary objection regarding violation of Article 21 of the Constitution of India.

37. At the cost of repetition it is reiterated that Article 21 clearly provides

protection of life and personal liberty, however, it has clearly provided that no person shall be deprived of his life or personal liberty "except according to procedure established by law".

38. In the present case, the stand taken by the State while raising preliminary objection to the present petition was that the petitioners are in Child Protection Home, therefore, even if at this stage, it is not clear as to how the petitioners have reached Child Protection Home, one thing is clear that administration of criminal justice is operating, which is the procedure established by law (although with this stand of the State, Full Bench decision in ***Rachna*** (supra) would cover the issue involved, including preliminary objection). It is clearly reflected from the record that the petitioners have already invoked provisions of Section 97 Cr.P.C. before the competent court of law i.e. Chief Judicial Magistrate having jurisdiction over the matters. Thus, they have availed the effective statutory remedy and thus, have put the criminal administration of justice into motion and as per settled law writ of habeas corpus cannot be issued to set the same at knot.

39. To sum up, it can be said that the petitioners have already invoked provisions of Section 97 Cr.P.C., hence administration of criminal justice has already come into play and the same cannot be set at knot by simultaneously invoking extra-ordinary remedy under Article 226 of the Constitution of India, which may be a remedy of right but as per settled law cannot be issued as a matter of course. Moreover, when corpus are in Child Protection Home, the present writ petition would not be maintainable as per the law settled by Full Bench decision in ***Rachna*** (supra).

40. Consequently, in view of the discussions made hereinabove preliminary objection raised by the State that the present petition is not maintainable as the petitioners have already invoked provisions of Section 97 Cr.P.C. and have approached the competent court is upheld.

41. Present petition, accordingly, stands dismissed as not maintainable.

(2023) 4 ILRA 57
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Habeas Corpus Writ Petition No. 919 of 2022

Vivan & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Manoj Kumar Keshari, Sri Beerendra Singh Pal

Counsel for the Respondents:
G.A., Sri Shri Krishan Yadav

Civil Law - Constitution of India - Article 226, - Indian Penal Code, 1860 - Sections 304-B, 306, 498-A, 323, 504 & 506 - Guardianship and Wards Act, 1890 - Section - 4, 4(1), 4(2), 4)3), 7, 17(1), 17(2), 17(3), - Hindu Minority and Guardianship Act, 1956 - Sections 2, 4, 6 & 13 - Hindu Marriage Act, 1955 - Section - 26, - The Dowry Prohibition Act, 1961 - Section - 3/4, - Domestic Violence Act, 2005- Section 12 - Writ of Habeas Corpus - father seeking custody of his Children being natural Guardian - Corpus are minor are aged about 8 years and 3 years lying in custody of their maternal grandparents - elder of them has

expressed his unequivocal desire to reside with his father and second corpus could not identify his father as he is too young - father of the corpuses facing criminal charges of abatement of commission of suicide of his wife the mother of children and he is on the bail - further, family atmosphere of the father is not conducive to their health growth and polluted - on the other hand, maternal grandfather maintained the child with utmost love and affection - it is settled law that, it is not the 'negative test' that the father is not 'unfit' or disqualified to have custody of his son/daughter is relevant but the 'positive test' that such custody would be in the welfare of the minor - hence, this court does not find good ground to make the rule nisi absolute - accordingly, discharged - petition fails and stands dismissed. (Para - 9, 21, 23)'

Petition Dismissed. (E-11)

List of Cases cited:

1. Nil Ratan Kundu & anr. Vs Abhijit Kundu, (2008) 9 SCC 413,

2. Saraswatibai Shripad Ved Vs Shripad Vasanji Ved, AIR 1941 Bom 103,

3. Surinder Kaur Sandhu Vs Harbax Singh Sandhu, (1986) 3 SCC 698,

4. Mausami Moitra Ganguli Vs Jayant Ganguli, (2008) 7 SCC 673,

5. Rosy Jacob Vs Jacob A. Chakramakkal, 1973(1) SCC 840,

6. Kirtikumar Maheshankar Joshi Vs Pradipkumar Karunashanker Joshi, (1992) 3 SCC 573.

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard learned counsel for the petitioners, learned counsel for the private respondents and learned A.G.A. for the State.

2. Corpus Vivan aged around 8 years and Divyansh aged around 3 years have been produced before this Court by respondent nos. 4 to 7.

Corpus Vivan is identified his father Vijay Vikram, deponent in present petition. The second corpus Divyansh could not identify his father as he is too young. Corpus Vivan stated that he intends to reside with her Mausi and maternal grand parents. He expressed his dis-inclination to go or live with his father.

3. Learned counsel for the petitioners submitted that children who are corpus in present case are sons of deponent, who are too younger to decide their future. They are brainwashed by their maternal grandfather and Mausi (aunt). In-laws of deponent had taken away his both sons along with them after death of his wife Smt. Sweta, who died on 29.4.2022 and they are residing with their maternal grandparents for more than nine months and they have been produced by them who are impleaded as respondents in present case. Deponent operates a GST Seva Kendra. Deponent resides with his father who is retired Bank Manager and the deponent is although an accused in a Case Crime No. 89 of 2022 lodged on 1.5.2022 under Section 306 IPC on account of alleged suicidal death of his wife, however, he is enlarged on bail. He undertakes to ensure welfare of the children if they are granted in his custody.

4. Per contra, learned counsel for the private respondents submitted that atmosphere of the house of deponent is polluted. His own mother resides separately from his father. Private respondents are well educated people. Respondent no. 7, aunt (Mausi), of the corpus is a Bank employee in Bank of Baroda and all the respondents are taking due care of the corpus. They are receiving appropriate education in their supervision.

5. Learned counsel for the respondents placed reliance on a judgment of Hon'ble Supreme Court in ***Nil Ratan Kundu and Another Vs. Abhijit Kundu, (2008) 9 SCC 413*** wherein Hon'ble Apex Court while interpreting provisions of Section 17(1), (2), (3), 7 and 4(1), 4(2) and (3) of Guardianship and Wards Act as well as Sections 2, 4, 6 and 13 of Hindu Minority and Guardianship Act, 1956 and Section 26 of Hindu Marriage Act held that in determining the question as to who should be given the custody of minor child, the paramount consideration is the welfare of the child and not the rights of the parents under statute for the time being in force. The legal position in India follows the doctrine laid down in English and American Law. In that case A was the son of the respondent. Allegedly, A' s mother, M had been continuously tortured by the respondent for bringing more dowry from her parents, the appellants here. On day M was brutally assaulted by the respondent and his mother which resulted in her death. The appellants herein lodged F.I.R. against the respondent and his mother under Sections 498-A and 304 IPC. The respondent was consequently arrested. A, who at that time was only five years old, was found in sick condition at the respondent's residence. His custody was then handed over to the appellants. The appellants maintained the child with utmost love and affection and got him admitted to a well-reputed school.

6. During the pendency of the criminal case, the respondent was enlarged on bail. He then filed an application under the Guardians and Wards Act, 1890 seeking custody of A. The appellants opposed that application. The trial court allowed the application and held that the respondent was the natural guardian of A and the present and future of A would be better secured in the custody of the respondent. Accordingly, it directed the custody of A to be "immediately" given to the respondent. This order was upheld by the High Court. The appellants then filed the present appeal by special leave.

7. Hon'ble Apex Court allowed the appeal filed by mother of the child and observed that the trial court's order to hand over minor to such guardian (father) immediately and High Court's order to do so within 24 hours positively was not proper on application of the father of the child which was opposed by his maternal grandparents with whom child was lying.

8. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as

well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.

9. Hon'ble Apex Court further observed that it is not the negative test' that the father is not `unfit' or disqualified to have custody of his son/daughter is relevant but the `positive test' that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of minor in favour of father, mother or any other guardian.

10. As regard the trial court's direction to hand over the custody of the child "immediately" by removing him from the custody of his maternal grandparents and the High Court's order to hand over the child to his father within twenty-four hours positively, it has to be held, that a child is not "property" or "commodity". The issues relating to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem.

11. Hon'ble Apex Court further observed that examination of the child helps the court in performing its onerous duty in exercising discretionary jurisdiction and in deciding the delicate issue of custody of a tender-aged group child. Moreover, final decision rests with the court which is bound to consider all questions to make appropriate order keeping in view the welfare of the child. Normally, therefore, in custody cases, wishes of the minor should be ascertained by the Court before deciding as to whom custody should be given. In the present case trial court ought to have ascertained the wishes of the child as to with whom he wanted to stay. The child was called in the chamber of judges deciding the present case. He admitted to be quite intelligent. When asked whether he wanted to go to his father and stay with him, he unequivocally refused to go with him or to stay with him. He also stated that that he was very happy with maternal grand parents and would like to continue to stay with them. It has, therefore, to be held that in would not be proper on the facts and circumstances to give custody of the child to his father, the respondent herein.

12. In above case also mother of the child died unfortunate death and the father of the child was arrested in a case lodged by parents of the deceased wife under Section 498-A IPC and Section 304-B IPC as she was repeatedly brutally assaulted by her husband and his mother, and after death of his wife and after death of mother of corpus, custody of child was handed over to maternal grandparents. At that time, he was only of five years. It was his maternal grandfather, appellant no. 1, who maintained the child with utmost love and affection. He was imparted education in a reputed college in Kolkata.

13. Hon'ble Apex Court in above case cited various Authorities in English and American Law held that ordinarily basis for issuance of writ of habeas corpus is an illegal detention; but in the case of such a writ issued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child. The legal position in India follows the this doctrine. There are various statutes which gives legislative recognition to these well established principles. Section 4 of the Guardian and Wards Act defines "minor" as a person who had not attained the age of majority. "Guardian means a person having care of

the person for a minor or of his property, or of both his person and property." "Ward" is defined as a minor from whose person or property or both, there is a guardian.

14. Hon'ble Apex Court further reproduced statutory provisions in paragraph nos. 31, 32, 35, 36, 37 which are reproduced as under"-

31. Chapter II (Sections 5 to 19) relates to appointment and declaration of guardians. Section 7 deals with `power of the Court to make order as to guardianship' and reads as under:

7. Power of the Court to make order as to guardianship.-(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made--

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

32. Section 8 of the Act enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of Court. Section 17 is another material provision and may be reproduced;

17. Matters to be considered by the Court in appointing guardian.-(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

* * * * *

(5) The Court shall not appoint or declare any person to be a guardian against his will.

(emphasis supplied)

35. Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as "1956 Act") is another equally important statute relating to minority and guardianship among Hindus. Section 4 defines "minor" as a person who has not completed the age of eighteen years. "Guardian" means a person having the care of the person of a minor or of his property or of both his persons and property, and inter alia includes a natural guardian. Section 2 of the Act declares that the provisions of the Act shall be in addition to, and not in derogation of 1890 Act.

36. Section 6 enacts as to who can be said to be a natural guardian. It reads thus;

6. Natural guardians of a Hindu Minor.

--The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl-- the mother, and after her, the father.

(c) in the case of a married girl--the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world becoming a hermit(vanaprastha)or an ascetic(yati or sanyasi).

Explanation.--In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.

37. Section 8 enumerates powers of natural guardian. Section 13 is extremely important provision and deals with welfare of a minor. The same may be quoted in extenso;

13. Welfare of minor to be paramount consideration.

(1)In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2)No, person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

(emphasis supplied)

15. In **Saraswatibai Shripad Ved Vs. Shripad Vasanji Ved, AIR 1941 Bom 103**, the High Court of Bombay stated that it is not the welfare of the father, nor the welfare of the mother i.e. paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration.

16. In **Surinder Kaur Sandhu Vs. Harbax Singh Sandhu, (1986) 3 SCC 698,** Hon'ble Apex Court held that Section 6 of the Hindu Minority and Guardianship Act, 1956 consitutes the father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.

17. In **Mausami Moitra Ganguli Vs. Jayant Ganguli, (2008) 7 SCC 673,** Hon'ble Apex Curt has held in paragraph no. 20 as follows:-

20 "The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his

or her custody. Better financial resources of either of the parents or
their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

18. Hon'ble Apex Court in Nil Ratan Kundu (supra) placeing reliance on **Rosy Jacob Vs. Jacob A. Chakramakkal, 1973(1) SCC 840,** observed that "we may only state that a child is not "property" or "commodity". To repeat issues relating to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem.

.....

One of the matters which is required to be considered by a court of law is the "character" of the proposed guardian.

20. In **Kirtikumar Maheshankar Joshi Vs. Pradipkumar Karunashanker Joshi, (1992) 3 SCC 573**, Apex Court, almost in similar circumstances where the father was facing the charge under Section 498-A IPC did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle, thus a complaint against father alleging and attributing the death of the mother under Section 498-A IPC is indeed a relevant factor and the court of law must address the said circumstance while deciding the custody of the minor in favour of such a person.

21. From perusal of material on record it appears that maternal uncle of the children Yogesh lodged an F.I.R. against deponent, father of the corpuses, and his father under Section 323, 504 IPC on 29.12.2014 at P.S. concerned with allegation that they had assaulted and abused the victim Shweta who happens to be his sister. The deceased wife of the deponent/petitioner had also lodged a case under Section 12 of the Protection of Women from Domestic Violence Act in Etawah in which interim maintenance was ordered by competent court to the wife of the deponent. She had also lodged an F.I.R. against her husband and in-laws on 5.7.2015 under Sections 498-A, 323, 504, 506 and Section 3/4 D.P. Act with allegation of demand of dowry and subjecting her to matrimonial cruelty against named accused persons at P.S. Diviyapura, District Auraiya. Unfortunately she died unnatural death on 29.4.2022 as alleged, by consuming some poisonous substance and her cremation took place on 30.4.2022. After death of the mother of the corpuses, her father Suresh Chandra Yadav lodged an F.I.R. on 1.5.2022 vide crime no. 89 of 2022 under Section 306 IPC against deponent, father of the corpuses, and his family members with allegation of subjecting the deceased to matrimonial cruelty on account of non-fulfillment of demand of dowry and her continuous torture physically and mentally committed by them and now the deponent, father of the corpuses, is enlarged on bail in that case under Section 306 IPC, however, he has been alleged to have abetted the mother of the corpuses to commit suicide, who happened to be his wife thus, relations of husband and wife remained strained just after some time of their marriage and ultimately she allegedly committed suicide. The corpus Vivan aged around 8 years and Divyansh aged around 3 years respectively have appeared before this Court today.

Vivan categorically stated that he intends to reside with her maternal grandparents and her mausi (aunt). He expressed his disinclination to go or live with his father, who has filed the present petition on their behalf. The second corpus Divyansh could not identify his father as he is too young and therefore his desire could not be elicited. It is submitted on behalf of private respondents, maternal grandparents and mausi (aunt) of the corpuses that family atmosphere of the deponent, father of the corpuses, is not conducive to their health growth and polluted. His own mother resides separately from his father. Private respondents are well educated and resourceful person and are able to take proper and due care of the children as they are lying with them, to ensure over all development. In counter affidavit, bona fide certificate has been filed which is issued by the Principal of Tapasthali Public School, Mainpuri which bears dated 10.10.2022 in which it is stated that Vivan s/o Vijay Vikram Singh is a student of class-3 in his school. He was admitted to the school by his maternal grandfather on 6.7.2022. The maternal grandfather of the child is also bearing all the academic expenses of the child and they are ready to carry on nurturing of both the children of their deceased's daughter.

22. This Court in habeas corpus writ petition no. 389 of 2020 (Master Aryan and Another) decided on 1.3.2021 wherein it was held that in that case the child appeared a bright and intelligent on his protection before the Court. He expressed his feelings of animosity feelings for his mother who was facing a charge about her husband's death in relation to which she was subjected to trial and there was a possibility, remote or not so remote, that she might be convicted and sentenced on the charge relating to her husband's (minors' father) murder. If that were to happen while minors are staying with her it would create trauma to the minors, to know that their mother, with whom they have bonded and are living, stands convicted of the father's murder and on that count, this Court dismissed habeas corpus petition filed by the mother of the children who were residing with their parental uncle and aunt after death of their father.

23. Considering rival submissions of learned counsel for the parties, facts and attending circumstances of the case and the judicial authorities of the Hon'ble Apex Court as well as this Court cited above and keeping in view the paramount interest of the welfare of the children who are presently lying in custody of their maternal grandparents and elder of them has expressed his unequivocal desire to reside with them and peculiar facts of the case that father had sought custody of the child in present habeas corpus petition who is facing charge of abatement of commission of suicide of his wife, the mother of the children, this Court does not find good ground to make the rule nisi absolute. It is accordingly, discharged.

24. In the result, this petition fails and stands **dismissed.**

(2023) 4 ILRA 64
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.04.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Matters U/A 227 No. 1396 of 2023

Anupma Sinha ...Petitioner

Versus

Real Estate Regulatory Authority, Rajya Niyojan Sansthan, Lko. U.P. & Anr.

...Respondents

Counsel for the Petitioner:
Kartikey Dubey

Counsel for the Respondents:
Shobhit Mohan Shukla

A. Real Estate Law – Maintainability - Real Estate (Regulation and Development) Act, 2016 - Section 40 r/w Rule 23 of Rules, 2016 - A preliminary objection has been raised in order dated 22.03.2023 w.r.t. maintainability of petition u/Article 227 of the Constitution of India that the Real Estate Regulatory Authority is neither a Court nor a Tribunal.

RERA has been held to be a quasi judicial authority by Hon'ble the Supreme Court and has been held to be covered under the connotation 'Tribunal' and as such petition would be maintainable.

The **preliminary aspect** whether the authority can be a Tribunal or not in terms of Article 227 of the Constitution of India **is that it is a statutory authority which is empowered under special enactment and setup by the State to decide a *lis* between contending parties in a judicial manner but under exercise of quasi-judicial powers since it has been invested with some function of judicial powers of the State.** (Para 10)

The authority (RERA) exercises quasi-judicial powers and would thus come within the term of tribunal as envisaged under Article 227 of the Constitution of India due to which petition against the said authority would be maintainable under Article 227 of the Constitution of India. (Para 13)

B. The petitioner had filed a complaint case which has been decided on 22.03.2022 whereafter execution of the sale has been required by filing of an application. It is submitted that in the meantime **the authority itself has framed standard operating procedure on 02.09.2020 which is not being adhered to. As such, it is submitted that execution order is required to be made in terms thereof.** (Para 15)

RERA is directed to ensure execution of order dated 22.03.2022 filed in Complaint No. LKO162/08/57523/2020, passed by RERA in terms of its standard operating procedure dated 02.09.2020 in case there is no other legal impediment. (Para 16)

Writ petition disposed of. (E-4)

Precedent followed:

1. Newtech Promoters & Developers Pvt. Ltd. Vs St. of U.P. & ors., 2021 SCC OnLine SC 1044 (Para 5)

2. Pan Realtors Pvt. Ltd. Vs St. of U.P. & ors., W.P. No. 27631 of 2021 (Para 5)

3. Associated Companies Ltd. Vs P.N. Sharma & anr., AIR 1965 SC 1595 (Para 6)

4. All Party Hill Leaders Conference Vs Captain W.A. Sangma, (1977) 4 SCC 161 (Para 7)

5. St. of Guj. Vs Gujarat Revenue Tribunal Bar Association, (2012) 10 SCC 353 (Para 8)

Present petition u/Article 227 seeks a direction to the RERA for taking necessary steps to ensure execution of order dated 22.03.2022 passed in Complaint No. LKO162/08/57523/2020, *Anupma Sinha* Versus *M/s Ansal Properties and Infrastructure Limited.*

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

1. Heard Mr. Kartikey Dubey, learned counsel for petitioner and Mr. Shobhit Mohan Shukla, learned counsel for opposite party no.1.

2. In view of order being proposed to be passed, notices to opposite party no.2 stand dispensed with.

3. Petition under Article 227 of the Constitution of India has been filed seeking a direction to the Real Estate Regulatory Authority for taking necessary steps to

ensure execution of order dated 22.03.2022 passed in Complaint No.LKO162/08/57523/2020, Anupma Sinha Versus M/s Ansal Properties and Infrastructure Limited. Further relief for issuance of Recovery Certificate under Section 40 of the Real Estate (Regulation and Development) Act, 2016 read with Rule 23 of Rules, 2016 has also been sought.

4. Initially as noticed in order dated 22.03.2023, a preliminary objection has been raised with regard to maintainability of petition under Article 227 of the Constitution of India that the Real Estate Regulatory Authority is neither a Court nor a Tribunal.

5. Learned counsel for petitioner in response to the preliminary objection has placed reliance on judgement rendered by Hon'ble the Supreme Court in the case of ***Newtech Promoters and Developers Pvt. Ltd. versus State of U.P. and others reported in 2021 SCC OnLine SC 1044*** as well as judgment rendered by Coordinate Bench of this Court in the case of ***Pan Realtors Pvt. Ltd. versus State of U.P. and others passed in W.P. No.27631 of 2021*** to submit that the aforesaid authority has been held to be a quasi judicial authority by Hon'ble the Supreme Court and has been held to be covered under the connotation 'Tribunal' and as such petition would be maintainable.

6. With regard to aforesaid preliminary objection, it would be necessary to advert to whether the Real Estate Regulatory Authority can be construed to be either a Court or a Tribunal. The aspect of when an authority can be said to be a Court or a Tribunal has been discussed by Hon'ble the Supreme Court in the case of ***Associated Cement Companies Ltd. V. P.N. Sharma and another*** reported in ***AIR 1965 SC 1595:***

"9. Tribunals which fall within the purview of Article 136(1) occupy a special position of their own under the scheme of our Constitution. Special matters and questions are entrusted to them for their decision and in that sense, they share with the courts one common characteristic; both the courts and the tribunals are "constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions", (vide Durga Shankar Mehta v. Thakur Raghuraj Singh [(1955) 1 SCR 267 at p. 272]). They are both adjudicating bodies and they deal with and finally determine disputes between parties which are entrusted to their jurisdiction. The procedure followed by the Courts is regularly prescribed and in discharging their functions and exercising their powers, the Courts have to conform to that procedure. The procedure which the tribunals have to follow may not always be so strictly prescribed, but the approach adopted by both the Courts and the tribunals is substantially the same, and there is no essential difference between the functions that they discharge. As in the case of Courts, so in the case of tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge. Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial functions and powers mainly to the Courts established by the Constitution; but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial

powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties. It is really not possible or even expedient to attempt to describe exhaustively the features which are common to the tribunals and the Courts, and features which are distinct and separate. The basic and the fundamental feature which is common to both the Courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State.

44. An authority other than a Court may be vested by statute with judicial power in widely different circumstances, which it would be impossible and indeed inadvisable to attempt to define exhaustively. The proper thing is to examine each case as it arises, and to ascertain whether the powers vested in the authority can be truly described as judicial functions or judicial powers of the State. For the purpose of this case, it is sufficient to say that any outside authority empowered by the State to determine conclusively the rights of two or more contending parties with regard to any matter in controversy between them satisfies the test of an authority vested with the judicial powers of the State and may be regarded as a tribunal within the meaning of Article 136. Such a power of adjudication implies that the authority must act judicially and must determine the dispute by ascertainment of the relevant facts on the materials before it and by application of the relevant law to those facts. This test of a tribunal is not meant to be exhaustive, and it may be that other bodies not satisfying this test are also tribunals. In order to be a tribunal, it is essential that the power of adjudication must be derived from a statute or a statutory rule. An authority or body deriving its power of adjudication from an agreement of the parties, such as a private arbitrator or a tribunal acting under Section 10-A of the Industrial Disputes Act, 1947, does not satisfy the test of a tribunal within Article 136. It matters little that such a body or authority is vested with the trappings of a Court. The Arbitration Act, 1940 vests an arbitrator with some of the trappings of a Court, so also the Industrial Disputes Act, 1947 vests an authority acting under Section 10-A of the Act with many of such trappings, and yet, such bodies and authorities are not tribunals.

45. The word "tribunal" finds place in Article 227 of the Constitution also, and I think that there also the word has the same meaning as in Article 136.

7. In another case of ***All Party Hill Leaders Conference v. Captain W.A. Sangma,*** reported in ***(1977) 4 SCC 161;*** it has been held as follows:-

23. The earliest decision of this Court as to the ambit of Article 136(1) with reference to the order of a tribunal came up for consideration in Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd. [AIR 1950 SC 188 : (1950) 1 SCR 459 : 950 Lab LJ 21] . The question whether an Industrial Tribunal constituted under the Industrial Disputes Act, 1947, was a tribunal within the scope of Article 136 was raised in that case. By majority the Constitution Bench of this Court held that the Industrial Tribunal was a tribunal for the purpose of Article 136. Having regard to the scheme of Article 136, this Court was not prepared to place a narrow interpretation on the amplitude of Article 136. This Court observed at p. 476/478 of the Report as follows:

"As pointed out in picturesque language by Lord Sankey, L.C. in Shell Co. of Australia v. Federal Commissioner of Taxation [1931 AC 275] , there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power. It seems to me that such tribunals though they are not full-fledged Courts, yet exercise quasi-judicial functions and are within the ambit of the word "tribunal' in Article 136 of the Constitution.

Tribunals which do not derive authority from the sovereign power cannot fall within the ambit of Article 136. The condition precedent for bringing a tribunal within the ambit of Article 136 is that it should be constituted by the State. Again a tribunal would be outside the ambit of Article 136 if it is not invested with any part of the judicial functions of the State but discharges purely administrative or executive duties. Tribunals, however, which are found invested with certain functions of a Court of justice and have some of its trappings also would fall within the ambit of Article 136 ....

25. From a conspectus of the above decisions it will be seen that several tests have been laid down by this Court to determine whether a particular body or authority is a tribunal within the ambit of Article 136. The tests are not exhaustive in all cases. It is also well-settled that all the tests laid down may not be present in a given case. While some tests may be present others may be lacking. It is, however, absolutely necessary that the authority in order to come within the ambit of Article 136(1) as tribunal must be constituted by the State and invested with some function of judicial power of the State. This particular test is an unfailing one while some of the other tests may or may not be present at the same time.

8. In the case of ***State of Gujarat V. Gujarat Revenue Tribunal Bar Association*** *reported in* ***(2012)10 SCC 353***; it has been held as follows:-

18. Tribunals have primarily been constituted to deal with cases under special laws and to hence provide for specialised adjudication alongside the courts. Therefore, a particular Act/set of rules will determine whether the functions of a particular tribunal are akin to those of the Courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority i.e. a situation where, (a) a statutory authority is empowered under a statute to do any act; (b) the order of such authority would adversely affect the subject; and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject; and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi-judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a "Court", but not all. In case certain powers under CPC or CrPC have been conferred upon an authority, but it has not been entrusted with the judicial powers of State, it cannot be held to be a Court. (See Bharat Bank Ltd. v. Employees [AIR 1950 SC 188] , Virindar Kumar Satyawadi v. State of Punjab [AIR 1956 SC 153 : 1956 Cri LJ 326] , Engg. Mazdoor Sabha v. Hind Cycles Ltd. [AIR 1963 SC 874], Associated Cement Companies Ltd. v. P.N. Sharma [AIR 1965 SC 1595] , Rama Rao v. Narayan [(1969) 1 SCC 167 : AIR 1969 SC 724] , State of H.P. v. Mahendra Pal [(1999) 4 SCC 43 : AIR

1999 SC 1786] , Keshab Narayan Banerjee v. State of Bihar [(2000) 1 SCC 607 : 2000 SCC (Cri) 272] , Indian National Congress (I) v. Institute of Social Welfare [(2002) 5 SCC 685 : AIR 2002 SC 2158] , K. Shamrao v. Asstt. Charity Commr. [(2003) 3 SCC 563] , Trans Mediterranean Airways v. Universal Exports [(2011) 10 SCC 316 : (2012) 1 SCC (Civ) 148] , SCC p. 338, para 53 and Namit Sharma v. Union of India [(2013) 1 SCC 745] .)

9. A Coordinate Bench of this Court in the case of ***Pan Realtors Pvt. Ltd. versus State of U.P. and others passed in Writ Petition No.27631 (M/s) of 2021*** has also considered when an authority can be said to be Tribunal in the following manner:

"16. Considering the aforesaid including the judgments referred hereinabove, this Court is of the view that in this case for determining that as to whether an "Authority" i.e. "State Government" is a "Tribunal" or not, as in this case the power of State Government under Section 41(3) of the Act of 1973 is in issue, which is as per above observations of this Court is revisional power, the basic test(s)/parameter(s) can be summarized as under:

(a) That the power of adjudication should be conferred on the concerned 'Authority' by a statute.

(b) That such adjudicating power is the part of State's inherent power exercised in discharging its judicial function.

(c) That the 'Authority' concerned is under obligation to act judicially.

(d) That the decision of the 'Authority' on the 'lis' before it is binding between the parties and final.

In this case, the power of adjudication is conferred upon 'State Government' by the statute, the 'State Government' is under obligation to act judicially and is also required to follow principle of natural justice, as appears from the proviso to Sub Section 3 of Section 41 of the Act of 1973, the State Government in this Sub Section decides the lis between the parties and decision of 'State Government', as per Sub Section 4 of Section 41 is binding and final. Thus, all test(s)/ parameter(s), aforesaid, are satisfied and being so it is held that the 'State Government' under Section 41 Sub Clause 3 of the Act of 1973, is a 'Tribunal'."

10. It is thus seen that the preliminary aspect whether the authority can be a Tribunal or not in terms of Article 227 of the Constitution of India is that it is a statutory authority which is empowered under special enactment and setup by the State to decide a lis between contending parties in a judicial manner but under exercise of quasi-judicial powers since it has been invested with some function of judicial powers of the State.

11. The aforesaid aspect has also been considered by Hon'ble the Supreme Court in the case of ***Newtech Promoters and Developers Pvt. Ltd. versus State of U.P and Ors.*** reported in ***2021 SCC OnLine SC 1044;*** in the following manner:

"117. The further submission made by learned Counsel for the Appellants that Section 81 of the Act permits the authority to delegate such powers and functions to any member of the authority which are mainly administrative or clerical, and cannot possibly encompass any of the core functions which are to be discharged by the authority, the judicial functions are non-delegable, as these are the core functions of the authority. The

submission may not hold good for the reason that the power to be exercised by the authority in deciding complaints Under Section 31 of the Act is quasi- judicial in nature which is delegable provided there is a provision in the statute. As already observed, Section 81 of the Act empowers the authority to delegate its power and functions to any of its member, by general or special order."

12. The authority as indicated in the judgment has reference to Section 31 of the Real Estate (Regulation and Development) Act, 2016 regarding filing of complaints with the authority or the adjudication officer. The term 'authority' has been defined under section 2(i) to mean the Real Estate Regulatory Authority Established under section 20(1) of the Act.

13. In view of aforesaid judgments, particularly ***Newtech Promoters*** (supra) it is evident that the authority therefore exercises quasi-judicial powers and would thus come within the term of tribunal as envisaged under Article 227 of the Constitution of India due to which petition against the said authority would be maintainable under Article 227 of the Constitution of India.

14. In view of aforesaid fact, preliminary objection raised is rejected.

15. Learned counsel for petitioner has submitted that the petitioner had filed the aforesaid complaint case which has been decided on 22.03.2022 whereafter execution of the sale has been required by filing of an application. It is submitted that in the meantime the authority itself has framed standard operating procedure on 02.09.2020 which is not being adhered to. As such, it is submitted that execution order is required to be made in terms thereof.

16. Upon consideration of submissions advanced by learned counsel for petitioner, opposite party no.1 i.e. Real Estate Regulatory Authority, Rajya Niyojan Sansthan, Naveen Bhavan, Kalakankar House Road, Old Hyderabad, Lucknow Uttar Pradesh is directed to ensure execution of order dated 22.03.2022 filed in Complaint No.LKO162/08/57523/2020, Anupma Sinha Versus M/s Ansal Properties and Infrastructure Limited passed by Real Estate Regulatory Authority, Rajya Niyojan Sansthan in terms of its standard operating procedure dated 02.09.2020 in case there is no other legal impediment.

17. Benefit of this order shall be available only in case petitioner cooperates in early conclusion of the application/trial.

18. With the aforesaid direction, the petition stands ***disposed of.***

(2023) 4 ILRA 70
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.03.2023

BEFORE

THE HON'BLE J.J. MUNIR, J.

Criminal Misc. Application U/S 482 No. 10522 of 2023

Mohammad Talha & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Vijay Kumar Mishra

Counsel for the Opposite Parties:
G.A., Sri Abhijeet Mukherji (State Law Officer)

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 323, 332, 336, 352, 395, 427, 435, 504, 506 & 120B - Criminal Law (Amendment) Act, 1932 - Section 7 - The Prevention of Damage to Public Property Act, 1984 - Section 3/4 - Constitution guarantees to every citizen is the right to protest peaceably and without arms - no sanction to unlawful assemblies that indulge in rioting and violence as a means to vindicate their rights, or to convey their point of view - democratic rights have to be exercised in a lawful manner, so that order in society, which sovereignty has to uphold at all costs, is not lost.(Para -7)

Widespread protest in the country relating to the Citizenship (Amendment) Act, 2019, the National Register of Citizens3 and Citizenship (Amendment) Bill, 20194 - Rampant rioting - assault on public officials - both uniformed and of civil administration - besides members of the public - destruction of property - both of government and public - continued over a stretch of about four hours - efforts were made at different points of time to restore order and peace - enough opportunity for a *locus poenitentiae* was given - rioters persisted in their violent course - did not relent, until much damage had been done to public property - injury inflicted to different sections of the society. (Para -2,7)

HELD:-Case relates to widespread incidents of violation of public order in the name of protest against a particular or more than one Bills introduced in Parliament. Charge against applicants may be true, but the case diary's material is subject to trial testing, and the Court cannot test it under Section 482 of the Code. Court cannot exercise jurisdiction under Section 482 of the Code to quash proceedings and nip this prosecution in the bud. (Para -7,8,9)

Application u/s 482 Cr.P.C. rejected. (E-7)

(Delivered by Hon'ble J.J. Munir, J.)

This is an application under Section 482 of the Code of Criminal Procedure, 19731, seeking to quash the entire proceedings of Criminal Case No. (R) 6205 of 2020 (Computerized Criminal Case No. (C) 605/2020), State v. Aasif Chandan and others (arising out of Case Crime No. 246 of 2019), under Sections 323, 332, 336, 352, 395, 427, 435, 504, 506 and 120B of the Indian Penal Code, 1860, Section 7 of the Criminal Law (Amendment) Act, 1932 and Section 3/4 of the Prevention of Damage to Public Property Act, 1984, Police Station Dakshin Tola, District Mau, pending the Court of the Chief Judicial Magistrate, Mau.

2. Heard Mr. Vijay Kumar Mishra, learned Counsel for the applicants and Mr. Shashi Shekhar Tiwari, learned Additional Government Advocate along with by Mr. Abhijeet Mukherji, learned State Law Officer appearing on behalf of the State of Uttar Pradesh

3. A First Information Report2 was lodged by Nihar Nandan Kumar, Station House Officer, Police Station Dakshin Tola, District Mau, regarding an incident dated 16.12.2019 in the aftermath of the widespread protest in the country relating to the Citizenship (Amendment) Act, 2019, the National Register of Citizens3 and Citizenship (Amendment) Bill, 20194. The FIR reported that on 16.12.2019, at half past two in the afternoon, a large multitude of people, who were 900-1000 strong, congregated at a certain *Mirzahadipura*. They were protesting against the NRC and the CAB They were shouting slogans and proceeded to the *Mirzahadipura* crossing. They shouted slogans there and obstructed public streets. Some of them proceeded

again to the crossroads, where some others joined. The congregation of these protestors was addressed by the District Magistrate, the Superintendent of Police, the Additional Superintendent of Police, the City Magistrate and other administrative officers present, but the mob, which has been described as those of rioters, were not prepared to heed counsel. There were also efforts made by other respectable citizens of District Mau, including Imams of mosques and other police officers, but to no avail. The aggressive members of this unlawful assembly, according to the FIR, abused the Chief Minister, the Prime Minister, the Superintendent of Police and the other administrative officers. They exhorted members of the unlawful assembly to do the police and the administrative officers to death. At this juncture, the members of the unlawful assembly turned violent and assaulted the Police, the administrative officials and other members of the public with an intent to kill. They hurled brickbats and opened fire with illicit weapons on the Police and the administrative officers with an intent to kill. They also hurled petrol bombs. It is reported that during this period of time, some sniping was also done, employing illicit weapons from rooftops and brickbats were also hurled. All these acts of violence led to public order being torn asunder. The shopkeepers in the neighbourhood pulled down their shutters and the passers-by, including the journalists et cetera made good their escape, abandoning their motorcycles and vehicles. The rioters, who are said to be about 600-700 strong, at this juncture, could not be controlled by any means. On the orders of the District Magistrate, the members of the unlawful assembly were warned for 10-15 minutes on loud-hailers. However, when nothing worked to restore order, the Police resorted to a light lathi-charge. At this stage, the rioters hurling bombs, brickbats and also taking potshots from their illicit weapons, escaped through different routes. They set afire dozens of motorcycles belonging to members of the public and the police force, besides government vehicles, that were four-wheelers. These were badly damaged. Finally, under the orders of the District Magistrate, in order to control the still ongoing rioting, tear gas shells, numbering about 50, were lobbed, besides chilly bombs. Thereupon, all the rioters escaped towards Rampur Chakiya. This violence had continued up to 06:30 in the evening. The FIR mentions that the rioters who were attacking the police force and indulging in acts of incendiarism were identified by police personnel present. Those identified have been named in the F.I.R.

4. The Police, after investigation, submitted a charge-sheet against 44 of the named accused, whereas another 55 are said to be absconding. The applicants, who have been charge-sheeted, are named in the FIR.

5. Learned Counsel for the applicants has argued that the first informant in this case is the Station House Officer of Police Station Dakshin Tola, whereas a number of his subordinates are involved in the teams subsequently set up to investigate, which vitiates the resultant charge-sheet. It is next submitted that none of the witnesses who have seen the various video-clips of rioting that were captured as the violence was on have identified the applicants. The applicants are students, who ought to be shown some leniency instead of being involved in a case of mob violence, giving rise to heinous offences that would be charged in consequence. It is also submitted that the applicants have already

been granted the indulgence of bail, which shows their doubtful complicity.

6. It is argued by Mr. Shashi Shekhar Tiwari, learned A.G.A. that the prosecution case that has been reported in the F.I.R. carries a very natural description of the offence, where, initially, 900-1000 people are said to be part of the unlawful assembly, who perpetrated all this violence and later on, they have been reported to have thinned down to a figure of 600-700. After a thorough inquiry, out of this multitude, 85 named accused have been reported in the FIR that was lodged on the day following the incident, with 600 unnamed offenders. It is submitted by Mr. Tiwari that the applicants being amongst the 85 named accused out of a mob of 600-700 persons, cannot be said to be implicated without identification. It is next submitted that it is not just that the applicants have been identified by the Police, but they have been identified by independent witnesses as well, who number more than 20. There is, thus, no reason to doubt the applicants' complicity, in the submission of Mr. Tiwari. In addition, it is submitted that there are video-clips that are part of the case diary, where the entire events of the fateful day have been captured, which would render anything of a doubt about the identity of the applicants beyond pale of controversy.

7. Upon hearing learned Counsel for the applicant and learned A.G.A. for the State, this Court is of opinion that the present case relates to widespread incidents of violation of public order in the name of protest against a particular or more than one Bills introduced in Parliament. What the Constitution guarantees to every citizen is the right to protest peaceably and without arms. There is no sanction to unlawful assemblies that indulge in rioting and violence as a means to vindicate their rights, or to convey their point of view. It is not that democracy and sovereignty are at crossroads. It is only that democratic rights have to be exercised in a lawful manner, so that order in society, which sovereignty has to uphold at all costs, is not lost. Here, what appears from the materials collected in the case diary is that there was rampant rioting, where there was assault on public officials, both uniformed and of the civil administration, besides members of the public. There was also destruction of the property, both of the government and the public. The episode in which all that happened was not a momentary one. It continued over a stretch of about four hours, during which, efforts were made at different points of time to restore order and peace, if the FIR version were to be accepted. To persuade the rioters to change course, enough opportunity for a *locus poenitentiae* was given. The rioters persisted in their violent course and did not relent, until much damage had been done to public property and injury inflicted to different sections of the society.

8. This Court does not mean to say that the charge against the applicants are true. There are materials in the case diary, which indicate that these could be true. All this is a subject matter to be tested at the trial. The kind of material that there is in the case diary is not such which this Court, in exercise of jurisdiction under Section 482 of the Code, can test.

9. In the circumstances, this Court does not find the present case to be one where we ought to exercise our jurisdiction under Section 482 of the Code to quash proceedings and nip this prosecution in the bud.

10. In the result, this application **fails** and consequently, stands **rejected.**

(2023) 4 ILRA 74
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2023
BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Misc. Application U/S 482 No. 11914 of 2022

Man Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Shiv Sagar Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Negotiable instruments Act, 1981 - Section 138 , Proviso (c) of Section 138 N.I. Act - pre-condition for invoking Section 138 by giving a notice to the drawer of the cheque - before filing a complaint under Section 138 of the Act which is a mandatory requirement - Once it is stated in the complaint that notice has been sent by the registered post to the address of the drawer, the due service has to be presumed in view of Section 27 of the General Clauses Act read with Section 114 of the Evidence Act - at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is to only prima facie satisfy that a case under said section is made out and the mandatory requirement have been complied with.(Para 10,11)

(B) The general clauses act, 1897 - Section 27 - meaning of service by post - service of notice has been effected when it is sent to the correct address by registered post. (Para 10)

(C) Indian Evidence Act, 1872 - Section 114 - when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed .(Para 10)

Cheque issued by accused - to discharge a legal debt - returned unpaid - dishonoured - evaded legal notice send through registered post - complainant filed a complaint - held by trial court - while passing impugned order - notice dated 07.07.2018 and 27.07.2018 will be deemed to have been issued within 30 days of dishonour of cheque in dispute. (Para -3,12)

HELD:-No infirmity in the impugned order passed by trial court.(Para - 13)

Petition dismissed. (E-7)

List of Cases cited:

C.C. Alavi Haji Vs Palapetty Muhammed & anr.,(2007) 6 SCC 555

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

1. Heard Shri Shiv Sagar Singh learned counsel for the petitioner as well as learned A.G.A. for the State.

2. Notices to respondent no. 2 are dispensed with.

3. Through this petition, the petitioner has challenged the impugned order dated 11.10.2021 passed by the Presiding Officer, Additional Court, Saharanpur in complaint case No. 877 of 2018 (Praveen Singh Vs. Man Singh), under Section 138 of N.I. Act, P.S. Sadar Bazar, District Saharanpur whereby the petitioner has been summoned for facing trail for an offence under Section 138 N.I. Act with regard to dishonor of alleged cheque dated 28.03.2018.

4. Brief facts of the case are that in order to discharge a legal recoverable debt or liability a cheque No. 004565 dated 28.03.2018 to the tune of Rs. 1,00,000/- was issued in favour of the complainant by the accused, the cheque was presented by the complainant in his bank account No. 3463556822, Central Bank of India, Naveen Nagar, Saharanpur for encashment. The cheque was returned back unpaid with an endorsement of the bank that payment stopped by the drawer. Again the cheque was presented by the complainant in his bank for encashment in his account, however, the same was again dishonoured on *25.06.2018* and the information regarding dishonouring of cheque was received by the complainant on 28.06.2018. The payment was again stopped by the drawer as per memo of the bank. The complainant thus issued a legal notice dated *07.07.2018* to the accused on his residential address through registered post which was evaded by the accused in collusion with the postal employees by mentioning an endorsement that the accused does not reside on this address. The second notice was sent by the complainant on *27.07.2018* through registered post which was also returned by the accused and was received by the complainant on 01.08.2018 and then on 20.08.2018, a complaint was filed by the complaint before the learned court below.

5. Earlier in the case under Section 138 of N.I. Act, vide order dated 17.1.2019, the learned trial court summoned the accused. Against that order, the accused filed a criminal revision No. 143/2019 "Man Singh Vs. State of U.P" which was allowed vide order dated 19.10.2019 by the learned Additional Sessions Judge, Court No. 6, Saharanpur and the order dated *17.01.2019* was set aside. The relevant part of the order passed by the Revisional Court is extracted below:-

निगरानीकर्ता के विद्वान अधिवक्ता का मुख्य तर्क यह था कि चेक अनादृत होने की मैमो दिनांकित *26.5.6.2018* की है तथा कथित नोटिस दिनांकित *27.07.2018* को दिया गया है। इस प्रकार उक्त नोटिस *30* दिन के अन्दर नहीं दिया गया है। आक्षेपित आदेश दिनांकित *17.01.2019* के अवलोकन से स्पष्ट है कि उसमें विद्वान अवर न्यायालय द्वारा नोटिस दिये जाने की तिथि / अवधि के आंकलन करने हेतु अपने आदेश में चैक अनादृत होने की सूचना की तिथियां 14.05.2018 व *25.06.2018* दर्शित की गयी है। यदि बाद वाली तिथि *25.06.2018* से दिनों की गणना की जाये तो जो नोटिस दिनांक *27.07.2018* को प्रेषित किया गया वह *30*दिन के बाद का है। विद्वान अवर न्यायालय द्वारा इस सम्बन्ध में अपने आदेश में कोई विवेचना नहीं की गयी है कि *30*दिन पश्चात् नोटिस भेजे जाने पर भी परिवाद किस कारण से पोषणीय है। इसके अतिरिक्त यहाँ यह भी उल्लेखनीय है कि परिवाद में परिवादी द्वारा चैक अनादृत होने की सूचना दिनांक 28.06.2018 को प्राप्त होना कथित किया है और इसके बाद एक नोटिस दिनांक 7.7.2018 को भी प्रेषित किया जाना कथित किया है। जिसके सम्बन्ध में पत्रावली पर रजिस्ट्री रसीद भी दाखिल है। उक्त दोनों तथ्यों की भी विवेचना विद्वान अवर न्यायालय द्वारा अपने आदेश में नहीं की गयी है, जो इस सम्बन्ध में निष्कर्ष निकालने में महत्वपूर्ण हो सकती थी कि वास्तव में परिवादी द्वारा प्रेषित नोटिस समय सीमा के अन्दर है या नहीं। इस प्रकार उक्त परिस्थितियों में विद्वान अवर न्यायालय द्वारा पारित आदेश पूर्णतया तथ्यों एवं साक्ष्यों पर आधारित नहीं है। विद्वान अवर न्यायालय द्वारा अपने में निहित क्षेत्राधिकार का पूर्णतः प्रयोग करने में लोप किया गया है। अतः उक्त आदेश यथावत् बने रहने योग्य नहीं है। निगरानी स्वीकार किये जाने योग्य है।

आदेश

प्रस्तुत फौजदारी निगरानी स्वीकार की जाती है। विद्वान अवर न्यायालय द्वारा पारित आदेश दिनांकित *17.01.2019* निरस्त किया जाता है। विद्वान अवर न्यायालय को निरदेशित किया जाता है कि वह उपर की गयी विवेचना के आधार पर यथोचित नवीन आदेश पारित करना सुनिश्चित करें। पत्रावली अग्रिम कार्यवाही हेतु विद्वान अवर न्यायालय प्रेषित की जाये। पत्रावली दिनांक *13.11.2019* को विद्वान अवर न्यायालय के समक्ष पेश हो परिवादी दिनांक *13.11.2019* को विद्वान अवर न्यायालय में उपस्थित हो।

6. On remand, the matter was again heard for orders on summoning. In

compliance of the observations made by the Revisional Court, the learned trial court has passed the impugned order dated 11.10.2022 summoning the accused. The relevant extract of the order is extracted below:-

"In support of the complaint averments the complainant has filed an affidavit in which she has reiterated her complaint's averments. In addition to aforesaid preliminary evidence the complainant has also filed on record following documents---

1 Cheque No. 004565 dated 28-3-2018 for the sum of Rs. 100,000/ in favour of the complainant

2 Bank memo dated 14-5-2018 showing cause of dishonour of the cheque as "payment stopped by drawer.

3. Bank memo dated 25-6-2018 showing cause of dishonour of the cheque as "payment stopped by drawer".

4. Copy of legal notice bearing date as 27-7-2018.

5. Registered postal receipt dated 07-7-2018 and

6. Registered postal receipt dated 27-7-2018.

7. Registered postal envelope issued against the accused on his residential address and returned undelivered bearing an endorsement of the postman dated 09-7-2018.

8. Registered postal envelope issued against the accused on his place of posting and returned back undelivered bearing endorsement of the postman dated 01-8-2018.

The complainant not only in her complaint but even in her affidavit has specifically mentioned that lastly she had presented the cheque in dispute for encashment before her banker but it was dishonoured once again and she could get such information on 28-6-2018. The veracity of this fact can only be ascertained after the conclusion of evidence. Therefore notices issued on 07 7-2018 against the accused on his residential address and then issued on his place of posting on 27-7-2018 will be deemed to have been issued within 30 days of the receipt of information of dishonour of cheque in dispute.

Therefore at this stage the complainant succeeds in proving all ingredients of Section 138 of NI Act against the accused.

So on the basis of the preliminary evidence of the complainant under Section 200 of Criminal Procedure Code and aforesaid documents the complainant at this stage appears to have been successful in prima facie establishing the necessary ingredients of Section 138 of NI Act as under:-

1. The cheque in dispute was issued by accused in order to discharge his legally enforceable debt or liability.

2. The cheque was presented for encashment within its validity period by the complainant.

3. The cheque was dishonored due to the reason "payment stopped by the drawer.

4. After being informed about dishonor of cheque the complainant within 30 days got issued the legal notice by way of registered post through his counsel.

5. Despite service of such notice the accused failed to pay the cheque amount within 15 days of the receipt of notice, 6 Thereafter the present complaint has been filed within time prescribed under Section 142(1)(b) of the NI Act.

Therefore at this stage the complainant appears to have been. successful in proving all legal ingredients of Section 138 of Negotiable Instruments Act against the accused. So at this stage

prima facie case under Section 138 of NI Act, against the accused is made out. Hence it appears reasonable and proper to summon the accused Maan Singh to face trial for an offence punishable under Section 138 of Negotiable Instruments Act

Order

1. Let the accused Maan Singh be summoned to face trial for an offence punishable under Section 138 of Negotiable Instruments Act 1881,for 07-01-2022 fixed for appearance.

2. Steps for service of summons be taken within 3 days in following modes:-

(i) By way of ordinary process.

(ii) By way of registered post with AD.

(iii) By way of courier service.

(iv) By way of e-mail, if possible.

3. Let the copies of the complaint and list of witnesses be filed within three days.

4. Compliance report along with postal and courier service receipts be filed positively by or before the date fixed."

7. Submission of learned counsel for the petitioner is that cheque was dishonoured on 26.06.2018 and the alleged notice was given on *27.07.2018* approximately after *30* days and thus, notice has not been given within *30* days as mandated under Negotiable Instrument Act. He further submits that in the complaint it has been mentioned by the complainant that information regarding dishonour of cheque was given on 28.06.2018 and subsequently a notice dated *07.07.2018* was sent to the accused. He further submits that the learned trial court while passing the summoning order order dated *17.01.2019* has not discussed the fact that as to whether the notice sent by the complainant was within time and the complaint can be maintainable after *30* days and therefore, the learned revisional Court on these grounds has remanded the matter to the learned trial court vide its order dated 19.10.2019.

8. Perusal of the record shows that cheque No. 004565 dated 28.03.2018 for a sum of Rs. 1,00,000/- issued in favour of the complainant was dishonoured on 14.05.2018 as per the bank memo filed with the complainant as payment was stopped by the drawer. Again when the cheque was presented second time in the bank it was again dishonoured showing the cause as payment was stopped by the drawer. As per the averment made in para 7 of the complaint, information regarding such dishonour of cheque was received by the complainant on 28.06.2018 and consequently registered legal notice dated *07.07.2018* was sent on the address of the accused. The postal receipt of the notice dated *07.07.2018* is on record. Thereafter again a notice was sent dated *27.07.2018* along with postal receipt which is also on record. Both the envelopes issued with legal notice on the address of the accused returned back not delivered with an endorsement of the postman dated 09.07.2018 and 01.08.2018. The complainant in para 6 of her complaint has categorically pleaded that she received information regarding dishonour of cheque on 28.06.2018 regarding that a registered notice was sent on *07.07.2018* on his correct residential address. Again a second legal notice was sent on *27.07.2018* on his official address. Both notices were returned with the endorsement.

9. Proviso (c) of Section 138 N.I. Act being a pre-condition for invoking Section 138 by giving a notice to the drawer of the cheque before filing a complaint under Section 138 of the Act which is a

mandatory requirement appears to have been fulfilled by the complainant in this case. The argument of the petitioner that no notice dated *07.07.2018* has been given to him and only notice dated *27.07.2018* has been given after *30* days of the date of dishonour of cheque was the second time i.e. on *25.06.2018* is misconceived for the reason that in the complaint the bank memo dated *25.06.2018* showing the dishonour of the cheque is annexed, coupled with the categorical pleading of the complainant in para 7 of the complaint and it has also been pleaded that on *07.07.2018* the registered notice on the residential address of the accused was sent which was returned with an endorsement and thereafter again a registered notice dated *27.07.2018* was sent on the official address of the accused which was again returned with endorsement and was received on 01.08.2018, hence, the notice issued on *07.07.2018* as well as *27.07.2018* were deemed to have been issued within thirty days of the receipt of the information of dishonour of cheque in question.

10. At the stage of taking cognizance only prima facie case has to be seen. The basic facts regarding mode and manner of issuance of the notice to the drawer of the cheque have been narrated in the complaint. Once it is stated in the complaint that notice has been sent by the registered post to the address of the drawer, the due service has to be presumed in view of Section 27 of the General Clauses Act read with Section 114 of the Evidence Act.

No further averment at this stage is required as per the judgment of the Apex Court passed in the case of "C.C. Alavi Haji Vs. Palapetty Muhammed and Another" reported in "(2007) 6 SCC 555". The relevant para 14 and 15 of the said judgment are extracted below:-

*"**14.** Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice "**14.** Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the co been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. (Vide Jagdish Singh v. Natthu Singh [(1992) 1 SCC 647 : AIR 1992 SC 1604] ; State of M.P. v. Hiralal [(1996) 7 SCC 523] and V. Raja Kumari v. P. Subbarama Naidu [(2004) 8 SCC 774 : 2005 SCC (Cri) 393] .) It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.*

***15.** Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the court to draw presumption or inference either under Section 27 of the GC Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when*

the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the court is required to be prima facie satisfied that a case under the said section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends."

11. The purpose of notice is to give an opportunity to the drawer to pay the cheque amount within 15 days from the date of the receipt of notice so as to free from prosecution under Section 138 of Negotiable Instrument Act. Law in this regard has been settled by the Apex Court that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is to only prima facie satisfy that a case under said section is made out and the mandatory requirement have been complied with. The drawer will be having opportunity to rebut the said presumption about the service of notice at the appropriate stage of the trial.

12. Perusing this fact, learned trial court while passing the impugned order has held that notice dated *07.07.2018* and *27.07.2018* will be deemed to have been issued within *30* days of dishonour of cheque in dispute.

13. There is no infirmity in the impugned order passed by the learned trial court. The petition lacks merits and is accordingly dismissed.

Office is directed to present this order to learned trial court.

(2023) 4 ILRA 79
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Misc. Application U/S 482 No. 13185 of 2019

Janki Sharan Trivedi @ Aman & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Birendra Singh, Sri Harikant Shukla, Sri Virendra Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Section 420, Dowry prohibition Act,1961 - Section 3/4 - false implication by way of general

and omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of process of law - courts warned from proceedings against the relatives and in-laws of the husband if no *prima facie* case is made out against them.(Para -17)

Applicant nos. 4 and 5 participated in ceremony - no role in arranging marriage - family members - were bound to accompany - participate in related functions with her brother and parents - general and omnibus allegations against them - no specific allegation - applicants refused to perform marriage - due to demand for dowry - F.I.R. lodged - F.I.R challenged in High Court - arrest of applicants was stayed - charge-sheet - Non-bailable warrant issued against applicants - quashing of**. (Para - 3,4)**

HELD:-No prima facie offence either under Section 420 I.P.C. or under Section ¾ D.P. Act made out . Impugned criminal proceedings against applicant nos.4 and 5 is nothing but misuse and abuse of legal process. Entire criminal proceedings with regard to applicant nos.4 and 5 quashed.(Para - 8, 22)

Application u/s 482 Cr.P.C. partly allowed. (E-7)

List of Cases cited:

1. Km. Pooja & ors. Vs St. of U.P. & ors. , Crl. Misc. Writ Petition No.14500 of 2008

2. Smt. Mithilesh & ors. Vs St. of U.P. & ors., Crl. Misc. Writ Petition No.14929 of 2008

3. Kahkashan Kaussar @ Sonam & ors. Vs St. of Bihar & ors., 2022 0 Supreme (SC) 117

4. Lalita Kumari Vs St. of U.P. & ors., (2014) 2 SCC 1

5. S.A.F. for Manav Adhikar & anr. Vs U.O.I., Ministry of Law & Justice & ors., (2018) 10 SCC 443

6. Rajesh Sharma & ors. Vs St. of U.P. & anr., (2018) 10 SCC 472

7. Arnesh Kumar Vs St. of Bihar & anr., (2014) 8 SCC 273

8. Preeti Gupta & anr. Vs St. of Jharkhand & anr., (2010) 7 SCC 667

9. Geeta Mehrotra & anr. Vs St. of U.P. & anr., (2012) 10 SCC 741

10. K. Subba Rao Vs St. of Telengana, (2018) 14 SCC 452

11. Pawan Kumar Bhalotiya Vs W. B.l, 2005 CrLJ 1810 (SC)

12. Premlata Vs St. of Punj., AIR 1991 SC 69

13. Kahkashan Kausar @ Sonam Vs St. of Bihar, 2022 0 Supreme (SC) 117

14. Geeta Mehrotra Vs St. of U.P. & ors., 2012 (10) ADJ 464

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

1. Heard Sri Harikant Shukla, Advocate, holding brief of Sri Virendra Singh, learned counsel for the applicants, Sri Pankaj Kumar Tripathi, learned A.G.A for the State and perused the material available on record.

2. From perusal of the records, it transpires that opposite party no.2 is served personally but he has not come forward to oppose this application and neither opposite party no.2 nor the State have filed any objection/counter affidavit.

3. This application under Section 482 Cr.P.C has been moved to quash the proceeding of Case No.2119 of 2008 (CNR No.UPMB040002302008, State Vs. Janaki Sharan and others) arising out of Case Crime No.2460 of 2008, under Section 420 I.P.C. and Section ¾ D.P. Act, Police Station Kotwali Mahoba, District Mahoba

pending in the Court of Chief Judicial Magistrate, Mahoba and also to quash non-bailable warrant issued against the applicants.

4. In brief, facts of the case are that opposite party no.2 lodged an F.I.R. on 16.07.2008 against the applicants that marriage of Kumari Anjana niece of opposite party no.2 had been fixed with applicant no.1, ring ceremony etc. were performed and date of marriage was fixed to solemnise marriage on 08.07.2008, but the applicants refused to perform the marriage for want of demand of dowry. The applicants never demanded the dowry. The present F.I.R was the result of malice. The F.I.R was challenged in the High Court through **Criminal Misc. Writ Petition No.14500 of 2008 (Km. Pooja and others Vs. State of U.P. and others)**, and the arrest of the applicants had been stayed vide order dated 14.08.2008 and vide order dated 20.08.2008 passed in **Criminal Misc. Writ Petition No.14929 of 2008 (Smt. Mithilesh and others Vs. State of U.P. and others)**. During the course of investigation the investigating officer (I.O.) recorded statement of informant Narendra Kumar Mishra and statements of hearsay witnesses Smt. Gauri Dulhaina (mother of informant) and Sushila Devi (wife of the informant) and also of one Deoki Nandan and other family members of the informant. All the witnesses have supported the prosecution story and after recording evidence, the I.O. submitted charge-sheet under Section 420 I.P.C and Section ¾ D.P. Act.

5. The concerned learned Magistrate took cognizance without passing detailed and reasoned order on 21.09.2008. Pursuant to the charge-sheet, process have been issued, neither any summon nor any notice has been served upon applicants. Later on, bailable warrant has been issued in February, 2019. It is true that the marriage of Kumar Anjana D/o Mahendra Kumar was proposed with applicant no.1, Janaki Sharan but later on, the applicants came to know that her family members are of criminal background, therefore, applicant no.1 refused to marry with Anjana. After refusal by applicant no.1, they exerted much pressure for marriage, rather they threatened to kill the applicant no.1 and just to harass the applicants lodged the F.I.R. in question.

6. Being aggrieved with false prosecution by opposite party no.2 and submission of charge-sheet, applicant no.1 moved an application to D.G.P. (Complaint), Government of U.P. and prayed for fair investigation, in which he also mentioned the criminal history of opposite party no.2 and his family. Applicant no.4 is the married daughter of applicant no.2 and applicant no. 5 is unmarried daughter of applicant no.2. Applicant no.6 belongs to same village, but she has no relation with the family of applicant nos.1 and 2, applicant nos.7 and 8 belong to other villages, they are relatives of applicant nos.1 and 2. From perusal of entire evidences it shows that applicants have not committed any cheating/fraud. Therefore, no offence under Section 420 I.P.C is made out against them. Applicant Kamla Kant is villager, applicant Uma Kant is maternal uncle and applicant Neeraj is cousin, son of aunt (mausi) of applicant no.1, thus they are not the family members of applicant no.1, therefore, no offence under the D.P. Act is made out against them.

7. Dowry means "a demand made by parents of either party to a marriage by any

other person, to either party to marriage or to any other person at or before or after marriage as consideration of marriage of said parties". In this case opposite party no.2 has implicated the entire family, villagers and other relatives of Janaki Sharan, thus the allegations contained in the F.I.R. do not come within the purview of Section ¾ D.P. Act, 1961.

8. Considering the aforesaid facts and circumstances of the case, it is quite clear that no prima facie offence either under Section 420 I.P.C. or under Section ¾ D.P. Act is made out. No useful purpose would be served to continue with trial on the basis of material available in the charge-sheet.

9. The applicants are innocent, committed no offence and F.I.R. is the result of malice of opposite party no.2, and the prosecution is *void ab initio*, hence the application be allowed and the entire proceedings of the impugned criminal case be quashed.

10. During the course of argument the learned counsel for the applicants has argued that at present this application remains only in respect of applicant nos.4 and 5 and rest of the applicants have appeared in the trial court and they are ready to face the trial.

11. As per the F.I.R. and the prosecution version marriage between the niece of the informant Kumari Anjana had been settled with Janki Sharan @ Aman, applicant no.1 son of applicant nos.2 and 3 but after *godbharai* and before the *tilak* ceremony, applicant no.2, Ram Bihari Trivedi sent a letter dated 14.06.2008 demanding a santro car and additional dowry and later on he also sent a notice dated 19.06.2008 for not being ready to solemnise the marriage of his son i.e. applicant no.1 with Anjana, niece of the informant.

12. The prosecution case is that the reason behind the denial was that applicant no.1, Janki Sharan had been successful in getting entrance in MBA, hence the applicants had become greedy and wanted more and more dowry. According to the prosecution applicant no.1 was provided a golden ring and rest of the applicants were also provided cash and clothes as a mark of honour. The informant was continuously meeting with the applicants to fix the date of marriage but they troubled him for an additional demand of car and valuable things.

13. According to the prosecution, all the applicants are jointly and severely liable for the offence about which charge sheet has been submitted against all the accused persons.

14. In spite of service upon the informant/opposite party no.2 neither he appeared nor filed any counter affidavit nor contested the application. However, the application has been opposed by the learned AGA on behalf of the State. During course of argument learned counsel for the applicants states that he does not press the application on behalf of the applicants except applicant nos.4 and 5. Hence, the role of the applicant nos.4 and 5 has to be scrutinized and it has to be seen as to whether the criminal proceedings going on against applicant nos.4 and 5 is the abuse of process of Court and whether it is necessary to give effect to any order under the Code of Criminal Procedure and to secure the ends of justice, this Court should exercise its inherent jurisdiction for quashing the criminal proceedings pending

against applicant nos.4 and 5. In this regard Section 482 CrPC has to be seen which reads as under:-

"482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

15. Learned counsel for the applicants has relied on the judgment **Kahkashan Kaussar @ Sonam and others Vs. State of Bihar and others, 2022 0 Supreme (SC) 117**, in which, niece, mother-in-law, sister-in-law and brother-in-law were made accused and general allegations were levelled against them.

16. The Apex Court relying on the citation **Lalita Kumari Vs State of U.P. and others, (2014) 2 SCC 1 and Social Action Forum for Manav Adhikar and another Vs. Union of India, Ministry of Law and Justice and others, (2018) 10 SCC 443** quashed the criminal proceedings.

17. The Apex Court held that now-a-days, a tendency is increased to apply provisions such as Section 498-A I.P.C. as instrument to settle personal scores against the husband and his relatives. The Apex Court cited the previous judgments of **Rajesh Sharma and others Vs. State of U.P. and another, (2018) 10 SCC 472; Arnesh Kumar Vs. State of Bihar and another, (2014) 8 SCC 273; Preeti Gupta and another Vs. State of Jharkhand and another, (2010) 7 SCC 667; Geeta Mehrotra and another Vs. State of U.P. and another, (2012) 10 SCC 741 and K. Subba Rao Vs. State of Telengana, (2018) 14 SCC 452** and observed that false implication by way of general and omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of process of law. Therefore, the Apex Court by way of this judgment has warned the courts from proceedings against the relatives and in-laws of the husband if no *prima facie* case is made out against them.

18. The Apex Court found that no specific and distinct allegations had been made against either of appellants. They had not been attributed any specific role in the cited case; the order of High Court of Patna and the F.I.R. was set aside.

19. It was held in **Pawan Kumar Bhalotiya Vs. West Bengal, 2005 CrLJ 1810 (SC)** that where the F.I.R. has been lodged only to harass the applicants, the criminal proceedings could be quashed exercising the power under Section 482 Cr.P.C.

20. In **Premlata Vs. State of Punjab, AIR 1991 SC 69,** it has been held that if the High Court observed that if no useful purpose would be served in continuing the proceedings, the High Court can quash the proceedings of the court below.

21. In view of the judgment pronounced by the Apex Court, the role of applicant nos.4 and 5 has been deeply scrutinized by this Court and thereafter this Court comes to the conclusion that being family members they had participated in the ongoing ceremony but neither they had any role in fixing the marriage between Anjana and applicant no.1 nor they had demanded any dowry nor they had instigated rest of the applicants for making

further demand of dowry nor there is any proof of conspiracy by them in this regard nor they were in any way beneficiary to the alleged demand of dowry, simply because they are the real sisters of applicant no.1, they were bound to accompany and participate in related function with her brother and parents. There is general and omnibus allegations against them. There is no specific allegation against applicant nos.4 and 5. On this score learned counsel for the applicants has relied on **Kahkashan Kausar @ Sonam Vs. State of Bihar, 2022 0 Supreme (SC) 117** and **Geeta Mehrotra Vs. State of U.P. and others, 2012 (10) ADJ 464** which are fully applicable to this case in support of both the applicants.

22. On the basis of above discussion, this Court is of the view that the impugned criminal proceedings against applicant nos.4 and 5 is nothing but misuse and abuse of legal process and to secure the ends of justice, it is mandatory to exercise the inherent power of this Court under Section 482 CrPC and to quash the entire criminal proceedings with regard to applicant nos.4 and 5, Puja and Meenu. Hence, this application is liable to be allowed accordingly.

ORDER

23. This application under Section 482 CrPC is dismissed in respect of applicant nos.1, 2, 3, 6, 7 and 8 on account of not pressing the petition by the learned counsel for the applicants.

24. This application is partly allowed with regard to applicant nos.4 and 5, Puja and Meenu and the entire criminal proceedings of the aforementioned case in respect of applicant no.4, Puja and applicant no.5, Meenu are hereby quashed.

(2023) 4 ILRA 84
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Misc. Application U/S 482 No. 28521 of 2022

Anwar Saifi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sushil Kumar Pandey

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Negotiable Instruments Act, 1881 - Section 138 - Dishonor of cheque for insufficiency, etc., of funds in the accounts - when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. (Para -15)

(B) The general clauses act, 1897 - section 27 - meaning of service by post - service of notice has been effected when it is sent to the correct address by registered post. (Para - 15)

(b) Indian Evidence Act, 1872 - Section 114 - when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed - once the notice is sent by the registered post by correctly addressing the drawer of cheque, the service of notice deemed to have been effected.(Para -15,18)

Complainant was offered money by applicant to keep - applicant dishonored two cheques - complainant demanded money back - applicant-accused presented two more cheques - dishonored due to insufficient funds - complainant confronted applicant and asked him to present cheques again - bank dishonored cheques - complainant returned them - applicant not gave any heed to demand of complainant - not made payment- complainant filed a legal notice - sent by registered post with acknowledgment due - Misconceived request for specific service date in complaint**.(Para - 4,5,14)**

HELD:-In view of Section 27 of General Clauses Act, 1987 and Section 114 of the Evidence Act, 1872 once the notice is sent by the registered post by correctly addressing the drawer of the cheque, the service of notice is deemed to have been effected. Notice was sent on 11.01.2016 on a local address by the registered post, hence, the service of notice is deemed to have been effected.(Para - 18)

Petition dismissed. (E-7)

List of Cases cited:

1. M.S. Shakti Travel & Tours Vs St. of Bihar , 2022 (9) SCC 415

2. C.C. Alavi Haji Vs Palapetty Muhammed & anr. , (2007) 6 SCC 555

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

1. Heard learned counsel for the applicant and learned A.G.A. for the State.

2. In view of the order which is proposed to be passed, notice to respondent no. 2 is dispensed with.

3. By This petition, the petitioner has prayed for quashing the impugned proceeding of complaint case No. 3792/9 of 2016 as well as the summoning order dated 05.04.2016 passed by the learned trial court.

4. Brief facts of the case is that an offer was given by the applicant to the complainant to keep his money with him. Believing that the complainant deposited Rs 1,00,000/- with the applicant in presence of a witness and promised to pay him back anytime after 1 year. The complainant further gave different amounts on different dates and all those amounts were got entered into a passbook by the applicant. After one year, the complainant demanded his money back, then on 10.09.2015, a check of rupees Rs. 3,50,000/- drawn at Punjab National Bank numbered as 958870, and another check dated 20.09.2015 of Rs. 3,50,000/-, numbered is 958871 were given at the house of the complainant by the applicant-accused which were presented by the complainant at the concerned bank. Those cheques were dishonored due to insufficiency of funds. Then the complainant confronted with the applicant regarding the dishonor of cheque and then he asked him again to present the cheque on 23.12.2015 as he has deposited the amount in the bank. Again checks were presented on 23.12.2015, however, the cheques were dishonored by the bank on 29.12.2015 on account of of insufficient funds and were returned.

5. Thereafter, the compliment gave a notice dated 11.01.2016 through his Council to the applicant. It is alleged in the complaint that after receiving the notice, the applicant has not given any heed to the demand of the complainant neither he has made the payment, hence, the complaint was filed.

6. Learned counsel for the applicant submits that that there is no averment in the complaint disclosing the date of service to the applicant and therefore, the complaint case ought to have been dismissed as premature and summoning order should not

have been passed. It is further submitted that even if the legal notice dated 11.01.2016 is accepted as served then also the complaint filed by the complainant is premature.

7. Having heard the learned counsel for the complainant and the learned A.G.A. and perusal of the record also including the summoning order which shows that the learned trial court has considered the fact that the cheques has been produced before the bank in the stipulated period of three months. Cheques were returned on 29.12.2015 and the notice was given by the complainant on 11.01.2016 and after prima facie being satisfied regarding the compliance of three conditions provided under Section 138 of N.I. Act, the summons appears to have been issued. Section 138 of N.I. Act is extracted below:-

138 Dishonour of cheque for insufficiency, etc., of funds in the account. *--Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless-*

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

Clause (b) of the aforesaid Section 138 of N.I. Act requires that the payee or the holder in due course of a cheque, has to make a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information from the bank regarding the return of the cheque as unpaid.

8. A supplementary affidavit has been filed by the applicant which is taken on record which contains several documents filed by complainant in support of the complaint which also include two return memorandum of the bank dated 29.12.2015. Thereafter within 30 days i.e. on 11.01.2016 a notice has been given by the complainant to the accused-applicant through his counsel. Specific averment of

giving notice has been made in the complaint to the effect that the complainant has given a notice dated 11.01.2016 through his counsel to the accused-applicant which has been received by the accused and has not given any reply. The mandatory requirement under 138 clause-b of N.I. Act is only that the complainant or the payee or holder of cheque has to make a demand for payment of the said amount of money by giving a notice in writing within 30 days of the receipt of information received by him from the bank.

9. In this case, the bank has dishonored both the cheques on 29.12.2015, return memo of the bank are on record. The notice has been given well within 30 days from 29.12.2015. The submission of learned counsel for the applicant is that there is no specific averment in the complaint regarding the date of service to the accused-applicant of the legal notice sent by the complainant, therefore, the entire proceedings are liable to be quashed.

10. The second contention is that even if the legal notice dated 11.01.2016 is accepted as served then also the complaint impugned has been filed on 09.02.2016 before the stage of maturity. The contention of the learned counsel for the applicant seems to be misconceived. There is no requirement under Section 138 to disclose the date of service in the complaint, however, the only requirement is that a demand for payment of the said amount of money has to be made by the payee or holder in due course of the cheque by giving a notice in writing to the drawer of the cheque within thirty days of the receipt of information by him from the bank. In this case, that requirement has been complied by the complainant. There is categorical averment in the complaint that a legal notice has been given to the accused-applicant by the complainant through his counsel. The notice has been given within thirty days of the receipt of the information by the bank.

11. Along with the supplementary affidavit, the applicant has filed all the nine documents filed by the complainant along with the complaint. Among those documents, are two cheques as well as the registered AD by which the legal notice was sent. He has also filed the registered acknowledgment receipt which shows that the the registered post sent to the address of the accused-applicant has been received at his resident. Copy of the registered AD is also on record.

12. Learned counsel for the applicant has relied on the judgment of the SC in the case of ***"M.S. Shakti Travel and Tours Vs. State of Bihar, reported in 2022 (9) SCC 415".***

13. A perusal of the aforesaid judgment shows in that case, in the complaint itself was not mentioned that the notice has been served, whereas in this case it is clearly mentioned in the complaint that the notice was given and it has been duly served. Therefore, the facts of the case of M.S. Shakti Travel and Tour (supra) are different from the present case. The of M. S. Shakti Travels and Tours (supra) is distinguishable on the facts.

14. In the present case, a demand has been made by the complainant by giving a legal notice through his counsel which has been sent by the registered post along with the acknowledgment due and as he received the acknowledgment due. The argument advanced by the learned counsel

for the applicant that there should be specific averment disclosing the date of service in the complaint in question, is misconceived.

15. The controversy has been settled by the Apex Court in the case of ***"(2007) 6 SCC 555, C.C. Alavi Haji Vs. Palapetty Muhammed and another"*** and it has been held that there is no need to make such averment in the complaint for raising presumption as to service of notice in the said situation and in view of Section 27 of General Clauses Act, 1987 and Section 114 of Evidence Act, 1872, once the notice is sent by the registered post by correctly addressing the drawer of cheque, the service of notice deemed to have been effected.

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. (Vide Jagdish Singh v. Natthu Singh [(1992) 1 SCC 647 : AIR 1992 SC 1604] ; State of M.P. v. Hiralal [(1996) 7 SCC 523] and V. Raja Kumari v. P. Subbarama Naidu [(2004) 8 SCC 774 : 2005 SCC (Cri) 393] .) It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the court to draw presumption or inference either under Section 27 of the GC Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the court is required to be prima facie satisfied that a case under the said section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which

proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.

16. In the aforesaid case of ***C.C. Alavi Haji (supra)***, the averments made in complaint that the complainant issued lawyer's notice intimating dishonor of cheque and demanded payment on 04.08.2001, the same was returned on 10.08.2001 saying that the accused was out of station. There was no averment to the effect that the notice was sent at the correct address of the drawer or the cheque by "registered post acknowledgment due". However, since the returned envelope was annexed to the complaint which formed a part of the complaint which showed that notice was sent by registered post acknowledgment due to the correct address and was returned with an endorsement that "the adressee was in abroad". It was held by the Apex Court that requirement of Section 138 of N.I. Act have been sufficiently complied. Likewise in this case, the complainant has issued lawyers notice on 11.01.2016, intimating the dishonor of cheque and a demand of payment was made by that notice which was sent by registered post at the correct address of the drawer, the registered receipt is on record and acknowledgment from the receiver on piece of paper by one Jeenat on behalf of the complainant is on record which confirms that the notice was properly served. That signed document/receipt has been delivered to the complainant/sender which is filed along with the supplementary affidavit. Therefore, it cannot be said that legal notice sent to the applicant-accused has not been served. The registered receipt as well as registered AD have been filed as evidence along with the complaint which form part of the complaint.

17. In this case, clear avement has been made in the complaint that a legal notice demanding the money has been sent through his lawyer's by the complainant to the applicant-accused. The registry receipt as well as the registered AD have been filed along with the complaint which forms part of the complaint, therefore it is unnecessary that specific date of service of legal notice to the applicant accused should have been mentioned. Law in this regard has been settled by the Apex Court in the aforesaid case of ***C.C. Alavi Haji (supra).***

18. So far as the second limb of argument that the complaint is premature is concerned, it is evident that legal notice through registered post was sent by the complainant to the applicant-accused who are resident of the same district, therefore, in view of Section 27 of General Clauses Act, 1987 and Section 114 of the Evidence Act, 1872 once the notice is sent by the registered post by correctly addressing the drawer of the cheque, the service of notice is deemed to have been effected. As per Section 142(1) N.I. Act, complaint under the said Act is to be made within one month of the date on which the cause of action arises under clause (c) of the Proviso to Section 138 of N.I. Act. The notice was sent on 11.01.2016 on a local address by the registered post, hence, the service of notice is deemed to have been effected. The drawer of the cheque of the accused-applicant was supposed to make a payment of the said amount within 15 days of the receipt of such notice, which he has failed to pay. The complaint has been filed on 09.02.2018.

19. In this case the notice was sent on 11.01.2016 which shall be deemed to have

been served on seven days on local address as it was sent through registered post. The drawer of the cheque/applicant-accused was supposed to make the payment of the said amount of money to the payee within 15 days of the receipt of notice, therefore, after expiry of 15 days within one month, the complaint could have been filed which has been done in this case. There is no substance in the argument of learned counsel for the applicant.

20. Even otherwise the applicant accused has filed the summons of learned trial court he has also filed the copy of the complaint as well as the other documents annexed with the complaint, therefore, it will be presumed that he has received the summons from the learned trial court along with the copy of the complaint under Section 138 of N.I. Act and therefore cannot contend that there was no proper service of notice as required under Section 138 of N.I. Act as held by the Apex Court in the aforesaid case of ***C.C. Alavi Haji*** (supra). Relevant para no. 17 is extracted.

17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the GC Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case [(1999) 7 SCC 510 : 1999 SCC (Cri) 1284] if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act.

21. In view of the aforesaid discussions and the law laid down by the Apex Court, the petition fails and is accordingly dismissed.

(2023) 4 ILRA 90
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Misc. Application U/S 482 No. 28701 of 2022

Vijay ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Sunil Kumar Yadav

Counsel for the Opposite Parties:
G.A., Sri Umesh Kumar

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent

power , Section 200 – Examination of complainant , Section 202 - Postponement of issue of process , Indian Penal Code, 1860 - Sections - 307, 323, 324, 504, 506 - Cross-examination is conducted by the adverse party for trial purposes under Section 137 Evidence Act . (Para - 8)

Sessions Judge noted rivalry between parties - criminal case of murder against petitioner father - at evidence stage - accused persons claimed alleged injuries were fake - C.M.O. ordered petitioner to appear for a re-medical examination - but he couldn't - accused persons used fake pellets to protect themselves from murder and exert pressure - court did not find any documents revealing petitioner's summons by C.M.O. **-** rivalry dispute between parties not considered - revisional court remands case to proceed afresh, following the observations . (Para - 9)

HELD:-Order of the revisional court that after cross examining the complainant and the witnesses, the learned Magistrate shall pass orders does not seem to be tenable and is bad in law. Order dated 28.7.2022 set aside to the extent it directs cross examining the complainant and witnesses, while the rest is upheld. Magistrate directed to proceed according to law, disregarding revisional court's direction for cross-examination of complainant and witnesses.(Para - 9)

Petition disposed of. (E-7)

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

1. The petition has been filed under Section 482 CrPC for setting aside judgment and order dated 28.7.2022 passed by Sessions Judge, Etah in Criminal Revision No.63 of 2022 Chandra Kant alias Vikku and others versus State of U.P. and others under sections 307, 323, 324, 504, 506 I.P.C., P.S. Pilua, district Etah, with a further prayer to remand back the case to Sessions Judge, Etah to reconsider the matter.

2. Heard learned counsel for the petitioner, learned counsel for private respondents and learned A.G.A. for the State.

3. In brief, the case of the petitioner is that he filed an application under section 156 CrPC before the trial court with the allegation that on 25.12.2018 at 8.00a.m. he along with one Raju alias Raj Kumar had gone to attend call of nature and when they reached near Primary School, Kapreta, they found the accused persons, i.e. respondents 2 to 4 present there. They abused the petitioner, beaten him and with an intent to kill, the accused Shivkant and Shashikant shot on him with fire arm, causing injury to the petitioner by the shot of Shiv Kant. The petitioner was escaped by the villagers.

4. Learned Addl. Civil Judge (Junior Division)/Judicial Magistrate, Court No.21, Etah after recording statement of the complainant and witnesses under sections 200 and 202 CrPC passed order dated 10.5.2022 whereby the trial court took cognizance and summoned the accused Shivkant alias Bhalu, Shashikant alias Gaurav under sections 323, 307, 504, 506 I.P.C. and and accused Chandrakant and Abhishek under sections 323, 324, 504, 506 I.P.C.

5. Feeling aggrieved with order dated 10.5.2022 (supra), the accused persons preferred a Criminal Revision No.63 of 2022 Chandrakant and three others versus State of U.P. and another. The Sessions Judge, Etah by the impugned order dated 28.7.2022 while allowing the revision petition set aside the order passed by the trial court with a direction to pass a fresh

order in the light of the observation made in the order.

6. The learned counsel for the petitioner has assailed the revisional court's order mainly on the ground that the order directing the trial court to pass a fresh order after cross examining the complainant, i.e. the petitioner and the witnesses with a view to know the correct fact is bad in law and being irregular is liable to be set aside.

7. Learned A.G.A. as well as learned counsel for the private respondents have opposed the petition.

8. A perusal of the order under challenge reveals that the learned Sessions Judge has noted in the impugned order that there is a rivalry going on between the parties and a criminal case of murder of the father of the accused Shivkant is pending against the petitioner and it is at the stage of evidence.

Further it has been taken note of by the learned revisional court that on the complaint of the accused persons that the alleged injuries on the person of the petitioner are fake, the Chief Medical Officer Etah vide order dated 4.1.2019 directed the petitioner/complainant to appear before him for his re-medical examination by the Medical Board, however, he could not turn up before him. It was the case of the accused persons that by arranging with the Doctor, fake pellets were placed in the chest just below the skin and with a view to protect himself from the criminal offence of murder and exert pressure, the petitioner/complainant made a false case against the accused-respondents. Learned revisional court further did not find any document on record of the lower court to disclose that the petitioner was summoned by the Chief Medical Officer for his medical examination before the Medical Board.

A perusal of the order dated 10.5.2022 passed by learned trial court also shows that the learned Magistrate while summoning the accused persons did not take into consideration the fact that the P.W.3, Doctor has not deposed before the court that the alleged injury caused to the injured petitioner was an injury by fire arm, nor there is any document on record to prove the injury by fire arm. The rivalry dispute going on between the parties has not been taken into consideration by the learned Magistrate. Taking this in view, the revisional court's order does not call for any interference to the extent it remands the matter to proceed with the case afresh, in accordance with law after taking into consideration the observations contained in it.

However, the order of the revisional court that after cross examining the complainant and the witnesses, the learned Magistrate shall pass orders does not seem to be tenable and is bad in law. In this context, the law is very clear. The cross examination is done by the adverse party and it is for the purpose of trial within the meaning of Section 137 Evidence Act.

9. In view of the above, the order dated 28.7.2022(supra) to the extent it directs cross examining the complainant and witnesses is set aside. The rest part of the order is upheld. The learned Magistrate is directed to proceed with the case in accordance with law and the discussions made herein above, ignoring the direction of the revisional court to cross examine the complainant and the witnesses.

10. The petition is disposed of accordingly.

(2023) 4 ILRA 93
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.02.2023

BEFORE

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

Criminal Misc. Application U/S 482 No. 42957 of 2022

Laxmi Shankar Pandey & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sandeep Pandey

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections -323, 504, 506, 356 .

(B) Criminal Law - Code of Criminal Procedure, 1973 – Sections 155(2) , 200, 202, *203,* 204(2) & 254 - If the Magistrate taking cognizance of an offence considers that there is sufficient ground for proceeding - he shall issue process against the accused person -Object of requiring the complainant/opposite party no.2 to furnish a list of witnesses before issue of process to the accused - contemplated under Section 204(2) Cr.P.C. - to enable the accused persons to prepare themselves for their cross-examination - nothing in section 204 Cr.P.C. says or indicates that if no list of prosecution witnesses is filed before the process is issued to the accused, then none can be filed later .(Para -8,10)

NCR filed by opposite party no.2 against applicants - application under Section 155(2) CrPC - requesting SHO to conduct investigation - case treated as complaint case - summoned applicants - appeared before court and obtaining bail - summoning order not passed considering mandatory provision of Section 204(2) of CrPC - which requires list of prosecution witnesses before issuing a summons - process improper and illegal - proceedings an abuse of law - application for quashing entire proceedings & summoning order**.(Para -3,4)**

HELD:-Section 204 (2) Cr.P.C. protects accused interests from harassment by unscrupulous litigants and does not limit Magistrate's power to issue summons to witnesses under Section 254 (2) Cr.P.C.. Section 204(2) Cr.P.C. provisions do not vitiate the issue of process or Court jurisdiction, even if mandatory.**(Para -10,11)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

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

1. Heard Mr. Sandeep Pandey, learned counsel for the applicants, Mr. K.P. Pathak, learned AGA for the State and perused the records.

2. This application U/s 482 Cr.P.C. has been filed by the applicant with a prayer to quash the summoning order dated 04.09.2015 as well as the entire proceedings of Old Case No.1118 of 2018 (New Case No.4678 of 2021) (Smt. Rajni Mishra vs. Laxmi Shankar Pandey and others), under Sections 323, 504, 506, 356 IPC, Police Station-Kotwali Katra, District-Mirzapur, pending before the Court of Chief Judicial Magistrate, Mirzapur.

3. Brief facts of the case are that an NCR was lodged by the opposite party no.2 on 29.09.2014 against the applicants under Sections 323, 504, 506 IPC at Police Station-Kotwali Katra, District-Mirzapur. Subsequently, on 10.10.2014, an

application under Section 155(2) CrPC was filed by the opposite party no.2 before the concerned Magistrate requesting that the concerned SHO be directed to conduct the investigation in the above NCR, on which, the aforesaid case was treated as complaint case and after recording the statements under Sections 200 and 202 Cr.P.C., the applicants have been summoned vide order dated 04.09.2015. Pursuant to which, the applicants appeared before this Court and have obtained bail. Therefore, the present application has been filed for quashing of the entire proceedings pursuant to the summoning order.

4. Learned counsel for the applicants submits that the summoning order has not been passed considering the mandatory provision of Section 204(2) of CrPC wherein it has been mentioned that before issuing summon, the list of prosecution witnesses has to be provided. He further submits that as the said provision is mandatory in nature and the complainant/opposite party no.2 having not furnished the list of witnesses, therefore, the issue of process against the accused-applicant is improper and illegal. He further submits that no offence under the relevant section is made out, therefore, the entire proceedings are nothing but abuse process of law and the same may be quashed by this Court.

5. Per contra, learned AGA submits that the complainant/opposite party no.2 has named herself as a witness of the incident in the complaint and, therefore it cannot be said that no list of witnesses has been furnished. In this regard, it is submitted that it is not necessary to furnish a separate list of witnesses and the complainant/opposite party no.2 having been named as a witness in the complaint itself, the same is sufficient compliance of the provisions prescribed under Section 204(2) Cr.P.C. It is submitted that as the said provision under Section 204(2) Cr.P.C., regarding furnishing of a list of witnesses before issue of process to the accused is only a matter of procedure, the same is not mandatory and the same can be complied before commencement of the trial, to avoid any prejudice to the accused persons. Even otherwise, the applicants have already given up their claim as the summoning order of the year 2015 is being challenged after a laps of about 7 years and after being released on bail. As regards the other contentions that the offence under the relevant sections has not made out, perusal of the FIR itself goes to show that the applicants after using abusive language entered into the house of the opposite party no.2 and assaulted the opposite party no.2 and her family members with kicks, fists, lathi and danda, due to which they sustained injuries. They also threatened her to leave the house or to face dire consequences. Thus, the allegations are *prima facie* made out. Therefore, no interference is required by this Court.

6. I have carefully considered the submissions advanced by learned counsel for the parties and have also gone through the material available on record.

7. The principal issue which thus arises is with regard to the manner of taking cognizance and issuing process as per the procedure prescribed under the Code and as to whether detailed and elaborate reasons are required to be recorded at the stage of taking cognizance or issuing of process. Complaints to Magistrate are dealt with under Chapter XV of the Code. The provisions relating to examination of complainant and the

witness are under Sections 200 and 202 Cr.P.C. Section 202 Cr.P.C. provides for postponement of issue of process, where the Magistrate, thinks fit, to either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purposes of deciding whether or not there is sufficient ground for proceeding. Section 203 CrPC provides for dismissal of complaint in a situation where after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 202 CrPC, the Magistrate is of the opinion that there is no sufficient ground for proceeding. The relevant Sections 200, 202 and 203 CrPC, are being extracted below:-

*"**200. Examination of complainant.**- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate: Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses- (a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192: Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.*

***202. Postponement of issue of process.**- (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made- (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or (b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.*

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

***203. Dismissal of complaint.**-If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such*

case he shall briefly record his reasons for so doing."

8. The procedure for commencement of proceedings before Magistrates is provided under Chapter XVI of the Code. Section 204 CrPC provides that if the Magistrate taking cognizance of an offence considers that there is sufficient ground for proceeding, he shall issue process against the accused person. Section 204 CrPC reads as follows:-

*"**204. Issue of process.-** (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be- (a) a summons-case, he shall issue his summons for the attendance of the accused, or (b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.*

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub- section (1) shall be accompanied by a copy of such complaint. (4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

9. After the close scrutiny of the aforesaid sections, this Court observed that the jurisdiction of the Magistrate under Section 204(1) Cr.P.C. to issue a summons or a warrant in the first instance, as the case may be, if he is satisfied that there was sufficient ground for proceeding cannot be taken away by the failure on the part of the complainant to file a list of prosecution witnesses. Section 204(2) Cr.P.C. does not override Section 254(1) Cr.P.C., which imposes a duty on the Magistrate to take all such evidence as may be produced in support of the prosecution. Moreover, sub-section (2) of Section 254 of the Code empowers the Magistrate, on the application of the prosecution, to issue summons to any witness. Section 254 Cr.P.C. does not contemplate that the witness to be examined would be only those witnesses who were cited in the list filed by the complainant in terms of Section 204(2) Cr.P.C. Therefore, the provision regarding submission of a list of witnesses in Section 204(2) Cr.P.C. cannot be considered as mandatory in nature so as to control the jurisdiction of the Magistrate to proceed with the trial of the accused and record his plea. Unless clear prejudice is shown to have been caused to the accused by late submission of the list of prosecution witnesses, the order issuing a summons to him cannot be said to be vitiated.

10. From the discussions made above the legal position that emerges is that the object of requiring the complainant/opposite party no.2 to furnish a list of witnesses before issue of process to the accused, as contemplated under Section 204(2) Cr.P.C., appears to be to enable the accused persons to prepare themselves for their cross-examination. There is nothing in section 204 Cr.P.C., which says or indicates that if no list of prosecution witnesses is filed before the process is issued to the accused, then none can be filed later.

Section 204 (2) Cr.P.C. is meant only to safeguard the interest of the accused against undue harassment at the hands of unscrupulous litigants and not to circumscribe the power of the Magistrate to issue summons to any witness, on the application of the prosecution, as provided under Section 254 (2) Cr.P.C. Further, even if it is held that the provisions of Section 204(2) Cr.P.C. are mandatory, that by itself, would not vitiate the issue of process or the jurisdiction of the Court.

11. In view of the above, this Court is of the opinion that the prayer for quashing the impugned summoning order dated 04.09.2015 as well as the entire proceedings of the aforesaid case are refused, as I do not see any abuse of the court's process.

12. This application under Section 482 Cr.P.C. lacks merit and is, accordingly, **dismissed.**

(2023) 4 ILRA 97
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.03.2023

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Application U/S 482 No. 43713 of 2022

Sushil Kumar Singh ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sugendra Kumar Yadav, Sri Dilendra Pratap Singh, Sri Anoop Trivedi (Sr. Advocate)

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections - 419, 420, 467, 468, 471, 504 & 506 - The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1)(Da) & 3(1)(Dha), The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 - Section 14A - an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law - When a statutory remedy is created by enactment for redressal of grievances, the exercise of inherent power by way of a petition U/S 482 Cr.P.C. could not be invoked ignoring the statutory dispensation.(Para -14)

(B) Code of Criminal Procedure, 1973 - Section 5 - Saving - when a special Act, provides remedy of appeal from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law, the special provision in the Act would prevail over the general provision. (Para - 6)

(C) Code of Criminal Procedure, 1973 - Section 482 - inherent powers under section 482 Cr.P.C. can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by any particular statute.(Para - 15)

Application seeks to quash proceedings, including charge sheet and cognizance order - Objection related to maintainability of application - applicant has a statutory alternative remedy to appeal - against cognizance/summoning order under Section 14-A of the 1989 Act - petition not maintainable - due to non-obstant clause in Section 14-A - appeals must lie from a Special Court judgment to the High Court **(Para - 2,3)**

HELD:-If an effective statutory alternative remedy is available, this court should refrain from exercising its extraordinary power under section 482 Cr.P.C., especially when the applicant has not availed of that remedy. Direction to applicant to avail remedy of appeal available to him under the Statute before the appropriate forum.**(Para - 15,18)**

Application u/s 482 Cr.P.C. disposed of. (E-7)

List of Cases cited:

1. Ghulam Rasool Khan & ors. Vs St. of UP & ors., 2022 0 Supreme (All) 608

2. Criminal Writ- Public Interest Litigation No. - 8 of 2018

3. Ramavawatar Vs St. of M.P., 2021 0 Supreme (SC) 625

4. Hitesh Verma Vs St. of Uttarakhand & anr., 2020 0 Supreme (SC) 653

5. Arnit Das Vs St. of Bihar, 2000 (5) SCC 488

6. N. Bhargavan Pillai Vs St. of Kerala, AIR 2004 SC 2317

7. Madhu Limaye Vs St. of Maha., AIR 1978 SC 47

8. St. of Har. Vs Bhajan Lal ,1992 Supp. (1) SCC 335

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Sri Anoop Trivedi, learned Senior Counsel for the applicant, Sri R.P. Mishra, learned A.G.A. for the State and perused the material available on record.

2. The present application U/S 482 Cr.P.C. has been filed by the applicant with the prayer to quash the entire proceedings of S.T. No. 469 of 2022 (State Vs Sushil Kumar Singh) arising gout of Case Crime No. 45 of 2018, under Sections 419, 420, 467, 468, 471, 504, 506 I.P.C. and Section 3(1)(Da) & 3(1)(Dha) of SC/ST Act, P.S.-Khajani, District- Gorakhpur including the charge sheet as well as cognizance order dated 8.2.2022 passed by learned Additional District Judge (Special Judge) S.C./S.T. Act, Gorkahpur.

3. A preliminary objection has been raised by learned A.G.A. regarding maintainability of the application on the ground that the applicant has a statutory alternative remedy of appeal challenging the cognizance/summoning order under Section 14-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (in short 1989 Act). It is submitted that the present 482 petition is not maintainable in view of opening line of Section 14-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, which is a statutory provision and this section starts with non obstant clause that "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), **an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law."** In support of his contention, learned A.G.A. has relied upon the Full Bench decisions of this Court in the case of **Ghulam Rasool Khan and others Vs State of UP and others, 2022 0 Supreme (All) 608 and In Re:-Provision of Section 14 A of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (CRIMINAL WRIT- PUBLIC INTEREST LITIGATION No. - 8 of 2018) decided on 10.10.2018.**

4. On the other hand, learned counsel for the applicant submitted that against the order impugned, petition under section 482

Cr.P.C. would be maintainable. He further submitted that the inherent power of the High Court under Section 482 Cr.P.C. cannot be ousted by Section 14-A of the Act. He relied upon the judgement of Apex Court rendered in **Ramavawatar Vs State of Madhya Pradesh, 2021 0 Supreme (SC) 625 & Hitesh Verma Vs State of Uttarakhand and another, 2020 0 Supreme (SC) 653.**

5. Learned AGA has further pointed out that the Hon'ble Apex Court has never considered the issue, in the cases relied upon by the learned counsel for the applicants, as to whether appeal would lie under Section 14-A of the Act, 1989 or petition U/S 482 Cr.P.C. would lie against the cognizance order passed of special Court, therefore, the decisions relied upon by the learned counsel for the applicant cannot be said to be a binding. In support of his argument, learned A.G.A. relied upon the case of **Arnit Das Vs Sate of Bihar, 2000 (5) SCC 488,** in which while examining the binding effect of such a decision, the Apex Court observed that "A decision not expressed, not accompanied by reasons and not proceedings on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgement is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined". He has also relied upon the case of **N. Bhargavan Pillai Vs. State of Kerala, AIR 2004 SC 2317**, to contend that if any view has been expressed without analyzing the statutory provision, it cannot be treated as a binding precedent.

6. Learned A.G.A. further taking recourse to Section 5 of the Code of Criminal Procedure has also contended that when a special Act, provides remedy of appeal from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law, the special provision in the Act would prevail over the general provision.

7. In the case of **Ramavawatar (supra)** the issue was whether criminal proceedings arising out of non compoundable offence can be quashed against a person accused of hurting the sentiments of the victim who belongs to the Scheduled Caste category by exercising special powers of the court? The Hon'ble Apex Court has ruled that where it appears to the Court that the offence in question, although covered under the SC/ST Act, is (i) **primarily private or civil in nature;, or** (ii) **where the alleged offence has not been committed on account of the caste of the victim; or** (iii) **where the continuation of the legal proceedings would be an abuse of the process of law**, the Court can exercise its powers to quash the proceedings.

8. However, in the case of **Hitesh Verma (supra)**, appellant had sought quashing of the charge-sheet on the ground that the allegation does not make out an offence under the Act against the appellant merely because respondent No. 2 was a Scheduled Caste since the property dispute was not on account of the fact that respondent No. 2 was a Scheduled Caste. The property disputes between a vulnerable section of the society and a person of upper caste will not disclose any offence under the Act unless, the allegations are on

account of the victim being a Scheduled Caste.

9. This Court is also mindful of the two Full Bench decisions of this Court rendered in **Ghulam Rasool Khan and Others Vs State of UP and Another, 2022 Latest Case Law 8330 Alld and In Re:- Provision of Section 14 A of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (CRIMINAL WRIT-PUBLIC INTEREST LITIGATION No. - 8 of 2018) decided on 10.10.2018.**

10. In Re: Provision of Section 14-A of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (supra), Full Bench of this Court has considered the question "(B) Whether in view of the provisions contained in Section 14-A of the Amending Act, a petition under the provisions of Article 226/227 of the Constitution of India or a revision under Section 397 of the Code of Criminal Procedure or a petition under Section 482 Cr.P.C., is maintainable. OR in other words, whether by virtue of Section 14-A of the Amending Act, the powers of the High Court under Articles 226/227 of the Constitution or its revisional powers or the powers under Section 482 Cr.P.C. stand ousted?

11. The Full Bench answered the said question in the negative. It was held that against the judgments or orders, for which remedy has been provided under Section 14-A of the 1989 Act, invoking the jurisdiction of this Court by filing petition under Articles 226 or 227 of the Constitution of India, a revision under Section 397 Cr.P.C. or an application under Section 482 Cr.P.C., will not be maintainable.

12. In another case of **Ghulam Rasool Khan and Others (supra)**, which is another Full Bench of this Court also considered the following question as to whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14-A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr.P.C.? The Full Bench answered the said question in negative holding that the aggrieved person having remedy of appeal under Section 14-A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section 482 Cr.P.C.

13. Both the cases relied upon by the learned counsel for the applicants are not applicable in the facts of the present case as the same are silent over the technical issue of maintainability of the petition under Section 482 Cr.P.C. after insertion of Section 14-A of Act, 1989 and unless the said issue is decided consciously, any departure from the statutory provision would be a bad precedent. The cases relied upon by the learned counsel for the applicants have been decided by Hon'ble Apex Court considering the fact that the dispute involved therein was either in the nature of private dispute or compromise took place between the parties.

14. It is no doubt true that the exercise of inherent power of the High Court is an extraordinary power which has to be exercised with great care and circumspection as has been reminded by Hon'ble Supreme Court in catena of decisions on various occasions. Perusal of Section 14-A of the Act 1989, itself shows that it starts with a non obstante clause. The legislative intent behind inserting non-obstante clause in any provision is to enforce overriding effect of that provision over any other provision or any other

prevailing law. When a statutory remedy is created by enactment for redressal of grievances, the exercise of inherent power by way of a petition U/S 482 Cr.P.C. could not be invoked ignoring the statutory dispensation.

15. Section 482 of the Code envisages the three circumstances under which the inherent jurisdiction may be exercised by High Court, namely, (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of court; and (iii) to otherwise secure the ends of justice. It is trite law that the inherent power of the High Court under Section 482 of the Code ought to be exercised to prevent miscarriage of justice or to prevent the abuse of the process of the court or to otherwise secure the ends of justice and the Court possesses wide discretionary powers. It is well settled that the inherent powers under section 482 Cr.P.C. can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by any particular statute. If an effective statutory alternative remedy is available, this court should refrain from exercising its extraordinary power under section 482 Cr.P.C., especially when the applicant has not availed of that remedy.

16. The Apex Court in the case of **Madhu Limaye Vs State of Maharashtra, AIR 1978 SC 47,** has held that the following principles would govern the exercise of inherent jurisdiction of the HC:

1. Power is not to be resorted to, if there is specific provision in code for redress of grievances of aggrieved party.

2. It should be exercised sparingly to prevent abuse of process of any Court or otherwise to secure ends of justice.

3. It should not be exercised against the express bar of the law engrafted in any other provision of the code.

17. In the landmark case **State of Haryana v. Bhajan Lal (1992 Supp. (1) SCC 335),** a two-judge bench of the Supreme Court of India considered in detail, the provisions of section 482 and the power of the High Court to quash criminal proceedings or FIR. The Supreme Court summarized the legal position by laying the following guidelines to be followed by High Courts in exercise of their inherent powers to quash a criminal complaint:

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

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

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

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

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of

which, no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

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

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

18. In view of above legal position, instant application is finally ***disposed of*** with the direction to the applicant to avail the remedy of appeal available to him under the Statute before the appropriate forum.

19. Certified copy of the impugned order, if any, be returned as per rules.

(2023) 4 ILRA 102
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ C No. 32432 of 2022

Aasha Devi ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajnath Yadav

Counsel for the Respondents:
C.S.C., Sri Narendra Kumar Tiwari

Civil Law-Constitution of India,1950-Article 21- Right to just compensation - Physical disability caused by electrocution-Writ petition against inadequate compensation-Notional Income provided under the scheme of the U.P. Power Corporation prima facie appears to be inadequate-Petitioner was doing the work of grazing of goats which is an activity connected to agriculture-Minimum wages for the unskilled employees working in agriculture as Rs. 409/- per day-Compensation enhanced taking into account (I)-Loss of Earning due to Disability(II)-Compensation for Medical Expenses (III)-Future Medical Expenses(IV)-Attendant Charges(V)-Loss of Conveyance and Special Diet(VI)-Pain and Suffering(VII)-Marriage Prospects-(VIII)-Loss of Amenities and Enjoyment of Life-Compensation enhanced from Rs. 5,81,000/- to Rs. 43,84,416. (Para 10-30)

Writ petition Allowed. (E-15)

List of Cases cited:

1. Kaneez Fatima Vs St. of U.P. & ors. in Writ-C No. 25065 of 2022

2. Kirti Vs Oriental Insurance Co. Ltd., (2021) 2 SCC 166

3. Kajal Vs Jagdish Chand, (2020) 4 SCC 413

4. Lata Wadhwa Vs St. of Bihar (2001) 8 SCC 197

5. National Insurance Co. Ltd. Vs Pranay Sethi, (2017) 16 SCC 680

6. Sarla Verma Vs DTC (2009) 6 SCC 121

7. Raman Vs Uttar Haryana Bijli Vitran Nigam Ltd., (2014) 15 SCC 1

8. Maharaja Agrasen Hospital Vs Rishabh Sharma (2020) 6 SCC 501

9. M.P. Electricity Board Vs Shail Kumari (2002) 2 SCC 162

10. Shiv Ranshu Chhuneja Vs St. of U.P. & ors. (WRIT - C No. - 10191 of 2009)

11. R.D. Hattangadi Vs Pest Control (India) Pvt. Ltd. & ors. (1995) 1 SCC 551

12. Raj Kumar Vs Ajay Kumar (2011) 1 SCC 343

13. K. Suresh Vs New India Assurance Company Limited & anr., (2012) 12 SCC 274

14. Sidram Vs Divisional Manager, United India Insurance Co. Ltd. & anr., 2022 SCC OnLine SC 1597

15. Divisional Controller, KSRTC Vs Mahadeva Shetty & anr. (2003) 7 SCC 197

16. Nizam's Institute of Medical Sciences Vs Prasanth S. Dhananka & ors.,(2009) 6 SCC 1

17. Subulaxmi Vs Managing Director, T. N. St. Tansport Corporation & anr. (2012) 10 SCC 177

18. Jagdish Vs Mohan & ors. (2018) 4 SCC 571

19. Ibrahim Vs Raju & ors., (2011) 10 SCC 634

20. Master Ayush Vs Branch Manager, Reliance General Insurance Company Ltd. & anr. (2022) 7 SCC 738

21. Govind Yadav Vs New India Insurance Co. Ltd., (2011) 10 SCC 683

22. Afnish Vs Oriental Insurance Company Ltd. (2018) 13 SCC 119

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Rajnath Yadav, learned counsel for the petitioner, learned Standing Counsel for the State respondents no. 1 and 4 and Sri Narendra Kumar Tiwari, learned counsel for
the respondents no. 2 and 3.

2. Rejoinder affidavit filed today is taken on record.

3. On 16.1.2023, this Court passed the following order:-

"Heard Sri Rajnath Yadav, learned counsel for the petitioner, Sri Manish Kumar, learned Standing Counsel for respondent nos. 1 and 4 and Sri Narendra Kumar Tiwari, learned counsel for respondent nos. 2 and 3/Purvanchal, Vidyut Vitran Nigam Limited, Kaushambi/Varanasi.

It is admitted case of the respondents that the petitioner aged about 18 years as on 7.12.2020, lost her right hand below right elbow and left thumb due to electrocution on 22.7.2020 caused by 11 KV three phase line which was found at the height of 1.80 meter as against standard height of 4.6 meter. Thus, physical disability caused to the petitioner by negligence of the respondents is undisputed.

The respondents have merely granted compensation of Rs. 1,40,000/ to the petitioner by which she could hardly meet expenses of her treatment. As per the certificate issued by the Chief Medical Officer, Kaushambi, the petitioner has incurred permanent physical disability of 70%. Having lost her right hand below elbow and left thumb, her whole life stood ruined and, she has become incapacitated to engage herself to earn her livelihood and shall remain dependent for whole life.

Despite the aforesaid fatal incident, the compensation payable to the petitioner has not been computed in

accordance with law more particularly the law laid down by this Court in ***Writ-C No. 25065 of 2022 (Kaneez Fatima Vs. State of U.P. and others) decided on 9.11.2022.***

Considering the facts and circumstances of the case, we direct the respondent nos. 1 and 2 to file separate counter affidavits within two weeks from today. The petitioner shall have one week thereafter to file rejoinder affidavit.

Put up as a fresh case on 3.2.2023."

4. Most of the relevant facts stated in the writ petition have been admitted by the respondent no. 2 in his counter affidavit dated 1.2.2023. Paragraphs 4, 5, 6, 12, 20 and 21 of the counter affidavit are relevant which are reproduced below:-

"4. That, a first information report was lodged by mother of petitioner after deliberate delay on 21-08-2020 bearing case crime No. 299 of 2020, under section 338 of I.P.C at concern police station-Paschim Sharira, District-Kaushambi. The reason of delay has not been explained by the informant. The Director Electrical Safety submitted its report on 09-09-2020 with its recommendations.

5. That, claim in respect to compensation has been filed by the petitioner. The claim of petitioner has been considered as per the provisions of the office memorandum dated 25-09-2021 (U.P.P.C.L.) applicable in case of petitioner. There are guidelines to calculate the amount of compensation including application of multiplier and income factor of the injured. The case of petitioner is covered with the 2nd row of the table II of the circular dated 2509-2021 (U.P.P.C.L.) applicable to calculate compensation for permanent disability.

A Copy of the office memorandum dated 25-09-2021 (U.P.P.C.L.) issued by the U.P. Power Corporation is being filed herewith and marked as ***ANNEXURE NO. CA-1*** *to this affidavit.*

6. That, the age of injured is admittedly 17 years as mentioned in first information report that means above 15 and below 20 years as mention at Sl. No.2 of the table-II annexed with the office memorandum. There is no income proof of injured as such the factor of ***notional income*** *will apply. The multiplier of 16 will apply. The percentage of disability is 70% as per medical report. The amount of compensation is mentioned for above mentioned claim is Rs. 5,81,200/- in table-II.*

12. That, the contents of paragraph no. 5 of the writ petition needs no comment being matter of record.

20. That, the contents of paragraph no.13 and 14 of the writ petition is not admitted and vehemently denied. It is respectfully submitted that case of petitioner has been considered as per the guidelines and directions made in office memorandum dated 25-09-2021. The claim of petitioner has been awarded worth Rs. 5,81,200/. Out of the said amount Rs. 1,40,000/- has been paid on 30-03-2022 and remaining amount of Rs. 4,41,200/- has been paid on 24-01-2023. The Copy of the approval dated 20-01-2023 and letter of receipt of petitioner payment of Rs. 4,41,200/- is being filed herewith and marked as ***Annexure No. CA-3*** *to this affidavit.*

21. That it is further to be pointed out here that an enquiry will be conducted to find out as to why the payment to the victim has been delayed and who was

responsible for such an inordinate delay. It may further be pointed out here that on the basis of the enquiry report, an appropriate action shall be against the erring officer/employee in accordance with law who might have caused the delay in making payment to the victim."

5. Thus, the averments made by the petitioner in paragraph 3 of the writ petition that she is a scheduled Caste and is unmarried and doing the work of grazing of goats, have been admitted by the respondent no.2 in paragraph 10 of the counter affidavit. The respondent no.2 has also admitted in paragraph 13 of the counter affidavit, the averments made by the petitioner in paragraph 6 of the writ petition that an enquiry report dated 9.9.2020 was sent to the respondent no.2 holding the negligence and liability of the respondent department. The averments made in paragraph 5 of the writ petition that the petitioner incurred more than two lakh rupees towards medical expenses has not been denied by the respondent no.2 in paragraph 12 of the counter affidavit. The averments made in paragraph 14 of the writ petition regarding 100% disability has also been denied by the respondent no.2 in paragraph 20 of the counter affidavit and in paragraph 22, the extent of disability has been admitted only to be 70%.

6. A counter affidavit on behalf of respondent no.1 has also been filed by Sri Anupam Shukla, Special Secretary, Energy Department, U.P. Secretariat at Lucknow, who has admitted contents of paragraphs 4, 5, 6, 7, 8 and 9 of the writ petition. In paragraph 8 of the counter affidavit, respondent no.1 has stated as under:-

"8. That in reply to the contents of paragraph no. 11 of the writ petition, it is submitted that in pursuance of the order of Uttar Pradesh Power Corporation Ltd. Dated 03.02.2016, Rs. 1,40,000/- was paid as compensation on 30.03.2022 and as per the order dated 06.10.2018 of Uttar Pradesh Power Corporation Ltd., out of the total amount of Rs. 5,81,200/-, the remaining amount of Rs. 4,41,200/- had been paid on 24.01.2023, which is admitted by the mother of the petitioner. Further, it is submitted that an order No. 2828-Aus/2021-19(125)A.S./01 25.09.2021 had also been passed by Uttar Pradesh Power Corporation Ltd. In this regard a photocopy of the order dated 06.10.2018 and order dated 25.09.2021 and photocopy of the Bank Statement of Aasha Devi and the receipt dated 25.01.2023 are being filed herewith and marked as ***ANNEXURES NO. CA-3, CA-4, CA-5*** *to this counter affidavit."*

7. Learned counsel for the petitioner submits that once it is admitted case of the respondents that on account of their negligence, the petitioner, who is a young girl of about 18 years; has suffered 70% disability and thus her entire life has been ruined by negligence of the respondents, therefore, the respondents are liable to pay just compensation. He further submits that the respondents have not paid compensation in the light of the law laid down by this Court in the case of **Kaneez Fatima Vs. State of U.P. and others in Writ-C No. 25065 of 2022 decided on 9.11.2022.** He further submits that the petitioner is also entitled for payment of interest on the delayed payment of compensation.

8. Learned standing counsel representing respondents no. 1 and 4 and learned counsel for respondents no. 2 and 3 reiterate the aforequoted paragraphs of the

counter affidavit and submitted that compensation has been paid as per office memorandum dated 25-09-2021 filed as Annexure-CA-1 to the counter affidavit.

9. We have carefully gone through the records of the case.

10. It is admitted case that the petitioner who is young girl belonging to Scheduled Caste had sustained injuries due to electrocution and she was admitted in District Hospital, Manjjanpur, Kaushambi from 02.08.2022 and was discharged on 19.09.2022 after being treated for about 49 days. It is also admitted that the right hand from elbow and left thumb of the petitioner were amputated during treatment. Thereby she had conjointly suffered permanent disability to the extent of hundred percent. It is further admitted that the petitioner had suffered injury due to the negligence of respondent nos. 2 and 3 in maintaining the electricity lines.

11. The U.P. Power Corporation Ltd. has framed some guidelines on 25.09.2021 for payment of compensation in case of death or permanent disability caused to third parties due to electrocution which has been heavily relied by the respondents while computing the amount of compensation to the petitioner. The aforesaid scheme/policy is reproduced herein below:

"'उ0प्र0 पावर कारपोरेशन लिमिटेड

(उ0प्र0 सरकार का उपक्रम)

न्च्च् च्वूमत ब्वतचवतंजपवद स्पउपजमक

;ळवअजण वि न्जजंत च्तंकमेी न्दकमतजांपदहद्ध

शक्ति भवन विस्तार, 14 अशोक मार्ग, लखनऊ–226001

संख्याः–

2828–औस/2021–19(125)–ए0एस0/01 दिनांक 25 सितम्बर, 2021

विषयः– त्रृटिपूर्ण विद्युत अधिष्ठापन के कारण हुई विद्युतीय दुर्घटना में बाहरी व्यक्ति की मृत्यु अथवा अपंगता/पशुओं की मृत्यु/फसल अग्निकाण्ड तथा सम्पत्ति के प्रकरणों में क्षतिपूर्ति प्रदान किये जाने के सम्बन्ध में।

कार्यालय ज्ञाप

उ0 प्र0 पावर कारपोरेशन लि0 के निदेशक की 169वीं बैठक में लिए गये निर्णय

के अनुसार उ0 प्र0 पावर कारपोरेशन लि0 एवं उसके सहयोगी डिस्काम के नियंत्रणाधीन क्षेत्रों में त्रुटिपूर्ण विद्युतीय अधिष्ठापन के फलस्वरूप घटित दुर्घटनाओं में किसी बाहरी व्यक्ति की मृत्यु अथवा अपंगता/पशुओं की मृत्यु/ फसल अग्निकाण्ड तथा सम्पत्ति के नुकसान होने की स्थिति में प्रभावित व्यक्ति अथवा उसके वैधानिक वारिस को निर्धारित समय–सीमा में क्षतिपूर्ति प्रदान किये जाने एवं निस्तारण के सम्बन्ध में कारपोरेशन के आदेश संख्या– 1890–ई0ए0/रा0वि0प0/ औ0सं0–18/92–8/विविध/92 दिनांक 26.09.1992, आदेश संख्या– 4570–औ0सं0–17/पाकालि/2004 दिनांक 25.09.2004, आदेश संख्या– 3286–औ0सं0/ 2011 दिनांक 19.10.2011 आदेश संख्या–4095–औ0सं0/2016 दिनांक 13.10.16 आदेश संख्या– 1816–औ0सं0/2017 दिनांक 10.04.2017, आदेश संख्या– 4004– औ0सं0/2018 दिनांक 06.10.2018 सपठित आदेश संख्या– 402–औ0सं0/2019 दिनांक 21.02.2019 को अवक्रमित करते हुए क्षतिपूर्ति प्रक्रिया के सरलीकरण व त्वरित निस्तारण हेतु एकल व्यवस्था एतद्द्वारा निम्नवत प्रतिपादित की जाती हैः–

विद्युत दुर्घटना की स्थिति में जॉच प्रक्रियाः–

1. त्रृटिपूर्ण विद्युत अधिष्ठान के कारण हुई विद्युतीय दुर्घटना में बाहरी व्यक्ति की मृत्यु अथवा अपंगता/पशुओं की मृत्यु/ फसल अग्निकाण्ड तथा सम्पत्ति के प्रकरणों के सम्बन्ध में।

. विद्युत अधिनियम, 2003 की धारा 53 के प्राविधानों के अनुसार सुरक्षित विद्युत

आपूर्ति में विफलता के कारण किसी जनहानि/पशुहानि/फसल अथवा सम्पत्ति के नुकसान की सूचना प्राप्त होने पर, सम्बन्धित उपखण्ड अधिकारी/ सहायक अभियन्ता 24 घण्टे के अन्दर विद्युत सुरक्षा निदेशालय को सूचित करेगा एवं 02 दिवस के अन्दर विद्युत दुर्घटना के सम्बन्ध में निर्धारित प्रपत्र सं0–44(ए) पर सहायक निदेशक/ उप निदेशक/ निदेशक, विद्युत सुरक्षा निदेशालय को सूचित करेगे तथा साथ में विद्युत सुरक्षा निदेशायल, उ0प्र0 द्वारा संचालित बेवसाइट टपकलनजेनतींण्वतह पर घटना का विवरण अपलोड भी करेंगे। इसके अतिरिक्त विद्युत दुर्घटना की सूचना जिला प्रशासन/ पुलिस प्रशासन एवं निकटतम चिकित्सालय

को देगें तथा कॉरपोरेशन के उच्च अधिकारियों को भी संज्ञानित करायेंगे।

. विद्युत दुर्घटना की सूचना प्राप्त होने पर सहायक निदेशक/उप निदेशक/निदेशक, विद्युत सुरक्षा द्वारा स्थालीय जॉच 18 दिनों में (विद्युत अग्निकाण्ड के कारण फसलों एवं सम्पत्ति की क्षति के प्रकरण में 02 दिवस में) पूर्ण कर जॉच आख्या अधीक्षण अभियन्ता को प्रेषित करेंगे तथा उसकी प्रतिलिपि अधिशासी अभियन्ता एवं सम्बन्धित विद्युत वितरण निगम के प्रबन्ध निदेशक एवं मुख्य अभियन्ता को उपलब्ध करायेंगे।

. कतिपय कारणों से यदि मृतक की पोस्टमार्टम रिपोर्ट एवं एफ0आई0आर0 रिपोर्ट आदि अभिलेखों की अनुपलब्धता होने की स्थिति में क्षतिपूर्ति (अनुग्रह राशि) के भुगतान में उत्पन्न हुई समस्याओं पर जॉच कमेटी बनाकर व जिलाधिकारी के समक्ष तथ्यों को लाकर प्रकरण का नियमानुसार विधिवत स्पष्ट रूप से निस्तारण सुनिश्चित किया जायेगा।

. उ0प्र0 पावर कारपोरेशन के अधीन विद्युत वितरण निगमों मे दिनांक 01.01.1992 से 06.1.2018 के मध्य घटित विद्युत दुर्घटनाओं के लम्बित प्रकरणो में बाहरी व्यक्तियों के एवं पशुओं की मृत्यु/ घायल होने की क्षतिपूर्ति पूर्ववत सम्बन्धित आदेशों के अन्तर्गत अनुमन्य की जायेगी।

. विद्युतीय दुर्घटना के कारण उत्पन्न हुई विपरीत प्रशासनिक स्थिति (सड़क जाम/उग्र प्रदर्शन आदि) के कारण यदि तत्काल अनुग्रह धनराशि का भुगतान किया जाना आवश्यक हो तो, ऐसी स्थिति में क्षेत्र के जिलाधिकारी क्षतिपूर्ति/ अनुग्रह राशि की स्वीकृति हेतु सक्षम अधिकारी होंगे।

2. <u>क्षतिपूर्ति के रूप में दी जाने वाली अनुग्रह राशि की प्रक्रिया का विवरणः– बाहरी व्यक्ति की विद्युत दुर्घटना में हुई मृत्यु/अपंगता की दशा में</u>

कारपोरेशन के त्रृटिपूर्ण विद्युतीय अधिष्ठान के कारण हुई बाहरी व्यक्ति की विद्युत दुर्घटना से प्रभावित बाहरी व्यक्ति/ वारिस को क्षतिपूर्ति/ मुआवजा दिये जाने हेतु निम्न व्यवस्था प्रतिपादित की जाती हैः–

. त्रृटिपूर्ण विद्युतीय अधिष्ठापन के कारण विद्युत दुर्घटना में बाहरी व्यक्ति की मृत्यु होने पर क्षतिपूर्ति के रूप में रू0 5.00 लाख, अनुग्रह राशि देय है। उ0प्र0 शासन द्वारा गठित समिति की संस्तुतियों के अनुसार मृतक की आयु के सापेक्ष **यदि किसी व्यक्ति की गणना के अनुसार क्षतिपूर्ति की धनराशि रू0 5.00 लाख के कम होने पर सम्बन्धित मृतक के आश्रितों को न्यूनतम रू0 5. 00 लाख की क्षतिपूर्ति अनुमन्य की जायेगी।**

. विद्युत दुर्घटना में मृत्यु, स्थायी/ पूर्ण अपंगता/ आंशिक अपंगता होने पर, क्षतिपूर्ति दुर्घटनाग्रस्त व्यक्ति की विवाहित/ अविवाहित स्थिति, आयु एवं परिवार की संख्या के आधार पर समिति की रिपोर्ट (तालिका–1 एवं 2) में दी गई सारणियों के अनुसार अनुमन्य किया जायेगा।

. सक्षम अधिकारी द्वारा घातक/ अघातक विद्युत दुर्घटनाओं में कारपोरेशन के अधिष्ठापन की त्रृटि न होने की स्थिति में छव निसज सपंइपसपजल के रूप में अनुग्रह धनराशि की क्षतिपूर्ति स्वीकृत की जायेगी।

. बाहरी व्यक्ति की मृत्यु की दशा मे, क्षतिपूर्ति के रूप में अनुग्रह राशि स्वीकृति करने हेतु अधीक्षण अभियन्ता सक्षम अधिकारी होगें।

. अनुग्रह धनराशि/ क्षतिपूर्ति हेतु सम्बन्धित अधिशासी अभियन्ता द्वारा निम्न प्रक्रिया का पालन किया जायेगाः–

. सम्बन्धित अधिशासी अभियन्ता, निदेशक, विद्युत सुरक्षा से विद्युत दुर्घटना से सम्बन्धित जांच आख्या प्राप्त होने पर पीड़ित परिवार के द्वारा प्रस्तुत आवेदन पत्र एवं उपलब्ध कराये गये साक्ष्यों/ अभिलेखों को संकलित करेंगे।

. विद्युत दुर्घटना में मृत्यु होने पर बाहरी व्यक्ति के परिवारजनों से प्राप्त आवेदन के अनुसार, उत्तराधिकारी की सूचना, मण्डल कार्यालय सहित सम्बन्धित विद्युत कार्यालय में चस्पा करेंगे, जिसमें आपत्ति प्रस्तुत करने हेतु 07 दिनों का समय दिया जायेगा।

. आपत्ति प्राप्त करने की समयावधि समाप्त होने पर, 07 दिन के अन्दर उत्तराधिकारी से उनका आधार कार्ड/ चुनाव पहचान–पत्र (वोटर आई0 डी0)/पैनकार्ड/ राशनकार्ड/ पासपोर्ट/ लेखपाल अथवा ग्राम विकास अधिकारी द्वारा प्रदत्त कुटुम्ब रजिस्टर के आधार पर पीड़ित परिवार के उत्तराधिकारी का निर्धारण विधिक मापदण्डों के आधार पर करते हुये प्रकरण में क्षतिपूर्ति स्वीकृति का कारण, आदेश में लिखित रूप से अंकित (Recording reason in writing) करते हुए आदेश निर्गत करेंगे। उत्ताराधिकारी के सम्बन्ध में किसी भी प्रकार के विवाद की स्थिति में विधिक रूप से समक्ष अधिकारी द्वारा प्रदत्त उत्ताराधिकार प्रमाणपत्र प्राप्त होने के उपरान्त ही अग्रिम कार्यवाही की जाये।

. क्षतिपूर्ति के रूप में अनुग्रह राशि प्राप्त करने वाले को अण्डरटेकिंग देना होगा कि यदि किसी भी प्रकार का विवाद उत्पन्न होने पर उनके द्वारा उक्त धनराशि विभाग को वापस की जायेगी और अगर तथ्य गलत पाये गये तो उनके विरूद्ध विधिक कार्यवाही भी की जायेगी।

. किसी बाहरी व्यक्ति की विद्युतीय दुर्घटना में मृत्यु की दशा में, क्षतिपूर्ति के रूप में दी गयी अनुग्रह राशि के अतिरिक्त, मृतक आश्रित के अधीन किसी भी प्रकार का सेवायोजन अथवा कोई अन्य अनुतोष अनुमन्य नहीं होगे।

3. **<u>बाहरी व्यक्ति की विद्युत दुर्घटना में घायल होने की दशा में</u>**।

बाहरी व्यक्ति की विद्युत दुर्घटना में घायल होने की दशा में, क्षतिपूर्ति के रूप में अनुग्रह राशि स्वीकृति करने हेतु अधीक्षण अभियन्ता सक्षम अधिकारी होगे।

. अघातक विद्युत दुर्घटना में किसी व्यक्ति के आंशिक/ पूर्ण अपंगता होने पर

तालिका–1 में दिये गये विकलांगता प्रतिशत के आधार पर क्षतिपूर्ति/ अनुग्रह

राशि का आंकलन किया जायेगा।

. विद्युत सुरक्षा निदेशालय द्वारा प्रस्तुत जांच आख्या, मुख्त चिकित्सा अधिकारी द्वारा निर्गत विकलांगता प्रमाण–पत्र, एफ0आई0आर0 की प्रति एवं विभागीय जांच में प्राप्त संस्तुति के आधार पर क्षतिपूर्ति की कार्यवाही सुनिश्चित की जायेगी।

. क्षतिपूर्ति के रूप में अनुग्रह राशि प्राप्त करने वाले को शपथ–पत्र देना होगा

कि यदि किसी भी प्रकार का विवाद उत्पन्न होने पर उनके द्वारा उक्त धनराशि विभाग को वापस की जायेगी और अगर तथ्य गलत पाये गये तो उसके विरूद्ध विधिक कार्यवाही भी की जायेगी।

4. **विद्युत दुर्घटना में पशु की मृत्यु होने की दशा में।**

. पशु की मृत्यु की दशा मे, क्षतिपूर्ति के रूप में अनुग्रह राशि स्वीकृति करने हेतु, अधीक्षण अभियन्ता सक्षम अधिकारी होंगे।

. विद्युत सुरक्षा निदेशालय द्वारा प्रस्तुत जांच आख्या, पशु की क्रय रसीद, समक्ष पशु चिकित्सा अधिकारी द्वारा जारी मृत्यु प्रमाण पत्र, पोस्टमार्टम

रिपोर्ट, एफ0आई0आर0 की प्रति, विभागीय जांच में प्राप्त संस्तुति के आधार पर क्षतिपूर्ति की कार्यवाही सुनिश्चित की

जायेगी।

. क्षतिपूर्ति के रूप में अनुग्रह राशि प्राप्त करने वाले को शपथ–पत्र देना होगा

कि यदि किसी भी प्रकार का विवाद उत्पन्न होता है तो उनके द्वारा उक्त

धनराशि विभाग को वापस की जायेगी और अगर तथ्य गलत पाये गये तो उनके विरूद्ध विधिक कार्यवाही भी की जायेगी।

5. **विद्युतीय अग्निकाण्ड में फसलों/ सम्पत्तियों की हुई क्षति के सम्बन्ध में।**

. विद्युतीय अग्निकाण्ड में फसलो/ सम्पत्तियों की हुई क्षति के रूप में अनुग्रह राशि स्वीकृति करने हेतु मुख्य अभियन्ता (वितरण) सक्षम अधिकारी होंगे।

. विद्युत सुरक्षा निदेशालय, उ0प्र0 शासन की संस्तुति के आधार पर सम्बन्धित पीड़ित परिवार के द्वारा प्रस्तुत आवेदन पत्र में भू–स्वामी होने के अभिलेखों का मालिकाना हक एवं खतौनी/ लेखपाल द्वारा उपलब्ध कराये गये साक्ष्यों/ अभिलेखों को संलग्न किया जायेगा।

. सम्बन्धित जिले के तहसीलदार एवं जिलाधिकारी के द्वारा क्षति का आंकलन एवं संस्तृति तथा निदेशक, विद्युत सुरक्षा निदेशालय, उ0प्र0 शासन की संस्तृति के आधार पर सम्बन्धित मुख्य अभियन्ता (विवरण) द्वारा अनुग्रह धनराशि की स्वीकृति प्रदान की जाएगी। स्वीकृत धनराशि का भुगतान खण्ड स्तर पर किया जायेगा।

. विद्युत दुर्घटना में बाहरी व्यक्तियों/ पशुओं के प्रकरणों के निस्तारण में विद्युत सुरक्षा निदेशालय की जॉच आख्या एवं संस्तृति प्राप्त होने के 10 दिनों के अन्दर क्षतिपूर्ति की धनराशि का भुगतान कर दिया जाये तथा सम्पूर्ण प्रक्रिया 30 दिनों में पूर्ण कर ली जाये। इसके अतिरिक्त फसल/ सम्पत्तियों की हुई क्षति के फलस्वरूप क्षतिपूर्ति के प्रकरणो को विद्युत सुरक्षा निदेशायल की संस्तृति व जिलाधिकारी की आख्या प्राप्त होने के आधार पर 07 कार्य दिवसों के भीतर स्वीकृत एवं निस्तारित किया जाये।

. मुख्य अभियन्ता (वितरण) विद्युत दुर्घटना के फलस्वरूप क्षतिपूर्ति के प्रकरणों का मासिक आधार पर अनुश्रवण करेंगे एवं भुगतान से सम्बन्धित समस्त सूचनायें क्षेत्रीय कार्यालय में संरक्षित रखेंगे एवं दुर्घटनाओ को रोकने हेतु किये गये प्रयासों की मासिक रिपोर्ट प्रबन्ध निदेशक, डिस्काम को भेजेंगे। सम्बन्धित डिस्काम/ क्षेत्र/ मण्डल/ खण्ड का दायित्व होगा कि वे अपने कार्यालय मे विद्युत दुर्घटनाओं के प्रकारणो की सूची बनाकर सुरक्षित रखेंगे एवं त्रृटिपूर्ण अधिष्ठापन को ठीक किये जाने हेतु किये गये प्रयासो को भी लिपिबद्ध करेंगे।

GUIDE LINES FOR COMPENSATION ON ELECTROCUTION

FAULT LIABILITY

A-Fatal Accident

1. Notional Income (N.I.) of victim shall be taken in to consideration as Rs. 51,000 *(Fifty One Thousand) per annum (about Rs. 140 per day).*

2. Multiplier shall be adopted as per following chart

Age of Victim Multiplier Applied (M.A.)

Up to 15 years 15

Above 15 years but not exceeding 20 years 16

Above 20 years but not exceeding 25 years 17

Above 25 years but not exceeding 30 years 18

Above 30 years but not exceeding 35 years 17

Above 35 years but not exceeding 40 years 16

Above 40 years but not exceeding 45 years 15

Above 45 years but not exceeding 50 years 13

Above 50 years but not exceeding 55 years 11

Above 55 years but not exceeding 60 years 8

Above 60 years but not exceeding 65 years 6

Above 65 years 5

3. The amount of compensation so arrived at in the case of fatal accident claims shall be deducted towards Personal and living Expenses (P.E.) by

(i) 1/2nd if deceased was unmarried but if family of a bachelor is large and dependent on the income of the deceased, the deduction shall be 1/3rd (33.33%)

(ii) 1/3rd if deceased was married where dependent family members are 2 to 3 in number, 1/4th where dependent family members 4 to 6 in number and 1/5th where dependent family members are more than 6 in number.

(iii) For the purpose of calculation of number of family members in clause (ii), a minor dependent will be counted as half.

Spouse, parents and grand-parents having no income and minor children shall be deemed dependent family members. (Parivar Register and affidavit may be considered as proof of family members and dependency).

4. The following General Damages shall also be payable in addition to Compensation Outlined (C.O.) above:

(i) Compensation for Loss of Estate (L.E.) Rs. 5,000 (Five Thousand).

(ii) Compensation for Loss of Consortium (L.C.), if beneficiary is spouse Rs. 5.000 (Five Thousand).

(iii) Compensation for Loss of love and Affection (L.A.) Rs. 5,000 (Five Thousand).

(iv) Funeral Expenses costs of transportation of body (F.E.) Rs. 5,000 (Five Thousand) or actual expenses whichever is less.

(v)Medical Expenses (M.E.) - Actual expenses incurred before death supported by bills/vouchers but not exceeding Rs. 20,000 (Twenty Thousand).

*Formula: N.I.*M.A.=C.O.*

C.O.:P.E.=Amount

C.O.-Amount+L.E.+L.C.+L.A.+F.E.+M.E.=Total Compensation.

Example for spot death of a person aged 14 years leaving behind mother and father:

*Rs.51000*15 (Multiplier) =765000*

Rs.765000/3 =255000

Rs.765000-255000+5000+5000+5000 =525000

B-Non-Fatal

General Damages in case of Injuries and Disabilities:

(i) Pain and Suffering Grievous injuries

(ii) Grievous injuries (G.I.) -- Rs. 10,000/-

(iii) Simple injuries (S.I.) --Rs. 5,000/-

(ii) Medical Expenses (M.E.) :- Actual expenses incurred, supported by bills/vouchers but not exceeding Rs. 20,000 for grievous injury and - Rs. 10,000 for simple injury (on medical report)

Disability in non-fatal accidents:

The following compensation shall be payable in cases of disabilities to the victim arising out of non-fatal accidents:

C- Temporary Disability

Loss of income, if any, for actual period of disablement not exceeding fifty two weeks.

D- Permanent Disability

(a) In case of permanent total disablement the amount payable shall be arrived at by multiplying the annual loss of income by the Multiplier applicable to the age on the date of determining the compensation, or

(b) In case of permanent partial disablement such percentage of compensation, which would have been payable in the case of permanent total disablement as specified under item (a) above.

Injuries deemed to result in Permanent Total Disablement/Permanent Partial Disablement and percentage of loss of earning capacity shall be as per Schedule I under Workmen's Compensation Act, 1923, Disability Certificate from Medical Board mentioning percentage of disablement shall be final and shall be taken in to consideration.

***Notional Income** of victim shall be taken in to consideration as Rs. 51,000 (Fifty One Thousand) per annum.*

Example for 100% permanent disability of person aged 14 years with medical bills for amount. Rs. 20.000 (Twenty Thousand):

*51000*15 =765000*

*765000*100/100 =765000*

765000+10000+20000 =795000

No Fault Liability

1. In death - Rs. 1.000,00 (One Lac)

2. In permanent disability - Rs. 1,25,000 (One Lac and Twenty Five Thousand)

3. Grievous injury - Rs. 3000 (Three Thousand)

4. Simple injury - Rs. 2000 (Two Thousand)

No compensation shall be paid if victim was involved in illegal activities like theft of electricity or riots etc. Third party insurance system may also be introduced to meet out compensation.

6- विद्युत दुर्घटना में पशुओं की मृत्यु/ घायल होने पर वर्तमान में प्रभावी क्षतिपूर्ति अनुग्रह राशिः–

दुधारू पशु

. भैस, गाय, ऊँट, याक आदि की मृत्यु होने पर रू0 30,000/– (तीस हजार) अनुमन्य किया जायेगा।

. भेड़ बकरी, सुअर, आदि की मृत्यु होने पर रू0 3,000/– (तीन हजार) अनुमन्य किया जायेगा।

दुधारू पशुओं के अतिरिक्त पशु

. ऊँट, घोड़ा, बैल आदि की मृत्यु होने पर रू0 25,000/– (पच्चीस हजार) अनुमन्य किया जायेगा।

. बछड़ा, गधा, खच्चर आदि की मृत्यु होने पर रू0 16,000/– (सोलह हजार) अनुमन्य किया जायेगा।

7. अनुशासनात्मक एवं वसूली की कार्यवाहीः–

विद्युत दुर्घटना के लिए दोषी कार्मिक/ कार्मिको का उत्तरदायित्व निर्धारित करते हुए डिस्कॉम के प्रबन्ध निदेशक के स्तर से एक माह के भीतर कार्यवाही सुनिश्चित की जायेगी।

क्र0सं0	विवरण	मुख्य दायित्व	पर्यावरणीय दायित्व	प्रशासकीय दायित्व
	एल0टी0 लाइन	लाइनमैन/ अवर अभियन्ता	उपखण्ड अधिकारी	अधिशासी अभियन्ता (वितरण)
2	11/04 परिवर्तक या इससे अधिक एवं 11 के0वी0 लाइनें	लाइनमैन/ अवर अभियन्ता	उपखण्ड अधिकारी	अधिशासी अभियन्ता (वितरण)
3	33 के0वी0 उपकेन्द्र	टी0जी0–2 (एस0एस0ओ0)/ अवर अभियन्ता	उपखण्ड अधिकारी	अनुरक्षण– अधिशासी अभियन्ता (वि0), परीक्षण– अवर अभियन्ता/ सहायक, अभियन्ता–मीटर
4ण	33 के0वी0 लाइन	अवर अभियन्ता/ उपखण्ड अधिकारी	अधिशासी अभियन्ता (वि0)	अधीक्षण अभियन्ता (वितरण)

8. <u>प्रकरण के निस्तारण हेतु आवश्यक अभिलेखः–</u>

क्र0सं0	वद्युत दुर्घटना का प्रकार	पीड़ित पक्षकार द्वारा उपलब्ध कराये जाने वाले अभिलेख
	बाहरी व्यक्तियो के विद्युत दुर्घटना में मृत्यु होने की दशा में	1. विद्युत सुरक्षा की जांच आख्या 2. मृत्यु प्रमाणपत्र 3. सक्षम अधिकारी द्वारा वारिसान प्रमाणपत्र 4. पोस्टमार्टम रिपोर्ट 5. एफ0आई0आर0 की प्रति 6. विभागीय जांच
2	बाहरी व्यक्तियो के विद्युत दुर्घटना में घायल होने की दशा में।	1. विद्युत सुरक्षा की जांच आख्या 2. मुख्य चिकित्सा अधिकारी द्वारा निर्गत विकलागता प्रमाण पत्र 3. एफ0आई0आर0 की प्रति 4. विभागीय जांच
3	विद्युत दुर्घटना मे पशुओं की मृत्यु होने की दशा में	। 1. विद्युत सुरक्षा की जांच आख्या 2. पशु की क्रय रसीद 3. पशु की मृत्यु में सक्षम पशु चिकित्सा अधिकारी द्वारा जारी मृत्यु प्रमाण पत्र 4. पोस्टमार्टम रिपोर्ट 5. एफ0आई0आर0 की प्रति 6. विभागीय जांच
4ै	फसल के नुकसान होने की दशा में।	1. विद्युत सुरक्षा की जांच आख्या 2. फसल के नुकसान में फसल मालिक के नाम खेत होने के सम्बन्ध में खतौनी होने के सम्बन्ध में प्रधान द्वारा सत्यापित विवरण पत्र 3. जिलाधिकारी/ उपजिलाधिकारी द्वारा फसल के आंकलन एवं क्षतिपूर्ति की संस्तुति 4. एफ0आई0आर0 की प्रति 5. विभागीय जांच
5	सम्पत्ति के नुकसान होने की दशा में।	1. विद्युत सुरक्षा की जांच आख्या 2. सम्पत्ति के नुकसान में सम्पत्ति मालिक के नाम होने के सम्बन्ध में सत्यापित विवरण पत्र 3. जिलाधिकारी/ उपजिलाधिकारी द्वारा सम्पत्ति के आंकलन एवं क्षति**allowed to the extent indicated above.**पूर्ति की संस्तुति 4. एफ0आई0आर0 की प्रति 5. विभागीय जांच

कारपोरेशन मुख्यालय को डिस्काम के माध्यम से धनराशि अवमुक्त हेतु प्रत्येक

माह मॉग पत्र निम्न सूचना के साथ प्रेषित किया जायेः–

1ण् विद्युत दुर्घटना की प्रकरणवार आख्या/ त्रृटिपूर्ण अधिष्ठान के दूर किये जाने के सम्बन्ध में की गई कार्यवाही।

2ण् पीड़ित व्यक्ति/ परिवार को विद्युत दुर्घटना के फलस्वरूप प्रदान की गई क्षतिपूर्ति का विवरण।

3ण् विद्युत दुर्घटना के लिए दोषी अधिकारी/ कर्मचारी के विरूद्ध की गई

अनुशासनात्मक एवं वसूली की कार्यवाही का विवरण संलग्न प्रारूप में उपलब्ध

कराया जाये।

4ण् विद्युत सुरक्षा निदेशालय से प्राप्त आख्या में दोषी कार्मिको के विरूद्ध कारपोरेशन के नियमानुसार जॉच कार्यवाही की जायेगी तथा सम्बन्धित कार्मिकों को अपने बचाव का पूरा अवसर देते हुए आवश्यक कार्यवाही सुनिश्चित की जायेगी।

ऐसे प्रकरण जिनमें दुर्घटना की तिथि प्रश्नगत आदेश के निर्गमन की तिथि से पूर्व की है, में तत्कालीन विद्यमान नियमों/ आदेशो के अनुसार ही क्षतिपूर्ति का निर्धारिण किया जायेगा साथ ही किसी भी दशा में कोई पुराना प्रकरण पुनर्रूदघाटित नहीं किया जायेगा। उपर्युक्त समस्त व्यवस्थायें तत्काल प्रभाव से लागू की जाती है।

<u>निदेशक मण्डल की आज्ञा से</u>*

12. In the aforesaid guidelines for compensation of electrocution, it has been provided that compensation is to be determined on the basis of income of the victim with minimum compensation of Rs. 5 lakhs. However, in the absence of actual income so as to avoid litigation and to grant compensation quickly to the dependant of the deceased, a **notional income** of Rs. 140/- per day has been provided in the aforesaid policy.

13. In the instant case, there is no definite proof for the income of the petitioner. In a catena of judgements, it has been time and again held, that compensation to the victims of accidents has to be just and reasonable and should be adequate to bring the victim on the same position as such accident would not have taken place.

14. In **Kirti v. Oriental Insurance Co. Ltd., (2021) 2 SCC 166 (Para-10)**, Hon'ble Supreme Court has laid down the law that any compensation awarded by a court ought to be just, reasonable and consequently must undoubtedly be guided by principles of fairness, equity and good conscience.

15. In the case of **Kajal v. Jagdish Chand, (2020) 4 SCC 413 (para-33)**, Hon'ble Supreme Court has held that it is

well settled law that in the motor accident claim petitions, the court must award the just compensation and, in case, the just compensation is more than the amount claimed, that must be awarded especially where the claimant is a minor. In the case of **Kajal (Supra)**, Hon'ble Supreme Court quoted with approval certain foreign judgments and its own judgment and held in Paras-8, 9, 10, 11, 12, 13 and 14 as under:

"8. In Phillips v. London & South Western Railway Co., (1879) [L.R.] 5 Q.B.D. 78 (CA), Field, J., while emphasising that damages must be full and adequate, held thus : (QBD p. 79)

"... You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation once and for all. He has done no wrong, he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered."

Besides, the Tribunals should always remember that the measures of damages in all these cases "should be such as to enable even a tortfeasor to say that he had amply atoned for his misadventure".

9. In Mediana, In re, 1900 AC 113 (HL), Lord Halsbury held : (AC pp. 116-17)

"... Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless, it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case : how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But nevertheless the law recognises that as a topic upon which damages may be given."

10. The following observations of Lord Morris in his speech in H. West & Son Ltd. v. Shephard, 1964 AC 326 : (1963) 2 WLR 1359 (HL), are very pertinent : (AC p. 346)

"... Money may be awarded so that something tangible may be procured to replace something else of the like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards."

In the same case, Lord Devlin observed (at p. 357) that the proper approach to the problem was to adopt a test as to what contemporary society would deem to be a fair sum, such as would allow the wrongdoer to "hold up his head among his neighbours and say with their approval

that he has done the fair thing?", which should be kept in mind by the court in determining compensation in personal injury cases.

11. Lord Denning while speaking for the Court of Appeal in Ward v. James, (1966) 1 QB 273 : (1965) 2 WLR 455 : (1965) 1 All ER 563 (CA), laid down the following three basic principles to be followed in such like cases : (QB pp. 299-300)

"First, assessibility : In cases of grave injury, where the body is wrecked or the brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity : There should be some measure of uniformity in awards so that similar decisions are given in similar cases; otherwise there will be great dissatisfaction in the community, and much criticism of the administration of justice. Thirdly, predictability : Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the public good."

12. The assessment of damages in personal injury cases raises great difficulties. It is not easy to convert the physical and mental loss into monetary terms. There has to be a measure of calculated guesswork and conjecture. An assessment, as best as can, in the circumstances, should be made.

13. McGregor's Treatise on Damages, 14th Edition, Para 1157, referring to heads of damages in personal injury actions states:

"The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. Of these the pecuniary losses themselves comprise two separate items viz. the loss of earnings and other gains which the plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the courts have sub-divided the non-pecuniary losses into three categories viz. pain and suffering, loss of amenities of life and loss of expectation of life."

14. In Concord of India Insurance Co. Ltd. v. Nirmala Devi, (1979) 4 SCC 365 : 1979 SCC (Cri) 996 : 1980 ACJ 55, this Court held : (SCC p. 366, para 2)

"2. ... the determination of the quantum must be liberal, not niggardly since the law values life and limb in a free country in generous scales."

16. Therefore, it is well established that it is the duty of Courts to award just compensation to the victims of accident and it has also been held that right to Just Compensation to Victims emanates from their right to life guaranteed under Article 21 of the Constitution of India.

17. Now, the question that arises for consideration is that how to determine the Just Compensation where no direct proof of income is available on record?. It is now well established that in such cases, the **notional income** of the victim has to be determined. So far as the concept of **notional income** is concerned, it has been held that the **notional income** cannot be a fixed term, it has to be dependant on the variety of circumstances such as the age of the victim, occupation, living status, future prospects of the victims, their contribution in the family on the basis of service rendered by them and the quality of life being led by the victim and her family.

Notional income of the victim is also to be determined on the basis of the earning capacity and sometimes in accordance with the provisions of the Minimum Wages Act etc., for example, the reference may be made to para 17, 18 and 19 of judgement in the case of **Kirti (supra) and Lata Wadhwa v. State of Bihar (2001) 8 SCC 197 (Para-10).**

18. When the notional or actual income is determined, the computation of the loss of income is to be calculated applying the multiplier method. However, for the loss of future prospects of the victim, the compensation has been directed to be awarded separately by the Constitution Bench Judgment in **National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 (Para-57) and also Sarla Verma Vs. DTC (2009) 6 SCC 121 (paras 17, 18, 19, 30, 31 and 32). In the Constitution Bench Judgment of Pranay Sethi (supra)**, Hon'ble Supreme Court held that the benefit of future prospects to be given to all the victims to the extent of an additional 40 per cent of the established income of the deceased towards future prospects if the deceased is below 40 years and an addition to the extent of 25 percent to be granted where the victim was between age of 40 to 50 years.

19. In the case of **Lata Wadhwa (supra)**, Hon'ble Supreme Court has entertained the writ petition under Article 32 of the Constitution of India for grant of compensation to the victims of fire accidents. The same principal has further been recognised by Hon'ble Supreme Court in the case of **Raman Vs. Uttar Haryana Bijli Vitran Nigam Ltd., (2014) 15 SCC 1** and also by this Court in its judgment dated 09.11.2022 passed in Writ C No. 25065 of 2022 **(Kaneez Fatima Vs State of U.P. 3 Ors.).**

20. In the case of death or injury caused due to the negligence, the principle of "strict liability' has been approved by the Hon'ble Supreme Court in various cases such as **Maharaja Agrasen Hospital v. Rishabh Sharma (2020) 6 SCC 501 (Para-12.5.4), Raman v. Uttar Haryana Bijli Vitran Nigam Ltd., (2014) 15 SCC 1 (Paras-16, 17, 18, 19, 20 and 21) and M.P. Electricity Board v. Shail Kumari (2002) 2 SCC 162 (Paras 9, 10, 11, 12 and 13).** In the case of **Raman (supra)**, the Hon'ble Supreme Court has affirmed the judgement of Punjab and Haryana High Court passed in Civil Misc. Writ Petition No.14046 of 2012 and L.P.A. No.1631 of 2013, whereby the High Court granted Rs. 60 lakhs as compensation for 100 % permanent disability suffered by five years old boy due to electrocution.

21. In the case of **Shiv Ranshu Chhuneja v. State Of U.P. And Others (WRIT - C No. - 10191 of 2009, decided on 10.04.2018)**, a coordinate Bench of this Court has granted compensation to the tune of Rs. 86,20,000/- to a victim who suffered hundred percent disability on account of electrocution. Further, another Bench of this Court in the case of **Kaneez Fatima Vs State of U.P. 3 Ors.** (Writ C No.25065 of 2022) decided on 09.11.2022 has awarded compensation of Rs. 66,85,000/- with simple interest while holding in para 36 as under:

"36. The discussions, findings and directions made above are briefly summarized as under:-

(A) Compensation awarded ought to be just, reasonable and consequently must undoubtedly be guided by principles of fairness, equity and good conscience and, in case, the just compensation is more than the amount claimed, that must be

awarded especially where the claimant is a minor.

(B) The respondents are bound to award just compensation to the petitioner for fatal accident on account of their own negligence which caused the death of the husband of the petitioner on 10.04.2022. (E) "Consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.

(F) To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice to the claimant. The (E) "Consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.

(F) To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice to the claimant. The compensation which is required to be determined must be just. Grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitution in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong.

(G) The order for compensation has been passed by the authority in exercise of statutory power under Section 161 of the Electricity Act, 2003 and the policy decision to award just compensation. If just compensation is not awarded, it would affect fundamental rights of the sufferer guaranteed under Articles 14 and 21 of the Constitution of India. Therefore, order so passed would be amenable to writ jurisdiction under Article 226 of the Constitution of India.

(H) Decision of the respondents dated 25.09.2021 to compute and pay compensation only on the basis of notional income, is not only arbitrary and violative of fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India but is also in conflict of the law laid down by Hon'ble Supreme Court in judgments aforementioned directing for payment of just compensation. ***Therefore, we issue a general mandamus to the respondents to compute and pay just compensation on the basis of actual income of the injured person/ victim/ deceased wherever actual income is ascertainable or may be proved by claimant with future prospect as per law settled by Hon'ble Supreme Court in the various judgments aforenoted and apply the multiplier as provided in the policy decision dated 25.09.2021. If actual income of injured/ victim/ deceased is either not ascertainable or is not proved by claimant, then notional income as given in the policy decision dated 25.09.2021, shall be applied for computation and payment of compensation. The amount of compensation for loss of estate, loss of consortium and funeral expenses shall be determined and paid by the respondents in accordance with the law settled by Hon'ble Supreme Court in the case of National Insurance Company Ltd. vs. Pranay Sethi*** *(supra), which is binding under Articles 141 of the Constitution of India.*

(I) The amount of compensation determined above shall be distributed amongst the dependents of the deceased as under:-

(a) The respondents shall pay to the dependents of the deceased the above mentioned amount of compensation of Rs.66,85,000/- with simple interest @ 6% per annum from the date of filing of the claim application till realisation, after adjusting the amount earlier paid by them to the petitioner."compensation which is required to be determined must be just. Grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitution in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong.

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(a) The respondents shall pay to the dependents of the deceased the above mentioned amount of compensation of Rs.66,85,000/- with simple interest @ 6% per annum from the date of filing of the claim application till realisation, after adjusting the amount earlier paid by them to the petitioner."However, despite there being admitted proof of actual income of the deceased to be Rs.3,50,000/- per annum, the respondents have computed compensation on the basis of assumed ***notional income*** *of the deceased as Rs.51,000/- per annum, which is arbitrary and illegal.*

(C) There are two distinct categories of situations wherein the court usually determines ***notional income*** *of a victim.* ***The first category*** *of cases relates to those wherein the victim was employed, but the claimants are not able to prove victim's actual income, before the court. In such a situation, the court "guesses" the income of the victim on the basis of the evidence on record, like the quality of life being led by the victim and her family, the general earning of an individual employed in that field, the qualifications of the victim, and other considerations.* ***The second category*** *of cases relates to those situations wherein the Court is called upon to determine the income of a* ***non-earning victim,*** *such as a child, a student or a homemaker. Different principles are adopted by courts for determining the compensation towards a non-earning victim in order to arrive at the just compensation.*

(D) ***In the absence of proof of actual income****, notional income is applied to compute compensation.*

(E) "Consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.

(F) To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice to the claimant. The compensation which is required to be determined must be just. Grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitution in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong.

(G) The order for compensation has been passed by the authority in exercise of statutory power under Section 161 of the Electricity Act, 2003 and the policy decision to award just compensation. If just compensation is not awarded, it would affect fundamental rights of the sufferer guaranteed under Articles 14 and 21 of the Constitution of India. Therefore, order so passed would be amenable to writ jurisdiction under Article 226 of the Constitution of India.

(H) Decision of the respondents dated 25.09.2021 to compute and pay compensation only on the basis of notional income, is not only arbitrary and violative of fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India but is also in conflict of the law laid down by Hon'ble Supreme Court in judgments aforementioned directing for payment of just compensation. Therefore, we issue a general mandamus to the respondents to compute and pay just compensation on the basis of actual income of the injured person/ victim/ deceased wherever actual income is ascertainable or may be proved by claimant with future prospect as per law settled by Hon'ble Supreme Court in the various judgments aforenoted and apply the multiplier as provided in the policy decision dated 25.09.2021. If actual income of injured/ victim/ deceased is either not ascertainable or is not proved by claimant, then ***notional income*** *as given in the policy decision dated 25.09.2021, shall be applied for computation and payment of compensation. The amount of compensation for loss of estate, loss of consortium and funeral*

expenses shall be determined and paid by the respondents in accordance with the law settled by Hon'ble Supreme Court in the case of National Insurance Company Ltd. vs. Pranay Sethi (supra), which is binding under Articles 141 of the Constitution of India.

(I) The amount of compensation determined above shall be distributed amongst the dependents of the deceased as under:-

(a) The respondents shall pay to the dependents of the deceased the above mentioned amount of compensation of Rs.66,85,000/- with simple interest @ 6% per annum from the date of filing of the claim application till realisation, after adjusting the amount earlier paid by them to the petitioner."

22. In case of the victims, who suffered permanent disability the compensation for physical pain and sufferings, emotional distress, loss of enjoyment of life and for the loss of prospects of marriage etc., a separate compensation has been held to be awarded to the victims in addition to the compensation for pecuniary losses.

23. In **R.D. Hattangadi v. Pest Control (India) Pvt. Ltd. And Others (1995) 1 SCC 551** dealing with the different heads of compensation in injury cases, Hon'ble Supreme Court held in para 9 as under:-

"9. Broadly speaking while fixing the amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in the future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

24. In **Raj Kumar v. Ajay Kumar (2011) 1 SCC 343,** Hon'ble Supreme Court in para 6 laid down the heads under which **compensation is to be awarded for personal injuries,** as under:

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages) (iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii) (b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

25. In the case of **K. Suresh v. New India Assurance Company Limited And Another, (2012) 12 SCC 274** Hon'ble Supreme Court in para 2 held as follows:

"2. ... There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity "the Act") stipulates that there should be grant of "just compensation". Thus, it becomes a challenge for a court of law to determine "just compensation" which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance.

26. In the case of **Kajal v. Oriental Insurance Co. Ltd., (2021) 2 SCC 166,** the Hon'ble Supreme Court mandated to adopt minimum wages instead of **notional income** to compute loss of earning. Paragraph 20 of the judgment in the case of **Kajal (supra)** is reproduced below:-

"Loss of earnings

*20. Both the courts below have held that since the girl was a young child of 12 years only **notional income** of Rs 15,000 p.a. can be taken into consideration. We do not think this is a proper way of assessing the future loss of income. This young girl after studying could have worked and would have earned much more than Rs 15,000 p.a. Each case has to be decided on its own evidence but taking **notional income** to be Rs 15,000 p.a. is not at all justified. The appellant has placed before us material to show that the minimum wages payable to a skilled workman is Rs 4846 per month. In our opinion, this would be the minimum amount which she would have earned on becoming a major. Adding 40% for the future prospects, it works to be Rs 6784.40 per month i.e. 81,412.80 p.a. Applying the multiplier of 18, it works out to Rs 14,65,430.40, which is rounded off to Rs 14,66,000."*

27. In view of the aforesaid settled prepositions of law the compensation in case of permanent disability is calculated for both pecuniary loss as well as non-pecuniary losses under different heads, as under:

a) Loss of Earning due to Disability-

For calculating loss of earning capacity due to disability, it has been held that the multiplier method must be applied for calculation of the loss of the earning due to disability. In the case of **Kajal (supra)**, it is clearly held that when there is

no proof of income available, then the provisions of minimum wages payable to such victims may be taken recourse to. In the instant case since the petitioner was unskilled person, the minimum wages applicable to unskilled workers can safely be taken as **Notional Income** of the petitioner. The **Notional Income** provided under the scheme of the U.P. Power Corporation *prima facie* appears to be inadequate. The Government of India vide Notification dated 28.09.2022 has determined the minimum wages for the unskilled employees working in agriculture as Rs. 409/- per day. The notification dated 28.09.2022 reads as under:

"File No. 116(r)/2O22-LS-II
Government of India
Ministry of Labour & Employment
Office of the Chief Labour Commissioner(C)
New Delhi
Dated:28/09/2022

O R D E R

In exercise of the powers conferred by Central Government vide Notification No. S.O.186(E) dated ***19th January, 2Ol7*** *of the Ministry of Labour and Employment, the undersigned hereby revise the rates of Variable Dearness Allowance for the employees employed in Agriculture w.e.f. 01.10.2022 on the basis of the average Consumer Price Index for Industrial workers reaching 365.76 from 357.65 as on 30.06.2022 (Base 2016-100) and thereby resulting in an increase of 8.11 points. The revised Variable Dearness Allowance as under shall be payable from 01.10.2022:-*

Category of Worker	*Rates of V.D.A. Area wise per day (in Rupees)*		
	'A'	*'B'*	*'C'*
Unskilled	*121*	*111*	*109*
Semi-Skilled/Unskilled Supervisory	*131*	*121*	*112*
Skilled/Clerical	*144*	*131*	*121*
Highly Skilled	*158*	*147*	*131*

Therefore, the minimum rates of wages including the basic rates and Variable Dearness Allowance payable w.e.f. 01.10.2022 to the employees working in Agriculture shall be as under:-

Category of Worker	*Rates of wages including V.D.A. Area wise per day (in Rupees)*		
	A	*B*	*C*
Unskilled	*333+ 121=454*	*303+ 111=414*	*300 + 109 =409*
Semi-Skilled/Unskilled Supervisory	*364+ 131=495*	*335+ 121=456*	*307 +112=419*
Skilled/ Clerical	*395+ 144=539*	*364+ 131=495*	*334 +121=455*
High1y Skilled	*438+ 158=596*	*4O7+147=554*	*364 +131=495*

The VDA has been rounded off to the next higher rupee as per the decision of the Minimum Wages Advisory Board.

The classification of workers under different categories will be same as in Part-l of the notification, whereas classification of cities will be same as in the Part-ll of the notification dated 19th January, 2Ol7. The present classification of cities into areas A, B & C is enclosed at Annexure I for ready reference.

(Remis Tiru)
Chief Labour Commissioner(C)"

Since, the petitioner was doing the work of grazing of goats, which is an activity connected to agriculture, the minimum wages payable to a workman involved in agricultural field, can safely be considered for determining the **Notional Income** of the petitioner. If such employee works about 26 days in a month, then the monthly income would be Rs. 10,634/- (Rs. 409/- x 26 days) and consequently, the annual income would be Rs. 1,27,608/-. Therefore, considering the aforesaid minimum wages, the annual **Notional Income** of the petitioner can safely be calculated to Rs. 1,27,608/- and if we add 40 % of the same towards the loss of future prospects, total annual loss of earning capacity would be safely calculated as Rs. 1,27,608/- + Rs. 51,043/- (Total Rs. 1,78,651/- per annum) and since the age of the deceased was between 15 to 20 years, as per the Scheme of U.P. Power Corporation, the multiplier of 16 can be applied. Thus, the total loss of earning due to disability would be Rs. **28,58,416/-** to which the petitioner is entitled in our considered opinion.

b) Compensation for Medical Expenses-

It is admitted case of the parties that the petitioner was not only treated at Nirmala Devi Charitable Society Hospital, Paschin Sarai, District- Kaushambi but subsequently, she was referred to District Hospital, Manjhanpur, District-Kaushambi, where she was treated from 02.08.2020 and was discharged on 19.09.2022. The right hand and left thumb of the petitioner have been amputated. The petitioner has stated in paragraph 5 of the writ petition that more than **Rs. 2,00,000/-** have been spent by the relatives for her treatment which has not been disputed by the respondent no. 2 in their counter affidavit. This being the admitted position, we award Rs. 2,00,000/- towards medical expenses incurred by petitioner for her treatment.

c) Future Medical Expenses-

The Hon'ble Supreme Court in the case of **Sidram v. Divisional Manager, United India Insurance Co. Ltd. and Another, 2022 SCC OnLine SC 1597** held as under:

"67. At the outset, we may state that the "Future Medical Expenses" and "Attendant Charges" would fall within the ambit of Pecuniary Expenses. In Abhimanyu Partap Singh v. Namita Sekhon and Another, (2022) 8 SCC 489, this Court held:

"19. In view of the said legal position, the compensation can be assessed in pecuniary heads i.e. the loss of future earning, medical expenses including future medical expenses, attendant charges and also in the head of transportation including future transportation. In the non-pecuniary heads, the compensation can be computed for the mental and physical pain and sufferings in the present and in future, loss of amenities of life including loss of marital bliss, loss of expectancy in life, inconvenience, hardship, discomfort, disappointment, frustration, mental agony in life, etc."

Considering the age of the petitioner at the time of accident and even if the bare minimum expenses of Rs. 1,000/- per month is taken into consideration which the petitioner is likely to spent on her medical treatment throughout her life, then the compensation for future medical expenses can be calculated as Rs. 1,000 x 12 x 16. Therefore, the compensation of **Rs. 1,92,000/-** is awarded towards future medical expenses.

d) Attendant Charges-

Since the petitioner had suffered hundred percent permanent disability and

she will not be able to work in the same manner as she used to do prior to the accident, therefore, she will require an attendant throughout the day for her daily chores.

Replying upon **Paragraph 73** of the judgement in the case of **Sidram (supra),** we fix charges for medical attendant, which the petitioner may require, at the rate of Rs. 2,000/- per month. As a result of which we award **Rs.3,84,000/-** (Calculated as Rs. 2000/- X 12 X 16= Rs.3,84,000/-) towards attendant charges.

e) Loss of Conveyance and Special Diet-

Since the petitioner was admitted in the Hospital for about 49 days, the relatives must had spent on conveyance and the petitioner must have required the special diet during her treatment in the Hospital and, thereafter for sometime. Hence, relying upon **Paragraph 89** of the judgement in **Sidram (supra)**, we award **Rs. 50, 000/-** towards conveyance and special diet.

f) Pain and Suffering-

Hon'ble Supreme Court in **Divisional Controller, KSRTC v. Mahadeva Shetty and Another (2003) 7 SCC 197** held in para 18 as under:

"18. A person not only suffers injuries on account of accident but also suffers in mind and body on account of the accident throughout his life and a feeling is developed that he is no more a normal man and cannot enjoy the amenities of life as another normal person can. While fixing compensation for pain and suffering as also for loss of amenities of life, features like his age, marital status and unusual deprivation he has undertaken in his life have to be reckoned."

In **Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka and Others, (2009) 6 SCC 1**, Hon'ble Supreme Court granted an amount of Rs. 10,00,000/- on account of pain and suffering of the victim. However, that was a case related to an engineering student aged about 20 years.

In **Sidram (supra)**, the Hon'ble Supreme Court in para 93 held as under:

"93. Pain and suffering would be categorized as a non-pecuniary loss as it is incapable of being arithmetically calculated. Therefore, when compensation is to be awarded for pain and suffering, special circumstances of the claimant have to be taken into account including the victim's age, the unusual deprivation the victim has suffered, the effect thereof on his or her future life....."

While holding thus, the Hon'ble Supreme Court has awarded an amount of Rs. 1,00,000/- toward pain and suffering in the case of **Sidram (supra)**. Likewise in the case of **Subulaxmi v. Managing Director, Tamil Nadu State Tansport Corporation and Another (2012) 10 SCC 177,** the Hon'ble Supreme Court awarded compensation of Rs. 1,00,000/- towards pain and suffering.

In the case of **Jagdish v. Mohan and others (2018) 4 SCC 571,** the Hon'ble Supreme Court has awarded **Rs. 2,00,000/-** as compensation on account of pain and suffering in the case of permanent disability. Thus, in our considered opinion, it will be appropriate to award compensation of Rs. 2,00,000/- towards pain and suffering, which the petitioner shall undergo throughout her life.

g) Marriage Prospects-

In **Paragraph 19** of the judgement in the case of **Ibrahim v. Raju and Others, (2011) 10 SCC 634**, Hon'ble Supreme Court in para 19 has held as under:

"19. On account of the injuries suffered by him, the prospects of the appellant's marriage have considerably

reduced. Rather, they are extremely bleak. In any case, on account of the fracture of pelvis, he will not be able to enjoy the matrimonial life. Therefore, the award of Rs 50,000 under this head must be treated as wholly inadequate. In the facts and circumstances of the case, we feel that a sum of Rs 2 lakhs should be awarded to the appellant for loss of marriage prospects and enjoyment of life."

In **Master Ayush v. Branch Manager, Reliance General Insurance Company Ltd. and Another (2022) 7 SCC 738**, the Hon'ble Supreme Court awarded Rs. 3,00,000/- for loss of marriage prospects. In **Sidram (Supra)**, the Hon'ble Supreme Court awarded a sum of Rs. 3,00,000/- towards marriage prospects.

In the instant case, since the petitioner is an unmarried girl of eighteen years old and had lost her hand and thumb, her prospects of marriage have reduced. Therefore, we award a sum of **Rs. 3,00,000/-** towards loss of marriage prospects.

h) Loss of Amenities and Enjoyment of Life-

In **Paragraph 18 of Govind Yadav v. New India Insurance Company Limited, (2011) 10 SCC 683**, Hon'ble Supreme Court in para 18 held as under:

"18. In our view, the principles laid down in Arvind Kumar Mishra v. New India Assurance Co. Ltd. (2010) 10 SCC 254 and Raj Kumar v. Ajay Kumar (2011) 1 SCC 343 must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."

In the case of **Afnish v. Oriental Insurance Company Ltd. (2018) 13 SCC 119**, the Hon'ble Supreme Court had awarded a sum of Rs. 5,00,000/- for the loss of amenities and enjoyment of life. Thus, having regard to the totality of circumstances of the petitioner herein we award a sum of **Rs. 2,00,000/-** towards loss of amenities and enjoyment of life.

28. Thus, the total compensation awarded under different heads are as under:

S. NO.	**Compensation**	**Amount (In Rupees)**
a	Loss of Earning due to Disability	Rs. 28,58,416/-
b	Compensation for Medical Expenses	Rs. 2,00,000/-
c	Future Medical Expenses	Rs. 1,92,000/-
d	Attendant Charges	Rs. 3,84,000/-
e	Loss of Conveyance and Special Diet	Rs. 50,000/-
f	Pain and Suffering	Rs. 2,00,000/-
g	Marriage Prospects	Rs. 3,00,000/-
h	Loss of Amenities and Enjoyment	Rs. 2,00,000/-
	Total	**Rs. 43,84,416/-**

29. Thus, the petitioner is entitled for a total compensation of Rs. 43,84,416/- with simple interest @ 6% per annum from the date of filing of claim application till realisation of the same, adjusting the amount earlier paid to the petitioner by the respondents. Out of the aforesaid amount of Rs. 43,84,416/- an amount of Rs. 5,81,000/- has already been paid by the respondent no. 2 to the petitioner. Out of the aforesaid total amount of compensation, a sum of Rs. 25,00,000/- shall be kept in the highest interest bearing Fixed Deposit

Account in a Nationalised Bank in the name of the petitioner, with interest payable on monthly basis to enable the petitioner to meet her day-to-day expenses and maintenance. In case of some emergent requirements, the petitioner may be permitted to withdraw 25 percent of the said amount. The interest and the balance amount of compensation after adjusting the amount already paid, shall be paid to the petitioner directly within two months from the date of production of a certified copy of this order.

30. With the aforesaid direction the writ petition is **allowed to the extent indicated above.**

(2023) 4 ILRA 124
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ C No. 49599 of 2011

U.P. State Warehousing Corporation, Rambagh, Bareilly ...Petitioner
Versus
Employee Provident Fund, Appellate Authority & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Mishra, Sri Abhishek Mishra, Sri K.N. Mishra, Sri Ashish Jaiswal

Counsel for the Respondents:
C.S.C., Sri Dhananjay Awasthi, Sri D.K. Pandey, Ms. Bushra Maryam, Sri Ramnath, S.C., Sri Sachindra Upadhyay, Sri Y.K. Sinha, Sri K.K. Pandey

क. केन्द्रीय कर्मचारी भविश्य निधि अधिनियम, 1952 – धारा 2.एफ एवं 7.ए – ठेके के कर्मचारी को पी0 एफ0 के भुगतान की देनदारी – कर्मचारी पर पर्यवेक्षण (सुपरविजन) एवं नियंत्रण, कितना महत्त्वपूर्ण – क्या ठेके के कर्मचारी, निगम के कर्मचारी माने जाएंगे – अभिनिर्धारित किया गया, बिना साक्ष्य के यह तय कर पाना संभव नहीं होगा कि ठेका कर्मचारियों का कोई सुपरविजन व कंट्रोल याची.निगम का था या नहीं और क्या ऐसे कर्मचारियों का पी0 एफ0 अं ादान की देयता याची.निगम की है अथवा ठेकेदार की है – इस बिन्दु पर आयुक्त एवं ट्रिब्यूनल द्वारा कोई स्पश्ट आदे ा नहीं किया गया है – हाईकोर्ट ने दि ाानिर्दे ा देने के साथ मामले को सहायक भविश्य निधि आयुक्त को वापस कर दिया। (पैरा 10, 11, 12 एवं 13)

रिट याचिका आं िाक रूप से स्वीकृत (म.1)

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

1. याची की ओर से विद्वान अधिवक्ता, श्री अभिषेक मिश्रा एवं विपक्षी तरफ से विद्वान अधिवक्ता श्री सचिन उपाध्याय, वाई०के० सिन्हा एवं कु० बुश्रा मरियम को सुना।

2. संक्षेप में वाद के तथ्य यह हैं कि वर्तमान रिट याचिका उ०प्र० राज्य वेयर हाउसिंग कॉरपोरेशन द्वारा औद्योगिक न्यायाधिकरण (केन्द्रीय) की अपील ए०टी०ए० सं०-570 (14)/2004 में पारित आदेश दिनाँक 03.08.2010 को चुनौती इस आधार पर दी गयी है कि धारा 7-ए, केन्द्रीय कर्मचारी भविष्य निधि अधिनियम, 1952 के अन्तर्गत सुनवाई करते हुए गलत तरीके से ठेका कर्मचारियों को उ०प्र० राज्य भण्डारण निगम का कर्मचारी मानकर पी०एफ० की देनदारी निर्धारित की गयी है। जबकि इस सम्बन्ध में औद्योगिक न्यायाधिकरण (प्रथम), इलाहाबाद द्वारा अभि० वाद सं0-89/2006 एवं 03/2009 में यह अभिनिर्णीत किया गया है कि ठेका कर्मचारी निगम

के कर्मचारी माने जायेंगे और समस्त लाभ पाने के अधिकारी होंगे। उपरोक्त अभिनिर्णय को निगम द्वारा रिट याचिका संख्या-72314/2010 से चुनौती दी गयी जिसमें इस न्यायालय द्वारा यह कहा गया कि ठेका कर्मचारी निगम के कर्मचारी नहीं हैं और कोई लाभ पाने के अधिकारी नहीं हैं। इस आधार पर सेवायोजकों ने धारा 7-ए के कार्यवाही के दौरान माननीय उच्च न्यायालय के आदेश दिनाँक 15.05.2013 की प्रति प्रस्तुत करके यह कहा है कि ठेका कर्मचारी निगम के कर्मचारी नहीं हैं। और उनके पी०एफ० की देनदारी नहीं बनती है।

3. सेवायोजकों द्वारा प्रस्तुत तथ्यों को सहायक आयुक्त कर्मचारी भविष्य निधि ने बल न पाते हुये आदेश दिनाँक 06.05.2004 द्वारा सेवायोजकों को 15 दिन में पी०एफ० की धनराशि जमा करने के निर्देश दिये। इस आदेश को याची द्वारा अधिनियम की धारा 7-आई के अन्तर्गत कर्मचारी भविष्य निधि अपीलेट le 10:53ट्रिब्यूनल, नई दिल्ली के समक्ष अपील दाखिल की गयी जो ए०टी०ए० नं० 570 (14)/2004 के रूप में पंजीकृत होकर सुनी गयी। अपीलेट ट्रिब्यूनल द्वारा पक्षों को सुनने के उपरान्त आदेश दिनाँक 03.08.2010 द्वारा सेवायोजकों के अपील में बल न पाते हुये अपील निस्तारित कर दी जिसे याची द्वारा वर्तमान याचिका में चुनौती दी गयी।

4. इस न्यायालय के अंतरिम आदेश दिनांक 30.08.2011 द्वारा इस शर्त पर कि यदि सेवायोजक विपक्षी द्वारा संगणित धनराशि को भविष्य निधि आयुक्त के समक्ष एक माह में जमा करें तो उसके विरूद्ध कोई दण्डात्मक कार्यवाही नहीं होगी और यदि एक माह में पैसा जमा नहीं किया जाता है तो अन्तरिम आदेश का लाभ सेवायोजक को प्राप्त नहीं होगा।

5. विपक्षी संख्या-2 द्वारा अपना प्रति शपथपत्र प्रस्तुत कर यह कहा गया कि अधिनियम की धारा 2-एफ के अंतर्गत सभी कर्मचारी जैसे-रेगुलर, कैजुअल, कांट्रेक्टर या पीस-रेटेड कर्मचारी, कर्मचारी की भाषा में आवृत होते हैं और उनका पी-एफ० का अंशदान देय है। विपक्षी संख्या-2 द्वारा यह भी कहा गया कि रिट के प्रस्तर-11 व 12 में उल्लिखित रिट याचिका का कोई सम्बन्ध भविष्य निधि संगठन से नहीं है, यह भी कहा गया है कि वर्मतान याची मुख्य सेवायोजक ठेका कर्मचारियों के नियोजक की परिभाषा में आवृत्त होता है और उनके द्वारा पी०एफ० के अंशदान का भुगतान किया जाना है। प्रतिवादी द्वारा धारा 7-ए के अंतर्गत पारित आदेश को सही कहा गया है।

6. प्रतिवादी संख्या 3 जो कि कर्मचारियों की यूनियन है के द्वारा भी अपना प्रति शपथपत्र प्रस्तुत करके कहा गया है कि वे याची के यहाँ कार्य करते हैं और उनके द्वारा की गयी शिकायत पर प्रतिवादी संख्या 1 व 2 ने संज्ञान लेते हुये जाँच करके नियमानुसार देनदारी की संगणना की है। याची द्वारा अपने रिज्वाइन्डर एफिडेविट प्रस्तुत किया गया।

7. वर्तमान याचिका को माननीय न्यायमूर्ति देवेन्द्र प्रताप सिंह द्वारा सुनकर दिनाँक 28.07.2013 को याचिका स्वीकार करते हुये आक्षेपित आदेश दिनाँक 03.08.2010 एवं 02.12.2002 को अपास्त किया गया।

8. उक्त आदेश के विरुद्ध सहायक भविष्य निधि आयुक्त, इ०पी०एफ०ओ० बरेली द्वारा माननीय उच्चतम न्यायालय के समक्ष एस०एल०पी० (सी) संख्या •3458/2015 प्रस्तुत की जो बाद में सिविल अपील संख्या 6295 वर्ष 2019 हो गयी।

9. माननीय उच्चतम न्यायालय अपने दिनांक 14.08.2019 द्वारा वर्तमान अपील स्वीकार करते हुए आदेश दिनाँक 15.05.2013 को कानूनन दूषित मानते हुये याचिका को पुनः सुनवाई हेतु इस न्यायालय को वापस की गयी और यह कहा गया कि उच्च न्यायालय (रिट कोर्ट) पक्षों को पुनः सुनकर नवीन आदेश पारित करे और ऐसा करते समय वह कर्मचारी की परिभाषा जैसा कि अधिनियम की धारा 2-एफ में दी गयी है को विचार करते हुये उस आलोक में देखे कि धारा 7- ए में पारित आदेश सही है अथवा नहीं।

10. माननीय उच्चतम न्यायालय द्वारा पारित रिमाण्ड आदेश दिनाँक 14.08.2019 के बाद याचिका पुनः सुनवाई हेतु सूचीबद्ध की गयी और पक्षों को सुना गया तथा पत्रावली का गहन अवलोकन किया गया। वर्तमान याचिका में मूल विवादित प्रश्न यह है कि क्या ठेके के कर्मचारी निगम के कर्मचारी माने जायेंगे और उनके पी०एफ० के अंशदान की जिम्मेदारी किसकी होगी। इस सम्बन्ध में सेवायोजकों ने यह साबित करने का प्रयत्न किया है कि उनके द्वारा अपने पंजीकृत ठेकेदारों द्वारा लोडिंग अनलोडिंग का कार्य लिया जाता है और उनका भुगतान कांट्रेक्टर को प्रस्तुत बिल के माध्यम से किया जाता है। सेवायोजकों का तर्क है कि उनका किसी प्रकार से कंट्रोल और सुपरविजन संबंधित कर्मचारियों के ऊपर नहीं रहता है।

11 वर्तमान परिस्थितियों में बिना साक्ष्य के यह तय कर पाना संभव नहीं होगा कि ठेका कर्मचारियों का कोई सुपरविजन व कंट्रोल याची का था या नहीं और क्या ऐसे कर्मचारियों का पी०एफ० अंशदान की देयता याची निगम की है अथवा ठेकेदार की है। न्यायालय द्वारा पक्षों से यह पूँछे जाने पर कि क्या कोई ऐसा अभिलेख पत्रावली पर उपलब्ध है कि श्रमिकों/ठेकेदार/निगम की कोई मौखिक साक्ष्य धारा 7-ए में जाँच करते

समय करायी गयी है अथवा नहीं। इस पर पक्षगण मौन रहे। सहायक भविष्य निधि आयुक्त ने भी यह उल्लिखित किया है कि प्रवर्तन अधिकारियों द्वारा कोई भी रिकार्ड जाँच के लिए प्रस्तुत नहीं किया गया।

12 मेरे द्वारा गहन अध्ययन करने पर यह पाया गया कि सहायक भविष्य निधि ' आयुक्त द्वारा धारा 7-ए में एवं अपीलीय ट्रिब्यूनल द्वारा अपना कोई सुस्पष्ट आदेश इस बिन्दु पर पारित नहीं किया है तथा उक्त के अभाव में वर्तमान विवाद का निस्तारण किया गया है।

आदेश

13. अतः सेवायोजक द्वारा प्रस्तुत वर्तमान याचिका आंशिक रूप से स्वीकार करते हुए आदेश दिनाँक 03.08.2010 एवं 02.12.2002 को निरस्त किया जाता है और प्रकरण प्रतिवादी संख्या 2, सहायक भविष्य निधि आयुक्त को इस निर्देश के साथ वापस किया जाता है। वह आदेश की प्राप्ति के 6 माह के अन्दर पक्षों को सुनवाई का अवसर देते हुये साक्ष्यों (लिखित व मौखिक), के आधार पर मुखर आदेश पारित करें। याचिका में पारित अन्तरिम आदेश दिनांक 30.08.2011 द्वारा जमा की गयी धनराशि अन्तिम निर्णय तक विपक्षी संख्या 01 के पास सुरक्षित रहेगी।

(2023) 4 ILRA 126
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.03.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Matters Under Article 227 No. 27 of 2021

Oriental Insurance Co. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anchal Mishra

Counsel for the Respondents:
C.S.C., Rinku Verma

A. Insurance Law – Compensation - Claim for compensation, which is the basic cause of action, arises only upon death of the insured. As such the issue of accident which precedes death of the insured is only a condition precedent for the purposes of entertainability of the claim and it is only death of insured arising from an accident which gives rise to cause of action to nominee/legal heir of the insured.

A perusal of Part-I of the agreement dated 14.09.2016 makes it evident that in case of death arising out of an accident pertaining to Head/Bread Earner of a family during course of insurance policy/scheme, the Insurance Company is required to compensate the nominee/legal heirs of deceased to the tune of Rs.5,00,000/-. The stipulation also indicates that the death should have occasioned during the course of insurance scheme. (Para 10, 11)

In the present case, it is apparent that although accident has occurred prior to enforcement of the scheme on 14.09.2016 but the death of the insured, late Usman Khan has occurred on 17.09.2016 which was after enforcement of the insurance scheme on 14.09.2016. Clearly, the nominees/legal heirs of the deceased were entitled to maintain a claim in accordance with the scheme since death has occasioned during the subsistence of agreement dated 14.09.2016. To that effect, the claim of opposite parties 3 to 6 was wrongly rejected by the Insurance Company. (Para 12)

B. Double Jeopardy – When claim is made in terms of mutually agreed and binding contract, it is only the conditions of contract which are adhered to without imposition of extraneous considerations. As such, once a penalty is clearly indicated under the contract for a party to fulfill in case of breach of contract, it is only that penalty which can be imposed and in the considered opinion of this Court, no further penalty or costs can be imposed which is beyond the terms and conditions of such contract. (Para 18)

Agreement dated 14.09.2016 provides for imposition of penalty upon the Insurance Company in case payment is not made to claimant in accordance with the terms and conditions of the agreement. It appears that earlier an amount of Rs.2500/- per week had been imposed as penalty, which was subsequently reduced to Rs.1,000/- per week. (Para 14)

By means of impugned order, while the Permanent Lok Adalat has imposed the aforesaid penalty, at the same time interest at the rate of 9% has also been imposed upon the Insurance Company. It is apparent that neither any statutory provision has been indicated for grant of interest nor does agreement dated 14.09.2016 stipulate grant of any interest. As such, **grant of interest over and above the penalty clearly amounts not only to Double Jeopardy but unjust enrichment and is unsustainable.** (Para 16, 19)

Writ petition partly allowed. Order dated 27.12.2019 is set aside only to the extent of grant of interest on the claimed amount. (E-4)

Precedent followed:

Shameena Khatoon & ors. Vs The Oriental Insurance Co. Ltd. & ors., PLA Case No. 15 of 2018 (Para 22)

Present petition challenges the order dated 27.12.2019, passed by the Permanent Lok Adalat, Lucknow whereby the claim of private parties for seeking compensation in terms of the Mukhya Mantri Kisan Evam Sarvhit Bima Yojna has been allowed.

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

1. Heard learned counsel for petitioner, learned State Counsel for opposite parties 1 and 2 and Mr. Rinku Verma, learned counsel for opposite parties 3 to 6.

2. Petition has been filed under Article 227 of the Constitution of India challenging order dated 27.12.2019 passed in PLA Case No.15 of 2018 by the Permanent Lok Adalat, Lucknow whereby claim of private opposite parties for seeking compensation in terms of the Mukhya Mantri Kisan Evam Sarvhit Bima Yojna has been allowed.

3. Learned counsel for petitioner submits that aforesaid scheme of the State Government was floated in which various insurance companies were a party to the memorandum of understanding for the purposes of providing services for implementation of the said insurance scheme for indemnifying farmers of the State from accident and death arising therefrom.

4. Learned counsel for petitioner submits that agreement was entered into between the petitioner-company and the State on 14.09.2016. It is further submitted that the said scheme was to be implemented with effect from the date it was entered into and as per provisions of the scheme, in case of death arising out of an accident pertaining to head of family/bread earner of family during the operation of the agreement, the insurance company was bound to make compensation at the rate of R.5,00,000/- to the nominee/legal heir.

5. It is submitted that in the present case, admittedly the predecessor in interest of opposite parties 3 to 6, Late Usman Khan was involved in an accident on 12.09.2016 and as a result thereof, passed away on 17.09.2016. It has been submitted that upon claim being made by legal heirs of Late Usman Khan, the same was rejected by the insurance company on 23.02.2017 on the ground that accident resulting in death of Late Usman Khan took place on 12.09.2016, which was prior to enforcement of agreement dated 14.09.2016. As such, the said incident was not covered within the insurance period.

6. Learned counsel for petitioner submits that since the cause of action, i.e. the accident occurred on 12.09.2016, which was prior to enforcement of insurance

agreement dated 14.09.2016, the claim of answering opposite parties has been rightly rejected. It is further submitted that the date of death of Late Usman Khan would be totally immaterial since cause of action has accrued to answering opposite party due to the accident which took place on 12.09.2016. Learned counsel has also adverted to the fact that by means of impugned order, the petitioner-insurance company has been put to double jeopardy since penalty amounting to Rs.1,000/- per week as provided in the agreement has been imposed along with interest at the rate of 9% per annum, which could not have been done since award of interest is beyond the stipulations indicated in agreement dated 14.09.2016.

7. Learned counsel appearing on behalf of opposite parties 3 to 6 has refuted the submissions advanced by learned counsel for petitioner with the submission that a perusal of agreement dated 14.09.2016 makes it evident that claim for compensation in terms of aforesaid insurance scheme arises from the date of death of an insured and not from the date of accident and as such cause of action will accrue from the date of death and not from the date of accident as is being submitted by learned counsel for petitioner. Learned counsel has also adverted to Part-I of the agreement dated 14.09.2016 to indicate the specific provision with regard to same.

8. With regard to double jeopardy, it is submitted that agreement dated 14.09.2016 itself stipulates grant of penalty in case compensation is not made upon claim being made under the scheme. It is submitted that the grant of penalty is an issue separate from grant of interest which is awarded in terms of the Interest Act, 1978.

9. Upon consideration of submissions advanced by learned counsel for the parties and perusal of material on record, the two questions requiring adjudication, are as under:-

(i) Whether cause of action would accrue to a claimant under the scheme from the date of accident or from the date of death as a result of accident?

(ii) Whether award of interest in addition to penalty indicated in the agreement amounts to double jeopardy?

Question No.(i) : **Whether cause of action would accrue to a claimant under the scheme from the date of accident or from the date of death as a result of accident?**

10. With regard to question no.(i), a perusal of Part-I of the agreement dated 14.09.2016 makes it evident that in case of death arising out of an accident pertaining to Head/Bread Earner of a family during course of insurance policy/scheme, the Insurance Company is required to compensate the nominee/legal heirs of deceased to the tune of Rs.5,00,000/-. The relevant provision reads as under:-

"**दुर्घटना में मृत्यु–** यदि दुर्घटना के कारण परिवार के मुखिया/रोटी अर्जक की मृत्यु बीमा अवधि के दौरान हो जाती है तो बीमा कम्पनी सम्पूर्ण बीमित राशि रू0 5.00 लाख का भुगतान नामिनी/कानूनी वारिश को करेगी।"

11. Evidently, although as per aforesaid clause, accident from which death has occasioned is an essential ingredient for fulfilling the claim of compensation as per insurance scheme, a reading of the said provision makes it evident that cause of action for filing a claim for compensation arises only in case of death due to a previous accident. The stipulation also

indicates that the death should have occasioned during the course of insurance scheme. As such, a bare reading of the provision makes it evident that claim for compensation, which is the basic cause of action, arises only upon death of the insured. As such the issue of accident which precedes death of the insured is only a condition precedent for the purposes of entertainability of the claim and it is only death of insured arising from an accident which gives rise to cause of action to nominee/legal heir of the insured.

12. In the present case, it is apparent that although accident has occurred prior to enforcement of the scheme on 14.09.2016 but the death of the insured, late Usman Khan has occurred on 17.09.2016 which was after enforcement of the insurance scheme on 14.09.2016. Clearly, the nominees/legal heirs of the deceased were entitled to maintain a claim in accordance with the scheme since death has occasioned during the subsistence of agreement dated 14.09.2016. To that effect, the claim of opposite parties 3 to 6 was wrongly rejected by the Insurance Company.

13. Question no.(i) is answered accordingly in favour of claimant.

Question No.(ii) : **Whether award of interest in addition to penalty indicated in the agreement amounts to double jeopardy?**

14. With regard to the second question, it transpires that agreement dated 14.09.2016 provides for imposition of penalty upon the Insurance Company in case payment is not made to claimant in accordance with the terms and conditions of the agreement. It appears that earlier an amount of Rs.2500/- per week had been imposed as penalty, which was subsequently reduced to Rs.1,000/- per week.

15. Apparently, the imposition of penalty upon the Insurance Company is a measure not only of encouragement to adhere to the terms and conditions of the agreement but is also in the nature of cost imposed upon the Insurance Company in case the claim is wrongly repudiated and compensation is not made to the nominee/legal heir of the insured.

16. By means of impugned order, while the Permanent Lok Adalat has imposed the aforesaid penalty, at the same time interest at the rate of 9% has also been imposed upon the Insurance Company.

17. It is trite that when claims are made and are to be decided in terms of a contract, it is only the conditions of contract which are required to be adhered to. The court concerned cannot on its own volition impose a condition which is not contemplated in the agreement. In the present case, it appears that a steep penalty of Rs.1000/- per week has been imposed upon insurance Company for repudiating or not providing compensation in terms of the insurance scheme. Award of penalty by Permanent Lok Adalat as such appears to be in conformity with agreement dated 14.09.2016. However, so far as award of interest at the rate of 9 percent per annum is concerned, the Permanent Lok Adalat in its impugned order does not indicate any provision or condition of agreement under which interest has been awarded over and above penalty imposed in terms of the agreement nor does the agreement contain any clause regarding payment of interest to claimant over and above the penalty clause. As such, in the considered opinion of this

Court, the permanent Lok Adalat travelled beyond the conditions of agreement dated 14.09.2016 in granting interest while ignoring the fact that a steep penalty of Rs.1,000/- per week has already been imposed and is payable by the Insurance Company in terms of the agreement.

18. As has been indicated herein above that when claim is made in terms of mutually agreed and binding contract, it is only the conditions of contract which are adhered to without imposition of extraneous considerations. As such, once a penalty is clearly indicated under the contract for a party to fulfill in case of breach of contract, it is only that penalty which can be imposed and in the considered opinion of this Court, no further penalty or costs can be imposed which is beyond the terms and conditions of such contract.

19. In the present case, it is apparent that neither any statutory provision has been indicated for grant of interest nor does agreement dated 14.09.2016 stipulate grant of any interest. As such, grant of interest over and above the penalty clearly amounts not only to Double Jeopardy but unjust enrichment and is unsustainable.

20. In view of aforesaid, Question no.(ii) is answered in favour of petitioner-Insurance Company.

21. In terms of aforesaid, order dated 27.12.2019 passed in PLA Case No.15 of 2018(Shameena Khatoon & others v. The Oriental Insurance Co. Ltd. & others) is set aside only to the extent of grant of interest on the claimed amount.

22. The petition as such is **partly allowed** in terms of aforesaid. Parties shall bear their own costs.

(2023) 4 ILRA 130
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 39133 of 2022

Rishipal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vinod Kumar Pandey, Sri Piyush Kumar Shukla

Counsel for the Opposite Parties:
G.A., Sri Sanjeet Kumar Mishra

(A) Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 307, 323, 504, 506 & 452 - Code of Criminal Procedure, 1973 - Section 156 (3) - For offense under Section 307 IPC - Not necessary for the accused to have injuries - criminal state of mind, motive and attempt of accused must be seen - to determine if the accused has an intention to commit murder - Injury caused by which weapon and on which part of the body can also be used to determine - whether the accused has an intention to commit murder.(Para -7)

Charge sheet and cognizance order under challenge - Injuries not of a serious nature - applicant had no intention of killing his own brother - applicant/accused filed a civil suit - pre-existing enmity between two parties - applicant also filed a F.I.R. against complainant under Section 156 (3) of Cr.P.C. - allegation - accused kept committing crimes against him - to grab his land - just because he is old and has only daughters. **(Para -2,7,17)**

HELD:-Facts recorded in F.I.R. corroborated by oral , documentary and medical records. Even if the complainant and his relatives wanted to

grab the property of the applicant/accused, such intention does not give the applicant/accused the right to cause the incident. **(Para - 14)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

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

1. प्रार्थी के विद्वान अधिवक्ता श्री विनोद कुमार पाण्डेय, विपक्षी संख्या-2 के विद्वान अधिवक्ता श्री संजीत कुमार मिश्रा तथा विद्वान अपर शासकीय अधिवक्ता श्री पंकज कुमार त्रिपाठी को ध्यानपूर्वक सुना गया तथा पत्रावली का अवलोकन किया गया।

2. प्रार्थी अभियुक्त ऋषिपाल ने धारा 482 दं०प्र०सं० के अंतर्गत सत्र वाद संख्या 1149 वर्ष 2021, अपराध संख्या 117 वर्ष 2021, अंतर्गत धारा 307 एवं 452 भा०दं०सं०, थाना नागल, जनपद सहारनपुर के बाद में प्रस्तुत चार्जशीट एवं संज्ञान आदेश दिनांकित 07.09.2021 को खण्डित करने के लिए यह प्रार्थनापत्र प्रस्तुत किया है। उक्त सत्र बाद अपर सत्र न्यायाधीश देवबंद जनपद सहारनपुर के न्यायालय में लंबित है।

1. संक्षेप में प्रार्थी ने यह आधार लिया है कि दिनांक 06.06.2021 को कथित घटित घटना के संबंध में एक दिन विलंब से दिनांक 07.06.2021 को प्रथम सूचना रिपोर्ट बिलंब का स्पष्टीकरण दिये बगैर पंजीकृत कराया गया है।

2. चोटें धर्मस्थल पर पायी गई, परन्तु वह गम्भीर प्रकृति की नहीं है।

3. प्रार्थी का अपने सगे भाई को जान से मारने का कोई आशय नहीं था।

4. विवेचक ने पर्याप्त साक्ष्य एकत्रित किये बगैर तथा साक्षीगण के बयान पर विचार किये बगैर अनुचित विवेचना करते हुए अवैध आरोपपत्र प्रस्तुत किया है।

5. प्रार्थी 77 वर्षीय वृद्ध व्यक्ति है, जो वृद्धावस्था की बीमारियों से ग्रस्त है तथा उसकी चिकित्सा चल रही है।

6. प्रार्थी ने भी शिकायतकर्ता के विरुद्ध प्रथम सूचना रिपोर्ट धारा 156 (3) दं०प्र०सं० के अंतर्गत अपराध संख्या 92 वर्ष 2022, अंतर्गत धारा 147, 148, 504, 506, 307 एवं 323 भा०दं०स० के अंतर्गत संबंधित थाने में दर्ज कराया है कि वृद्धावस्था एवं मात्र लड़कियाँ होने के कारण उसकी जमीन को हड़पने के लिए अभियुक्तगण उसके प्रति ऐसा अपराध करते रहते हैं।

7. प्रार्थी को प्रश्नगत अपराध करने की कोई भूमिका प्रदान नहीं की गई है।

8. प्रार्थी की कोई पूर्व आपराधिक इतिहास नहीं है।

9. सम्पूर्ण साक्ष्य के आधार पर धारा 307 एवं 452 भा०दं०सं० का अपराध उसके विरुद्ध नहीं बनता।

3. यह निवेदन किया गया कि उपरोक्त आधारों पर यह प्रार्थनापत्र स्वीकार कर प्रश्नगत आरोपपत्र दिनांकित 12.08.2021 खण्डित किया जाए।

4. पत्रावली पर उपलब्ध साक्ष्य से यह निष्कर्ष निकलता है कि घटना दिनांक 06.06.2021 के 3.50 बजे अपराह्न की कही जाती है। जिसके संबंध में दूसरे दिन अर्थात् दिनांक 07.06.2021 को 03.37 बजे अपराह्न प्रथम सूचना रिपोर्ट नामित अभियुक्त के विरुद्ध लाठी में जड़े हुए गड़ासे से अपने भाई चुटैल वादी के पिता राजपाल त्यागी के शरीर के मर्मस्थल पर हत्या करने के आशय से चोटें कारित करने के संबंध में पंजीकृत कराया गया।

5. प्रथम सूचना रिपोर्ट से यह ज्ञात होता है कि शिकायतकर्ता ने सर्वप्रथम अपने पिता की जान बचाना आवश्यक समझा यद्यपि उसकी भतीजी खुशी ने घटना की सूचना घटना के तत्काल उपरान्त 112 नंबर पर पुलिस को दे दिया था तथा शिकायतकर्ता अपने दो अन्य मित्रों के साथ चुटैल को गाड़ी में डालकर थाने में ले गये तथा वहाँ से प्राथमिक स्वास्थ्य केंद्र नागल ले गये तथा प्राथमिक उपचार करा कर सहारनपुर सरकारी अस्पताल ले गये तथा सहारनपुर के सरकारी अस्पताल के चिकित्सकों ने चुटैल की गम्भीर हालत को देखते हुए उन्हें अन्य उच्चीकृत चिकित्सा केंद्र में ले जाने की सलाह दी, तब शिकायतकर्ता चुटैल को मैक्स अस्पताल देहरादून ले गया, वहाँ भी चिकित्सकों ने चुटैल की गम्भीर स्थिति

को देखते हुए डिस्चार्ज कर दिया तथा किसी अन्य बड़े अस्पताल में ले जाने के लिए कहा तब वह चुटैल को मेरठ कैलाशी अस्पताल मेरठ बाईपास पर ले गये जहाँ चुटेल की चिकित्सा चल रही है एवं तदुपरान्त वह प्रथम सूचना रिपोर्ट दर्ज कराने थाने आ सका।

6. उक्त से यह स्पष्ट है कि घटना के उपरान्त जिस प्रकार प्रार्थी अपने पिता चुटैल की चिकित्सा में व्यस्त रहा तथा फुर्सत पाते ही तत्काल प्रथम सूचना रिपोर्ट दूसरे दिन पंजीकृत कराया तो इसमें कोई अनुचित विलंब नहीं है, जो भी विलंब हुआ है, तत्संबंधी परिस्थितियों का समुचित स्पष्टीकरण स्वयं प्रथम सूचना रिपोर्ट में ही वर्णित है। उक्त के विरुद्ध प्रार्थी द्वारा कोई अन्य तथ्य इंगित अथवा प्रस्तुत नहीं किया जा सका।

7. प्रार्थी की तरफ से यह तर्क प्रस्तुत किया गया कि यद्यपि चोटें शरीर के मर्मस्थल पर हैं। परन्तु वह गम्भीर प्रकृति की नहीं हैं। इस न्यायालय के मतानुसार धारा 307 भा०दं०सं० का अपराध कारित करने के लिए चोटें भी होना आवश्यक नहीं हैं। मात्र अभियुक्त की आपराधिक मनःस्थिति, हेतुक एवं प्रयास देखा जाना चाहिए तथा यदि चोटें आयी हैं तो वह किस हथियार से आयी हैं तथा वह शरीर के किस भाग पर हैं, इसको देखते हुए भी यह अवधारित किया जा सकता है कि क्या अभियुक्त का हत्या करने का आशय एवं ज्ञान था। अथवा नहीं।

8. इस संबंध में पत्रावली पर उपलब्ध चिकित्सकीय साक्ष्य से यह स्पष्ट होता है कि चुटैल के शरीर के मर्मस्थल पर जैसे दाहिनी भौंह पर दाहिने कान के पिना पर तथा गर्दन पर धारदार हथियार से कटे हुए घाव (Incised Wound) पाये गए। चिकित्सक के अनुसार ऐसी चोटें धारदार हथियार से कारित की गई थी तथा अभियोजन के अनुसार प्रार्थी /अभियुक्त ने लाठी में लगे हुए गड़ासे जैसे धारदार हथियार से चुटैल को चोटें पहुँचाई थीं। यह भी अंकित है कि सभी चोटें ताजा तथा गम्भीर प्रकृति की थी। इस प्रकार यह सिद्ध होता है कि प्रार्थनापत्र के साथ संलग्न शपथपत्र में प्रार्थी द्वारा यह झूठा तथ्य वर्णित है कि चोटें गम्भीर प्रकृति की नहीं हैं। उस दशा में और भी महत्वपूर्ण हैं, जबकि अत्याधुनिक चिकित्सा प्रदान किये जाने के उपरान्त भी चुटैल 16 तारीख को 9 दिन के उपरान्त अस्पताल से डिस्चार्ज हो सका। इससे प्रथमदृष्टया यह निष्कर्ष निकलता है कि यदि चुटैल को तत्काल अच्छी चिकित्सा न दी गई होती तो उसकी मृत्यु संभावित थी।

9. प्रार्थी की तरफ से यह तर्क प्रस्तुत किया गया कि चुटैल उसका सगा छोटा भाई है तथा प्रार्थी अभियुक्त का उसकी हत्या कारित करने का कोई आशय नहीं था। इस संबंध में पत्रावली पर उपलब्ध साक्ष्य से यह निष्कर्ष निकलता है कि चूंकि गड़ासे जैसे धारदार हथियार से चुटैल के मर्मस्थल पर चोटें पहुंचाई गई थीं, अतः यह निष्कर्ष निकाला जा सकता है कि प्रार्थी / अभियुक्त का चुटैल की हत्या करने का आपराधिक आशय विद्यमानः था।

10. प्रार्थी/ अभियुक्त ने विवेचक पर यह आरोप लगाया है कि उसने पर्याप्त साक्ष्य एकत्रित किये बगैर तथा साक्षीगण के बंधान का उचित विश्लेषण किये बगैर अवैध तरीके से विवेचना करते हुए गलत आरोपपत्र प्रस्तुत किया है। इस संबंध में विपक्षी की तरफ से यह तर्क प्रस्तुत किया गया कि प्रथम सूचना रिपोर्ट में प्रार्थी /अभियुक्त नामित व्यक्ति है, वह वादी का सगा बड़ा ताऊ तथा चुटैल का सगा बड़ा भाई है तथा घटना दिन की है। अतः उसके न पहचानने का कोई प्रश्न उत्पन्न नहीं होता। यह भी तर्क प्रस्तुत किया गया कि अभियोजन केस एवं कथानक तथा प्रथम सूचना रिपोर्ट के तथ्यों का समर्थन साक्षीगण ने अपने बयान में किया है तथा उनका समर्थन चिकित्सकीय साक्ष्य से भी होता है, अतः यह नहीं कहा जा सकता कि विवेचक ने बिना पर्याप्त साक्ष्य एकत्रित किये तथा साक्षीगण के बयान को ध्यान में रखे बगैर गलत तरीके से विवेचना कर गलत आरोपपत्र प्रस्तुत किया है। यह न्यायालय विपक्षी के उक्त तर्क से पूर्णतया सहमत है।

11. प्रार्थी/ अभियुक्त की तरफ से यह तर्क लिया गया कि वह 77 वर्षीय वृद्ध व्यक्ति है तथा वृद्धावस्थाजनित रोगों से ग्रस्त है तथा उसकी चिकित्सा चल रही है। इस न्यायालय के मतानुसार किसी अभियुक्त का वृद्ध होना तथा वृद्धावस्थाजनित रोगों से ग्रस्त होना धारा 482] दं०प्र०सं० का प्रार्थनापत्र स्वीकार कर किसी आरोपपत्र एवं संज्ञान आदेश को निरस्त करने का कोई आधार नहीं है।

12. प्रार्थी/अभियुक्त ने यह कथन किया कि उसने भी शिकायतकर्ता एवं उसके परिजनों के विरुद्ध धारा 152 (3) दं०प्र०सं० के अंतर्गत अपराध संख्या 92 वर्ष 2022 में संबंधित थाने में धारा 147, 148, 504, 506, 307 एवं 323 भा०दं०सं० का प्रथम सूचना रिपोर्ट दर्ज कराया है। पत्रावली पर उक्त प्रथम सूचना रिपोर्ट के चिक एफ. आई. आर. की प्रतिलिपि को प्रस्तुत किया गया है, जिसके अनुसार घटना दिनांक 19.03.2022 के प्रातः 08.30 बजे की है तथा उसके संबंध में दिनांक 02.05.2022 को प्रथम सूचना रिपोर्ट दर्ज करायी गई है। प्रार्थी जहाँ 1 दिन विलंब से दर्ज प्रश्नगत बाद के प्रथम सूचना रिपोर्ट को विलंबित होना। कहता है वहीं इसका कोई स्पष्टीकरण नहीं देता कि क्योंकर दिनांक 19.03.2022 की घटना के संबंध में पुलिस द्वारा प्रथम सूचना रिपोर्ट दर्ज नहीं किया गया तथा क्यों उसे दिनांक 02.05.2022 को धारा 156 (3) दं०प्र०सं० के अंतर्गत प्रथम सूचना रिपोर्ट दर्ज करना पड़ा। यह भी महत्वपूर्ण है कि उसके प्रथम सूचना रिपोर्ट के घटना की तिथि दिनांक 19.03.2022 की कही जाती है जबकि प्रश्नगत मामले की घटना दिनांक 06.05.2021 की है, अतः इस कथित पश्चातवर्ती घटना के आधार पर वर्तमान मामले के आरोपपत्र एवं संज्ञान लिये जाने के आदेश को खण्डित करने का कोई आधार एवं औचित्य उत्पन्न नहीं होला।

13. प्रार्थी यह तर्क प्रस्तुत करता है कि उसका कोई पुत्र नहीं है तथा मात्र दो विवाहित पुत्रियाँ है, अतः परिवादी एवं उसके परिजन उसकी संपत्ति को हड़पना चाहते हैं, अतः उन्हें फर्जी मुकदमे में फंसा दिया है।

14. इस संबंध में पूर्व की विवेचना से यह पूर्णतया स्पष्ट है कि ऐसा नहीं है। त्वरित प्रथम सूचना रिपोर्ट में दर्ज तथ्यों की पुष्टि मौखिक अभिलेखीय एवं चिकित्सकीय प्रपत्रों से हुई है। घटना का जो भी कोई कारण हो, यदि शिकायतकर्ता एवं उसके परिजन प्रार्थी/ अभियुक्त की संपत्ति हड़पना चाह रहे थे तथा उनका यदि ऐसा आशय रहा भी हो तो ऐसा आशय प्रार्थी/ अभियुक्त को आरोपित घटना कारित करने का अधिकार प्रदान नहीं करता।

15. प्रार्थी ने यह तर्क लिया है कि उसको घटना कारित करने में भूमिका प्रदान नहीं की गई है। जो सर्वथा गलत आधार है। प्रथम सूचना रिपोर्ट से लेकर सभी मौखिक एवं अभिलेखीय साक्ष्य में इस घटना को कारित करने की एक मात्र भूमिका एवं उत्तरदायी व्यक्ति प्रार्थी को माना गया है। ऐसी दशा में इस प्रकार का निराधार तर्क लेने का कोई औचित्य नहीं है।

16. प्रार्थी/ अभियुक्त ने यह आधार लिया है कि वह शांतिप्रिय एवं कानून का पालन करने वाला व्यक्ति है, जिसका इस मामले के अतिरिक्त अन्य कोई आपराधिक इतिहास नहीं है। इस संबंध में विपक्षी की तरफ से स्वयं प्रार्थी / अभियुक्त दर्ज कराये गये प्रथम सूचना रिपोर्ट दिनांकित 02.05.2022 के तथ्यों पर बल दिया गया, जिसमें प्रार्थी / अभियुक्त ने स्वयं यह स्वीकार किया है कि वर्ष 2012 में उसके छोटे भाई राजपाल व भतीजे मनोज शिकायतकर्ता ने उसके हाथ की हड्डी तोड़ दिया था तथा उसे झूठे मुकदमे में जेल भिजवा दिया था। इससे स्पष्ट है कि वर्ष 2012 में भी प्रार्थी/ अभियुक्त के विरुद्ध कोई प्रथम सूचना रिपोर्ट दर्ज की गई। होगी अथवा परिवाद दर्ज कराया गया होगा, जिसमें पारित आदेश के अनुपालन में उसे जेल भेजा गया था।

17. प्रार्थी/ अभियुक्त ने अपने स्वयं दर्ज कराये गये प्रथम सूचना रिपोर्ट में यह स्वीकार किया है। कि उसने दीवानी का मुकदमा दर्ज कराया है, जिसके कारण वादी पक्ष उससे तथा उसकी लड़कियों से रंजिश रखते हैं। उक्त से इतना स्पष्ट है कि उभयपक्षों में पूर्व से दुश्मनी विद्यमान है, जो घटना को कारित करने का कारण भी हो सकता है तथा झूठा फंसाये जाने का भी, परन्तु इस संबंध में विचारण न्यायालय ही निष्कर्ष दे सकता है।

18. इस प्रकार उपरोक्त विवेचना के आधार पर यह निष्कर्ष निकलता है कि इस प्रार्थनापत्र अंतर्गत धारा 482 दं०प्र०सं० में लिये गये कोई भी आधार स्थापित नहीं होता तथा अनायास एवं निराधार तरीके से यह प्रार्थनापत्र प्रस्तुत किया गया है जिसमें धारा 482 दं०प्र०सं० के अंतर्गत इस न्यायालय को हस्तक्षेप करने का कोई युक्तियुक्त कारण, आधार एवं औचित्य प्रतीत नहीं होता। यह प्रार्थनापत्र अत्यंत गुणहीन है तथा उपरोक्तानुसार खण्डित किये जाने योग्य है।

आदेश

19. यह प्रार्थनापत्र अंतर्गत धारा 482 दं०प्र०सं० उपरोक्तानुसार खण्डित किया जाता है।

(2023) 4 ILRA 134
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Civil Revision No. 7 of 2023

C/M Waqf Masjid & Anr. ...Revisionists
Versus
Waqf Tribunal, U.P. & Ors. ...Opposite Parties

Counsel for the Revisionists:
Mohd. Shadab Khan

Counsel for the Opposite Parties:
Syed Aftab Ahmad

A. Civil Law – Waqf Act, 1995 – Sections 3(k), 67(6) & 83(9) – Proceeding before the Waqf Tribunal – Who can sue – Plaintiff was removed from the post of Mutawalli – Effect – Person interested – Defined – Held, a person interested in a waqf is any person who is entitled to receive any pecuniary or other benefits from the waqf – Provision is inclusive of any person who has a right to offer prayer or perform any religious rite in a religious place as defined thereunder – Held further, despite the fact that revisionist was removed from his post as Mutawalli/Secretary of the managing committee of waqf, the application filed by him under Section 83(2) of the Act, 1995 in his individual capacity was clearly maintainable not only as a person interested in a waqf but also as a person aggrieved by order. (Para 10 and 18)

Revision allowed. (E-1)

List of Cases cited:

1. P. Kasilingam & ors. Vs P.S.G. College of Technology & ors.; 1995 Supp (2) SCC 348

2. N.D.P. Namboodripad Vs U.O.I.& ors.; (2007) 4 SCC 502

3. Ayaaubkhan Noorkhan Pathan Vs St. of Mah. & ors.; (2013) 4 SCC 465

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

1. Heard Mr. Mohd Shadab Khan learned counsel for revisionist and Mr. Syed Aftab Aftab Ahmad learned counsel for opposite parties 4 and 5. The opposite parties 1,2 and 3 being merely proforma in nature, notices are dispensed with.

2. Revision under Section 83(9) of the Waqf Act 1995 has been filed against order dated 26th December, 2022 passed in Case No. 37 of 2022 whereby the suit proceedings have been dismissed on the ground that it has become infructuous.

3. Learned counsel for revisionist submits that the aforesaid case had been filed before the Waqf Tribunal under Section 83(2) of the Act of 1995 against order dated 16th February, 2022 whereby the opposite party No.4 was inducted as a Member of the Committee of Management. It is submitted that the aforesaid suit was filed by the revisionist in his capacity as Mutawalli/Secretary of the Managing Committee of the Waqf as well as in his individual capacity. It is submitted that by means of impugned order, it has been noticed that subsequent to filing of the suit, the revisionist has been removed from the post of Mutawalli/Secretary by means of order dated 20th September, 2022 in terms of Section 67(6) of the Act, 1995 and therefore the cause of action having come

to an end, the case itself was dismissed as infructuous.

4. Learned counsel for revisionist submits that the Waqf Tribunal has clearly erred in passing the impugned order while ignoring the fact that suit proceedings were maintainable in the individual capacity of revisionist apart from his status as Mutawalli/Secretary of the Committee of Management. He has adverted to Section 83(2), Section 32(2)g) and Section 3(i)(k) of the Waqf Act 1995 to submit that the revisionist would come within definition of not only a person interested but also a person aggrieved by the initial order and these are the aspects which have not been considered by the Tribunal by passing the impugned order.

5. Learned counsel appearing on behalf of opposite party No. 4 and 5 has submitted that it was on the application made by opposite party No.5 that the impugned order has been passed dismissing the case as having become infructuous. It is submitted that there is no error in the impugned order since the case was filed by the revisionist in his capacity as Mutawalli/Secretary of the Managing Committee of the waqf and since during pendency of proceedings, he was removed from the said post, the cause of action at the instance of revisionist came to an end since he lost his locus standi to maintain the suit. It is further submitted that the revisionist does not come within the definition of either any person interested in a waqf or any other person aggrieved by the order made under the Act and therefore the impugned order rejecting the suit as infructuous has been rightly passed.

6. Considering submissions advanced by learned counsel for parties, it is evident that a suit or proceeding can be instituted before a waqf tribunal in terms of Section 83(2) of the Act of 1995 which authorizes any mutawali or person interested in a waqf or any other person aggrieved by an order made under the Act or Rules made thereunder to make an application before the Tribunal within the specified time frame for determination of any dispute, question or other matter relating to waqf.

7. In the present case, admittedly the plaint was filed by revisionist not only in his capacity as Mutawalli/Secretary of the Managing Committee of waqf but also in his individual capacity. The order against which the suit proceedings were instituted is dated 16th February, 2022 pertaining to inclusion of opposite party No.4 as a member of the managing committee of the waqf. It is also admitted that during pendency of proceedings, revisionist was removed from his post of Mutawalli/Secretary of the managing committee of waqf vide order dated 20th September, 2022.

8. For the purposes of maintaining any proceeding before the waqf tribunal in terms of Section 83(2) of the Waqf Act of 1995, a person should either be a mutawalli, a person interested in a waqf or any other person aggrieved by an order made under the Act. Admittedly at the time of filing of proceedings, revisionist was a mutawalli. Question as such requiring adjudication is whether the revisionist would also come within definition of a person interested in a waqf as well as any other person aggrieved by order made under the Act ?

9. For the purposes of determination of aforesaid question, it is necessary to advert to definition of 'a person interested in a

waqf' as defined under Section 3(k) of the Act, 1995 which is as follows:-

"3(k) "person interested in a [wakf]" means any person who is entitled to receive any pecuniary or other benefits from the [wakf]and includes--

(i) any person who has a right to [offer prayer] or to perform any religious rite in a mosque, idgah, imambara, dargah,[khanqah, peerkhana and Karbala], maqbara, graveyard or any other religious institution connected with the [wakf] or to participate in any religious or charitable institution under the [wakf];

(ii) the [wakif] and any descendant of the [wakif] and the mutawalli;"

10. Evidently a person interested in a waqf is any person who is entitled to receive any pecuniary or other benefits from the waqf. The provision is inclusive of any person who has a right to offer prayer or perform any religious rite in a religious place as defined thereunder.

11. It is not denied by learned counsel for opposite party that the revisionist has a right to offer prayers or to perform religious rite in the religious institution for which the waqf has been created but submits that the aforesaid right would be restricted to only those persons who receive any pecuniary or other benefits of the waqf only and as such would exclude the revisionist who after removal from the post of Mutawalli/Secretary of the managing committee of the waqf does not derive any pecuniary or other benefits of the waqf. The aforesaid submission of learned counsel for opposite party No.4 and 5, though attractive at first glance, does not hold any good ground in view of definition clause itself which is an inclusion clause and not an exclusion clause and is therefore required to be seen ejusdem generis with the primary clause whereby a person interested in a waqf has been defined to be any person entitled to receive any pecuniary **or other benefits** from the waqf. Such other benefits have been explained as an inclusionary clause to include a person who has a right to offer prayer or to perform any religious rite in the religious institution concerned. Once it is admitted that petitioner even without holding the post of Mutawalli or Secretary of the managing committee of the waqf has a right to offer prayers or to perform any religious rite in the religious institution of the waqf, the revisionist would come within definition of a person interested in the waqf as defined under Section 3(k) of the Act, 1995.

12. With regard to an inclusionary clause in a statutory provision, Hon'ble Supreme Court in the cases of P. Kasilingam and others versus P.S.G. College of Technology and others reported in 1995 Supp (2) Supreme Court Cases 348 and **N.D.P. Namboodripad versus Union of India and others** reported in **(2007) 4 SCC 502** has held as follows:-

P. Kasilingam and others versus P.S.G. College of Technology and others

"A particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word ' means' indicate that "definition is a hard- and-fast definition and no other meaning can be assigned to the expression that is put down in definition." [See Gough v. Gough, (1891) 2 QB 665; Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court, (1990

(3) SCC 682,717]. The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words 'means and includes', on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

N.D.P. Namboodripad versus Union of India and others

"19. Justice G.P. Singh in his treatise Principles of Statutory Interpretation (10th Edn., 2006), has noticed that where a word defined is declared to "include" such and such, the definition is prima facie extensive, but the word "include" when used while defining a word or expression, may also be construed as equivalent to "mean and include" in which event, it will afford an exhaustive explanation of the meaning which for the purposes of the Act must invariably be attached to the word or expression [vide pp. 173 and 175 referring to and relying on the decisions of this Court in Municipal Council, Raipur v. State of M.P. [(1969) 2 SCC 582 : AIR 1970 SC 1923] , South Gujarat Roofing Tiles Manufacturers Assn. v. State of Gujarat [(1976) 4 SCC 601 : 1977 SCC (L&S) 15 : AIR 1977 SC 90] , Hindustan Aluminium Corpn. v. State of U.P. [(1981) 3 SCC 578 : 1981 SCC (Tax) 280 : AIR 1981 SC 1649] and Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd. [(1987) 1 SCC 424] It is, therefore, evident that the word "includes" can be used in interpretation clauses either generally in order to enlarge the meaning of any word or phrase occurring in the body of a statute, or in the normal standard sense, to mean "comprises" or "consists of" or "means and includes" depending on the context."

13. Upon applicability of aforesaid judgment, it is evident that the inclusionary clause would directly relate to other benefits being derived from the waqf by any person who is entitled to such benefit and would therefore come within definition of a person interested in a waqf.

14. Furthermore under Section 83(2) of the Act 1995, an application for the purposes of determination of any dispute, question or other matter relating to waqf is also maintainable at the behest of 'any other person aggrieved by and order made under this Act or Rules'.

15. Although the definition of person aggrieved has not been provided in the Act of 1995 but the same has been explained in a number of judgments not only of this Court but also of the Hon'ble Supreme Court as laid down in the case of **Ayaaubkhan Noorkhan Pathan versus State of Maharashtra and others** reported in **(2013) 4 SCC 465** in the following manner:-

10. A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must, therefore, necessarily be one whose right or interest has been adversely affected or jeopardised. (Vide Shanti Kumar R. Canji v. Home Insurance Co. of New York [(1974) 2 SCC 387 : AIR 1974 SC 1719] and State of Rajasthan v. Union of India [(1977) 3 SCC 592 : AIR 1977 SC 1361] .

xxx xxxx xxxxx

12. In A. Subash Babu v. State of A.P. [(2011) 7 SCC 616 : (2011) 3 SCC (Civ) 851 : (2011) 3 SCC (Cri) 267 : AIR 2011 SC 3031] , this Court held : (SCC pp. 628-29, para 25)

"25. ... The expression ''aggrieved person' denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which the contravention is alleged, the specific circumstances of the case, the nature and extent of the complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant."

16. The provision of Section 83(2) of the Act 1995 as such clearly includes any other person aggrieved by an order made under this Act or Rules. It is not disputed that the order dated 16th Febraury, 2022 pertaining to inclusion of opposite party No.4 as a member of the committee of management has been passed in terms of Section 32(2)(g) pertaining to powers of the Board to appoint and remove Mutawalli in accordance with provisions of the Act. The aforesaid power is clearly referable to Section 3(i) of the Act of 1995 which defines Mutawalli in the following manner:-

"3(i) "mutawalli" means any person appointed, either verbally or under any deed or instrument by which a 1[waqf] has been created, or by a competent authority, to be the mutawalli of a 1[waqf] and includes any person who is a mutawalli of a 1[waqf] by virtue of any custom or who is a naib-mutawalli, khadim, mujawar, sajjadanashin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act, any person, committee or corporation for the time being managing or administering any 1[waqf] or 1[waqf] property:

Provided that no member of a committee or corporation shall be deemed to be a mutawalli unless such member is an office-bearer of such committee or corporation:

2[Provided further that the mutawalli shall be a citizen of India and shall fulfil such other qualifications as may be prescribed:

Provided also that in case a waqf has specified any qualifications, such qualifications may be provided in the rules as may be made by the State Government;]"

17. Upon consideration of the said provisions of the Act, it is clear that the order dated 16th February, 2022 which was under challenge at the behest of revisionist was passed by the board exercising its power under Section 32(2)(g) of the Act of 1995 read with Section 3(i) of the Act pertaining to any person, committee or corporation for the time being managing or administering any waqf or waqf property.

18. It is therefore evident that despite the fact that revisionist was removed from his post as Mutawalli/Secretary of the managing committee of waqf, the application filed by him under Section 83(2) of the Act, 1995 in his individual capacity was clearly maintainable not only as a person interested in a waqf but also as a person aggrieved by order dated 16th February, 2022 passed in terms of Section 32 of the Act.

19. A perusal of the impugned order reveals the fact that revisionist's application

under Section 83(2) of the Act of 1995 has been dismissed as infructuous only on the ground that he has been removed from the post of Mutawalli/Secretary of the managing committee of waqf. The Tribunal has clearly not adverted to other provisions of Section 83(2) of the Act of 1995 pertaining to whether the suit was maintainable in individual capacity of revisionist either as a person aggrieved or as a person interested in the waqf.

20. The aspect of a person aggrieved by the order dated 16th February, 2022 was also required to be seen in the context of pleading made in the plaint particularly with regard to paragraph 16 thereof in which the revisionist has clearly stated that the person inducted in the management of the waqf have no concern with the management and that their inclusion is also barred under provisions of Section 32(2)(g) of the Waqf Act, 1995. The aforesaid pleadings made by revisionist in his plaint have clearly been ignored by the Tribunal while passing the impugned order.

21. Considering the aforesaid factors, the impugned order dated 26th December, 2022 passed by the Waqf Tribunal in case No. 37 of 2022 being against provisions of Act,1995 is hereby set aside.

22. Consequently the revision succeeds and is allowed. Parties to bear their own cost.

(2023) 4 ILRA 139
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.03.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Civil Revision No. 14 of 2023

Ansar Nawaz Khan ...Revisionist

Versus

Adeel Ahmad & Ors. ...Opposite Parties

Counsel for the Revisionist:
Mohammad Tariq Saeed

Counsel for the Opposite Parties:
Sunil Sharma, Farhan Habib, Ruved Kamal Kidwai, Syed Aftab Ahmad

A. Civil Law – Court Fees Act, 1870 – Sections 7 (iv-A) and (iv-A) Suit for declaration, not for possession – Application of provision – Held, suit for declaratory decree has been filed with consequential relief of only permanent injunction and not for possession. In such circumstances, Court fees would be payable in terms of Section 7(iv)(a) of the Act and not in terms of Section 7(iv-A) of the Act and therefore only a fixed Court fee of Rs. 500/- was payable by the revisionist. The Tribunal has clearly erred in holding ad valorem Court fee being payable. (Para 21)

Revision allowed. (E-1)

List of Cases cited:

1. Basant Kumar Mata Nehliya Vs Chowdhary Ujjair; (2011) 89 ALR 551

2. Dr. Sushil Suri Vs Harish Suri & ors.; 2023(2) ADJ 552 (L.B)

3. Chief Inspector of Stamps Vs Laxmi Narain; AIR 1958 SC 245

4. Suhrid Singh Vs Randhir Singh & ors.; (2010)12 SCC 112

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

1. Heard Mr. Mohammad Tariq Saeed, learned counsel for revisionist, Mr. Sunil Sharma and Mr. Ruved Kamal Kidwai, learned counsel for opposite party no.2 and Mr. Syed Aftab Ahmad, learned counsel for opposite party no.8.

2. In view of order being proposed to be passed, notices to opposite parties no.1, 3, 4, 5, 6 and 7 stand dispensed with.

3. Learned counsel for opposite parties submit that since a question of law is involved, the revision may be decided without objections being filed by the answering opposite parties.

4. Revision under section 83(9) of the Waqf Act 1995 has been filed against order dated 17.11.2022 passed in Case No.38 of 2020 whereby revisionist-plaintiff has been directed to pay ad valorem Court fees on the relief sought in plaint.

5. Learned counsel for revisionist submits that the aforesaid case had been filed by revisionist seeking a relief of permanent injunction against the defendants and their agents from interfering in peaceful possession over suit property. Further relief for a decree of declaration for properties entered in Waqf deed dated 03.12.1924 as Waqf Properties were also sought. It is submitted that for the purposes of payment of Court fees, it was indicated in the plaint that Waqf Property not having marketable value, only for the purposes of payment of Court fee, suit was being valued tentatively at Rs.1000/- and since prayer for permanent injunction had been sought, the maximum prescribed Court fee of Rs.500/- was being paid and on the point of declaration, Rs.200/- was being paid.

6. It is submitted that objection against the valuation and Court fee was filed by defendants whereafter by means of impugned order dated 17.11.2022, the Waqf Tribunal held that in view of relief sought in the suit, ad valorem Court fee was payable which was required to be paid within a period of two weeks.

7. Learned counsel for revisionist submits that while passing impugned order, Tribunal has ignored specific provisions of Section 7 of Court fee Act 1870 inasmuch as, with regard to relief sought, Court fee was payable only in terms of Section 7(iv)(a) excluding the provisions of Section 7(iv)(A) of the aforesaid Act and as such only the fixed Court fees was required to be paid as indicated in plaint and not ad valorem Court fee.

8. Learned counsel has placed reliance on judgment rendered by Division Bench of this Court in the case of ***Basant Kumar Mata Nehliya versus Chowdhary Ujjair*** reported in ***(2011)89 ALR 551*** to buttress his submission.

9. Learned counsel appearing on behalf of opposite parties on the other hand submits that in view of consequential relief being sought by the revisionist-plaintiff, Tribunal has rightly considered the provisions of Section 7 of the Act and has rightly adjudged ad valorem Court fee being payable by plaintiff in view of relief that has been sought in plaint.

10. He has placed reliance on judgment of Coordinate Bench rendered by this Court in the case of ***Dr. Sushil Suri versus Harish Suri and others*** reported in ***2023(2) ADJ 552 (L.B).***

11. Upon consideration of submissions advanced by learned counsel for parties, the question of law requiring adjudication is whether in a suit for declaration with consequential relief for permanent injunction, ad valorem Court fee or fixed Court fee is payable in terms of Section 7(iv) of the Court Fees Act, 1870.

12. For the aforesaid purpose, it is relevant to indicate that in the suit filed by

revisionist, a decree for declaration of suit properties as Waqf Properties in terms of Waqf deed dated 03.12.1924 was sought along with consequential relief of permanent injunction to restrain defendants from interfering in the peaceful possession of plaintiff over the suit property. It is noticeable that no prayer for consequential relief of possession has been sought by the plaintiff.

13. Section 7 of Court Fees Act, 1870, which is relevant for the purposes is as follows:

"Computation of fees payable in certain suits for money. -- The amount of fee payable under this Act in the suit next hereinafter mentioned shall be computed as follows:

For money--(i) In suits for money (including suits for damages or compensation, or arrears of maintenance, or annuities, or of other sums payable periodically)-according to the amount claimed;

For maintenance and annuities-(ii-a) In suits for maintenance and annuities or other sums payable periodically, according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount claimed to be payable for one year:

Provided that in suits for personal maintenance by females and minors, such value shall be deemed to be the amount claimed to be payable for one year;

For reduction or enhancement of maintenance and annuities-(ii-b) In suits for reduction or enhancement of maintenance and annuities or the sums payable periodically according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount sought to be reduced or enhanced for one year,

For other movable property having a market value-(iii) In suits for movable property other than money, where the subject-matter has a market value-according to such value at the date of presenting the plaint;

For declaratory decree with consequential relief (iv) In suits-(a) to obtain a declaratory decree or order, where consequential relief other than reliefs specified in sub-section (iv-A) is prayed; and

For accounts.- (b) For accounts according to the amount at which the relief sought is valued in the plaint or memorandum of appeal:

Provided that in suits falling under Clause (a), where the relief sought is with reference to any immovable property, such amount shall be the value of the consequential relief and if such relief is incapable of valuation, then the value of the immovable property computed in accordance with sub-section (v), (v-A) or (v-B) of this section as the case may be:

[Provided further that in all suits falling under Clause (a), such amount shall in no case be less than Rs. 300]:

[Provided (also), that in suits falling under Clause (b) such amount shall be the approximate sum due to the plaintiff and the said sum shall form the basis for calculating (or determining) the valuation of an appeal from a preliminary decree passed in the suit.

For cancellation or adjudging void instruments and decrees.?(iv-A) In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value:

(1) where the plaintiff or his predecessor-in-title was a party to the decree or the instrument, according to the value of the subject-matter, and

(2) where he or his predecessor-in-title was not a party to the decree or instrument, according to one-fifth of the value of the subject-matter, and such value shall be deemed to be?

if the while decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a part of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates.

Explanation.--'The value of the property' for the purposes of this sub-section, shall be the market-value, which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B) as the case may be.

For easement.-(iv-B) In suits-(a) for a right to some benefit (not herein otherwise provided for) to arise out of land;

For an injunction-(b) to obtain an injunction;

To establish an adoption- (c) to establish an adoption or to obtain a declaration that an alleged adoption is valid;

To set aside an adoption-(d) to set aside an adoption or to obtain a declaration that an alleged adoption in invalid or never, in fact, took place;

To set aside an award other than awards mentioned in section 8--

(e) to set aside an award not being an award mentioned in section 8; according to the amount at which the relief sought is valued in the plaint;

[Provided that such amount shall not be less than one-fifth of the market value of the property involved in or effected by the relief sought or Rs. 200 whichever is greater:

Provided further that in the case of suits falling under Clauses (a) and (b) the amount of Court fee leviable shall in no case exceed Rs. 500]

Explanation 1.--When the relief sought is with reference to any immovable property the market-value of such property shall be deemed to be the value computed in accordance with sub-section (v) and (v-A) or (v-B) of this section, as the case may be.

Explanation 2.--In the case of suits?

(i) falling under Clauses (a) and (b), the property which is affected by the relief sought, and where properties of both the plaintiff and defendant are affect, the property of the plaintiff so affected;

(ii) falling under Clauses (c) and (d), the property to which title by succession or otherwise may be delivered or affected by the alleged adoption; and

(iii) falling under Clause (e), the property which forms the subject-matter of the award;

shall be be deemed to be the property involved in or affected by the relief sought within the meaning of the proviso to this sub-section."

14. From a perusal of aforesaid provision, it is evident that computation of Court fee payable in certain suits particularly with regard to declaratory decree with consequential relief is indicated in Section 7(iv)(a) whereunder provisions of sub-section(iv-A) is an exception. The proviso to aforesaid provisions indicates that in cases of suits falling under Clause (a) where relief sought is with reference to

any immoveable property, such amount shall be the value of consequential relief and if such relief is incapable of valuation, then the value of immoveable property is to be computed in accordance with Sub-Section (v-A) or (v-B) of the Section.

15. The provisions regarding cancellation or adjudging void instruments and decrees has been indicated in Section 7(iv-A) of the Act, which has been exempted for consideration for purposes of Court fees pertaining to Section 7(iv)(a).

16. Proviso to section 7(iv-B)(e) provides that in cases of suits following under clauses (a) and (b), the amount of Court fee leviable shall in no case exceed Rs.500/-. Section 7 (iv-B) provides also that with regard to consequential relief of injunction, the amount of Court fee leviable in no case shall exceed Rs.300/-.

17. The aspect of matter with regard to Court fees payable for the purposes of relief sought in a plaint for declaration with consequential relief of permanent injunction has been considered by Division Bench of this Court in the case of ***Basant Kumar Mata Nehliya*** (*supra*) in the following manner:-

"6. A plain reading of relevant portion reproduced (supra) shows that so far as the injunction is concerned, Court fee shall not exceed Rs. 500/-. Similarly, in case a suit is filed to obtain a declaratory decree or order, where consequential relief other than the relief specified in sub-section (iv-A) is prayed, then for the occupant of the property, the Court fee shall be paid to the amount on which relief sought is valued in the plaint or memorandum of appeal. However, in case, the suit is filed for cancellation or adjudging void instrument and decrees, then Court fee shall be assessed on the face of market value of the property keeping in view the explanation given in the section.

7. It is settled law that it is for the plaintiff to pay Court fees in terms of the relief sought in the plaint and ordinarily such valuation for the purpose of Court fee and jurisdiction ordinarily has to be accepted vide S. Rm. Ar. S. Sp. Sathappa Chettiar v. S. Rm. Ar. Rm. Ramanathan Chettiar [AIR 1958 SC 245.],Tara Devi v. Sri Thakur Radha Krishna Maharaj through Sebaits Chandeshwar Prasad and Meshwar Prasad[(1987) 4 SCC 69.].

10. In the present case, the consequential relief is of injunction for which the proviso to section (iv-B) provides that the amount of Court fee leviable shall in no case exceed Rs. 300/-. To put in other words, in case the plaintiff is in possession of the property and files declaratory suit with prayer for injunction, then the Court fee leviable shall not exceed Rs. 500/-.

12.The aforesaid proposition also revealed that from the combined reading of section 7 (iv-A) or section 7 (iv-B), the legislature to their wisdom while making provision for valuation of declaratory decree with consequential relief under the proviso of section 7 (iv-a) has consciously excluded section 7 (iv-A) which provides imposition of Court fee with regard to the suit for cancellation or adjudging void instrument or decree for money or other property having market value, where the Court fee shall be assessed on the basis of market value of such property. In the present case, so far as relief is concerned, plaintiff has not made any prayer for cancellation or setting aside of any document, deed or revenue record or sought the delivery of possession. The proviso of section 7 (iv-B) has not been

dealt with in the cases referred relied upon by the parties Counsel."

18. Paragraph 6 of the aforesaid judgment clearly indicates the fact that in a suit filed to obtain declaratory decree or order where consequential relief other than relief specified in sub-section (iv-A) is prayed for with relief for permanent injunction, then the Court fees is to be assessed as per the valuation indicated in the plaint. As such, the Division Bench has come to a conclusion that in such cases that possession of property is not sought as a consequential relief, the declaratory suit filed with prayer for injunction, Court fee leviable shall not exceed Rs.500/-.

19. The Division Bench in terms has placed reliance on Full Bench of this Court in the case of ***Chief Inspector of Stamps versus Laxmi Narain*** reported in ***AIR 1958 SC 245*** in the following manner:

"11. The Full Bench has been relied upon by both sides in Chief Inspector of Stamps v. Laxmi Narain [1970 AIR All 488.] , in which identical situation has been dealt with. Para 22 of the judgment is reproduced as under:

"In suit No. 12 of 1960, the reliefs prayed for were a declaration that the first plaintiff was the Mahant of the Math and the Sarbarakar of the deity and the properties of the Math and an injunction restraining the defendants from interfering with the possession of the first plaintiff over the properties as Mahant and Sarbarakar. The relief of injunction flowed directly from the right which the plaintiff desired to be declared and is a consequential relief. This suit is also, therefore, covered by sub-section (iv)(a)."

20. The aforesaid aspect has also been considered by Hon'ble the Supreme Court in the case of ***Suhrid Singh v. Randhir Singh and others*** reported in ***(2010)12 SCC 112*** in the following terms:

"7.Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently A wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by A is invalid/void and non est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and Court fee is also different. If A, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem Court fee on the consideration stated in the sale deed. If B, who is a non- executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed Court fee of Rs. 19.50 under Article 17(iii) of the Second Schedule of the Act. But if B, a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem Court fee as provided under Section 7(iv)(c) of the Act.

8. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the Court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7."

21. Upon applicability of aforesaid judgments in the present facts and circumstances of the case, it is evident that suit for declaratory decree has been filed with consequential relief of only permanent injunction and not for possession. In such circumstances, Court fees would be payable in terms of Section 7(iv-a) of the Act and not in terms of Section 7(iv-A) of the Act and therefore only a fixed Court fee of Rs.500/- was payable by the revisionist. The Tribunal has clearly erred in holding ad valorem Court fee being payable by the revisionist. It is also a relevant factor that it can not be assumed that a relief of possession is to be sought for by the plaintiff particularly when no such express relief has been sought in the plaint. The aforesaid judgments clearly indicate that Court fee is payable only as per relief sought in a plaint and not for what it ought to have prayed for.

22. Learned counsel for opposite parties has placed reliance on judgment rendered in the case of ***Dr. Sushil Suri*** (supra) but upon a perusal of same, it is evident that nothing contrary has been laid down in the aforesaid judgment, which in itself is based on judgment rendered by Supreme Court in the case of ***Suhrid Singh*** (supra) whereby also it has been held that ad valorem Court fees in such matter is not paid.

23. Considering aforesaid facts and the aforesaid judgments, it is apparent that the impugned order dated 17.11.2022 passed by the Waqf Tribunal in case no.38 of 2020; Ansar Nawaz Khan versus Tashkeel Ahmad & others is against the propositions of law and is therefore set aside.

24. Consequently, revision succeeds and is ***allowed***. Parties to bear their own costs.

25. Learned counsel for answering opposite parties submits that even otherwise the suit was not maintainable in view of the fact that the plaintiff has not disclosed his locus standi as a Mutwali to maintain the suit and the value of property has not been disclosed.

26. With regard to aforesaid submissions, it is apparent that issue with regard to maintainability of suit is not the subject matter of the present proceedings and for which purpose opposite party as defendant have a right to file objections before the Tribunal concerned.

(2023) 4 ILRA 145
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Civil Revision No. 104 of 2001

Dev Raj ...Defendant-Applicant-Revisionist
Versus
Smt. Rukmani Devi ...Plaintiff-Respondent

Counsel for the Revisionist:
Sri Rama Goel, Sri Rajesh Tandon

Counsel for the Plaintiff-Respondent:
Sri S.K. Jauhari, Sri Kshitij Shailendra, Sri S.K. Joshi

A. Tenancy Law – UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – Section 2(2), Proviso – Eviction suit – Applicability of the Act – Map of house was sanctioned on 19.04.1984 – Presumption of construction – Date of sanctioning the map, how far relevant – Held, as per the relevant proviso enumerated in Section 2 where construction of a building is completed on or after April 26, 1985 then the reference in this section to the period of 10 years shall be deemed to be a reference to a period of 40 years from the date on which its construction is completed – House in suit is not governed by UP Act No. 13 of 1972. (Para 19 and 20)

B. Evidence Act, 1872 – S. 114(g) – Burden of proof – Presumption – Non-production of public document – Effect – Rate of rent fixed by the Government was very much available in Collectorate which could be obtained by the plaintiff land-lord to prove the averments of the plaint – Held, It is omission on the part of the plaintiff-land-lord – A presumption arises against the plaintiff that if any public document is already available and the same has not been filed by the concerned party it would be presumed that it is against the party who had not filed it. (Para 22 and 23)

Revision dismissed. (E-1)

List of Cases cited:

1. Ram Swaroop Rai Vs Smt. Leelawati, 1980 ARC 466

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

1. This civil revision has been filed to quash the judgment and decree dated 24th January, 2001 passed by Sri R.B. Singh, Spl. Judge Anti-Corruption/A.D.J. Bareilly in SCC Suit No. 23 of 1997.

2. In brief, facts of the case are that respondent Rukmani Devi filed a suit for eviction and arrears of rent and damages against the defendant/revisionist Dev Raj alleging that the plaintiff is the owner of House No. 29-A Sindhu Nagar, Mohalla Katra, Chand Khan Old City, Bareilly. There is a room, kitchen-cum-store room, bathroom and latrine room towards North-East on the ground floor of the house in which the defendant is a tenant since 15th February, 1995 @ Rs.1,000/- per month. He is also responsible for paying the electric bill and local taxes. The tenancy starts from 15th of every month. The defendant after 15th May 1996 has not paid rent, mesne profits, electric bill and local taxes after 15th May, 1996. The plaintiff is a little educated lady and has a little knowledge of law. She used to deliver receipts pasting revenue tickets on blank papers. She never prepared any copy or counter foil of it. Therefore, she had not taken signatures of the defendant on any counter foil of receipts. After 15th May, 1996, the plaintiff had demanded several times the rent, mesne profits and amount of electric bill and local taxes but defendant ignored and has not paid the same and started unparliamentary behaviour and abusing. Therefore, she sent a notice under Section 106 of the T.P. Act on 06th January 1997 reduced in writing by her Advocate, Raj Kumar Agrawal. It was delivered to the defendant same day as dasti notice but defendant refused to receive the same. Thereafter, the plaintiff pasted the notice upon the main door and terminated the tenancy of the defendant.

3. The defendant had filed a suit No. 37 of 1996 Dev Raj vs. Rukmani Devi and Others and moved temporary injunction application. The plaintiff had filed objection and counter objection and also copy of notice dated 06th January, 1997 as Schedule-A and copy of affidavit was also provided to the counsel of the defendant. Thus, the defendant had full knowledge of the notice. In spite of that neither the defendant vacated the tenanted part of the house nor provided the possession nor paid any rent, mesne profit, electric bill amount and local taxes due upon him. In Para 6 of the suit, the plaintiff has given the details of the amount. In Para 8 of the plaint she has valued the suit and has stated about the court fees and thereafter, has sought the relief.

4. The copy of the written statement has been annexed as Annexure 2 in which the petitioner has said that provisions of U.P. Act 13 of 1972 are applicable to the property in suit. He admitted to be the tenant and also admitted filing of the suit. In addition to that he replied that the suit is not property valued and insufficient court fees has been paid. The property in suit is very old. The rear portion of the house was made in 1973. When the tenancy started, the house in suit was under the operation of U.P. Act 13 of 1972. The plaintiff did not adopted the procedure of allotment which was necessary. Therefore, the contract between the plaintiff and the defendant is against the law and void, and is not enforceable. The defendant has not received any notice under Section 106 of the T.P. Act. The defendant is tenant @ Rs. 500 per month in which taxes of water and electric charges are also included. The defendant has been paying the rent to the plaintiff but plaintiff had never given receipt. The plaintiff had taken Rs. 20,000/- cash for the construction of kitchen with the condition that this amount would be set off in the amount of rent but the plaintiff did not construct the kitchen and got it lingered. The plaintiff again started demanding Rs. 10,000/-. The defendant is a poor, gentle and peace loving person who any how passes the life. When he refused to pay this amount, the plaintiff became angry and disconnected the electricity of the defendant and started to dispossess the defendant forcefully with the help of unsocial elements. She stared threatening and tried to throw the household articles of the defendant. Then he moved an application to the S.P. and filed the suit in the Court of Civil Judge (Junior Division). The defendant also sent rent money through money order but the plaintiff refused to accept the same. Therefore, he started depositing the rent in Misc. Case No. 230/1996 under Section 30 of the U.P. Act 13 of 1972 in the Court of Civil Judge(Junior Division), Bareilly. The plaintiff has no right to sue and the cause of action. It is wrong to say that the defendant has not paid the rent after 15.05.1996 in spite of the repeated demand. The allegations of the ill treatment and abusing by the defendant is totally wrong, baseless and concocted. No such notice was given or pasted on the door of the defendant's rented room. It is also wrong to say that copy of the notice along with counter affidavit had been filed in the original suit and its copy was given to the counsel of the defendant. Hence, at this score alone, the suit is liable to be dismissed. Hence, the case be dismissed.

5. The suit was decreed and decree for eviction and for arrears of payment and for arrears of rent @ Rs.500/- per month was ordered to be paid by the lower court. Being aggrieved, the defendant has

preferred this SCC revision on the following grounds that:

6. The impugned order is wholly illegal. The U.P. Act 13 of 1972 is fully applicable to the premises in dispute. The defendant-revisionist has fully proved the advance given by the plaintiff-respondents which has not been adjusted. Hence, the impugned order is wholly illegal. There was no arrears of rent. Hence, the impugned order and judgment is wholly illegal. Until and unless the first assessment is assumed according to Municipalities Act as well as under Section 2(2) of the U.P. Act 13 of 1972 there cannot be any presumption of the building being constructed in the year 1985. Therefore, the impugned judgment and decree is wholly erroneous illegal and bad in law. Even if the Act No. 13 of 1972 is not applicable, the defendant even assuming without admitting that Act No. 13 of 1972 is not applicable the defendant-applicant is entitled for the benefit under Section 114 of the T.P. Act. In any view of the matter, four month rent was not due. Hence, the suit could not be decreed.

7. It has been held in **Ram Swaroop Rai Vs. Smt. Leelawati, 1980 ARC 466** that the municipal records appearing on the completion of construction alone is a criteria in order to prove the assessment as contained in the explanation to Section 2(2) of the U.P. Act 13 of 1972. The trial court has decreed the suit without examining the first assessment in accordance with Section 2(2) of U.P. Act No. 13 of 1972 and as such, the impugned judgment and decree is wholly illegal and erroneous and bad in law.

8. This Civil Revision was taken up for hearing on 11.11.2022.

9. No one appeared from the either side. Since the revision should be decided on merit, hence, the judgment was reserved and this judgment is passed on merit.

10. From perusal of file it transpires that Sri Sarvasri Prakash and Sri Apoorva Prakash, advocates have filed Vakalatnama on behalf of defendant land-lord on 12.02.2001. Later on Sri Shailendra Kumar Jauhari and Kshitij Shailendra, advocates have filed Vakalatnama from the side of the respondent, Rukmani Devi on 29.07.2003. An application to vacate the stay and a counter affidavit have also been filed on behalf of respondents.

11. In the counter affidavit the respondent has reiterated the contents of her plaint and has denied the averments of the revision and has said that the provisions of UP Act No.13 of 1972 are not applicable as the map of the disputed house was itself got sanctioned on 13.04.1984 which clearly shows that the construction were raised thereafter. She had denied that the house in suit was constructed in the year 1980. According to the respondent, the finding regarding non-applicability of Act No.13 of 1972 while deciding issue no.1 is true and correct. Further she has averred that there was no assessment and it was not the case of defendant revisionist that the building was subject to municipal assessment. According to the respondent land-lord, the finding of the trial court that on the basis of date of construction the house in suit falls under the exemptions as enumerated under Section 2 of the Act is a correct finding. The ex parte stay order dated 16.02.2001 be vacated and the amount of monthly rent be deposited in the bank account of the respondent land-lord instead of depositing in the court as the opposite party is finding

it very difficult to withdraw the amount from the court.

12. No rejoinder affidavit has been filed by the revisionist. The record of the lower court has been summoned and it is before the Court.

13. The following oral evidence were adduced by the plaintiff land-lord to prove the case:

(I) PW-1, Rukmani Devi, plaintiff land-lord (ii) PW-2, Ghanshyam.

14. Documentary evidences of the plaintiff land-lord are the map sanctioned by the Bareilly Development Authority, copy of the notice, copy of the affidavit produced in Original Suit No.371 of 1996 (Dev Raj Vs. Rukmani Devi).

15. From the side of defendant tenant following witnesses have been testified:

(I) DW-1, Dev Raj, tenant himself (ii) DW-2, Urmila.

16. The trial court has framed following points for determination:

(1) Whether the provisions of UP Act No.13 of 1972 are applicable to the house in suit?

(2) Whether the notice given by the plaintiff was served on the defendant?

(3) Whether the house rent is Rs.1,000/- per month or Rs.500/-?

(4) Whether the defendant had provided Rs.20,000/- to the plaintiff, if yes, its effect?

(5) Whether the respondent has paid the rent from May, 1996?

(6) Whether the respondent has not paid the rent to the plaintiff since May, 1996?

17. The trial court had decided the points for determination serially.

18. Point No.1--In this respect the trial court has concluded that the Act of 13 of 1972 is not applicable to the house in suit. The basis of the finding is that the map was sanctioned by Bareilly Development Authority on 19.04.1984, therefore, it cannot be said that the house was made in 1980 as alleged by the defendant. It would have been constructed certainly after 1984. In this regard the defendant has replied in written statement that the property in suit is covered under the Act of 13 of 1972 and the property in suit is very old. The rear portion of the house is made in 1973. The defendant tenant has also relied on the citation in **Ram Swaroop Rai Vs. Smt. Leelawati, 1980 ARC 466** in which it is held that the municipal records appearing on the completion of construction alone is a criteria in order to prove the assessment as contained in explanation to Section 2(2) of the Act of 13 of 1972 and the trial court had decreed the suit without examining the first assessment in accordance with Section 2(2) of the Act.

19. According to this Court when it has been established from the documentary evidence that the map was sanctioned on 19.04.1984 then certainly the house could not be constructed before the said date. As per the relevant proviso enumerated in Section 2 where construction of a building is completed on or after April 26, 1985 then the reference in this section to the period of 10 years shall be deemed to be a reference to a period of 40 years from the date on which its construction is completed. The option was also open to the tenant to file a copy of assessment if so available to establish that the house in suit was completed prior to the cut date April 26,

1985. In this respect explanation-1 is also relevant which has been perused by this Court. Section 2 of the Act reads as under:-

*"**2. Exemptions from Operation of Act.**- (1) Nothing in this Act shall apply to-*

(a) any building belonging to or vested in the Government of India or the Government of any State or any local authority ; or

(b) any tenancy created by grant from the State Government or the Government of India in respect of a building taken on lease or requisi-tioned by such Government ;, or

(c) any building used or intended to be used as a factory within the meaning of the Factories Act, 1948 ; or

(d) any building used or intended to be used for any other industrial purpose (that is to say, for the purpose of manufacture, preservation or processing of any goods) or as a cinema or theatre, where the plant and apparatus installed for such purpose in the building is leased out along with the building :

Provided that nothing in this clause shall apply in relation to any shop or other building, situated within the precincts of the cinema or theatre, the tenancy in respect of which has been created separately from the tenancy in respect of the cinema or theatre ; or

(e) any building used or intended to be used as a place of public entertainment or amusement (including any sports stadium, but not including a cinema or theatre) , or any building appurtenant thereto ; or

(f) any building built and held by a University or any other statutory corporation or' by a society registered under the Societies Registration Act, 1860, or by a co-operative society, company or firm, and intended solely for its own occupation or for the occupation of any of its officers or servants, whether on rent or free of rent, or as a guest house, by whatever name called, for the occupation of persons having dealing with it in the ordinary course of business.

(2) Except as provided in sub-section (2) of section 24 or sub-section (3) of section 29, nothing in this Act shall apply to a building during a period of ten years from the date on which its construction is completed.

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

(a) the construction of a building shall- be deemed to have been completed on the date on which-the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction, and in the case of a building subject to assessment, the date on which the first assessment thereof comes into effect, and where the said dates are different, the earliest of the said dates, and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purposes of supervising the construction or guarding the building under construction) for the first time :

Provided that there may be different dates of completion of construction in respect of different parts of a building which are either designed as separate units or are occupied separately by the landlord and one or more tenants or by different tenants ;

(b)"construction" includes any new construction in place of an existing building which has been wholly or substantially demolished ;

(c) where such substantial addition is made to an existing building that the existing building becomes only a

minor part thereof the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition.

(3) The State Government, if it is satisfied that it is necessary or expedient so to do in the interest of genera public, may by notification in the Gazette, exempt from all or any of the provisions of this Act any building which is owned by an educational or charitable institution and the whole of the income derived from which is utilised for the purposes of that institution, and may in the like manner cancel or amend such notification."

20. On the basis of aforesaid discussion this Court is in conformity with the findings recorded by the trial court that the house in suit is not governed by UP Act No.13 of 1972.

21. Point No.2--The plaintiff land-lord has proved this fact that she had provided dasti summon to the defendant on 06.01.1997 and when he did not receive it, the same was pasted at the house of the defendant. It is noteworthy that a suit i.e. Original Suit No.371 of 1996 was filed by the defendant tenant against the land-lord in which the land-lord had filed affidavit and also copy of the notice dated 06.01.1997. The trial court found that from the perusal of the aforesaid papers it has again been established that the notice was properly served to the defendant. This Court is also in conformity with the finding recorded by the lower court contrary to these facts no any adverse fact could be established by the defendant tenant.

22. Point No.3--According to plaintiff land-lord the monthly rent of house is Rs.1,000/- per month but denying it, the defendant tenant has said that the monthly rent of the house in suit was only Rs.500/- per month. In this respect both parties had filed affidavit and from the side of the plaintiff an independent witness, Ghanshyam has tried to prove the fact that even in his presence Rs.1,000/- monthly rent was fixed but evidence thereon has not been accepted by the trial court. The trial court considered the accommodation provided to the tenant that it was only one room, store, bathroom and latrine without kitchen. The trial court has also based its finding stating that in this regard no documentary evidence could be produced by the plaintiff. When there was dispute regarding rate of rent then it was also the duty of the plaintiff land-lord to get the rate of rent from administration and after filing the same the plaintiff land-lord could argue that in the area where the house in suit exists is not so as said by the defendant and for such accommodation the rate of rent is not less than Rs.1,000/-. It is known to all that the Government has fixed the market value of the properties and also rate of rent of the urban areas, therefore, the rate of rent fixed by the Government was very much available in Collectorate which could be obtained by the plaintiff land-lord to prove the averments of the plaint. Thus, it is found that there is omission on the part of the plaintiff land-lord, therefore, a presumption arises against the plaintiff that if any public document is already available and the same has not been filed by the concerned party it would be presumed that it is against the party who had not filed it.

23. Section 114(g) of the Indian Evidence Act reads as under:-

"114 Court may presume existence of certain fact.--*The Court may presume the existence of any fact which it thinks likely to have happened, regard*

being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustrations The Court may presume--

x x x x x

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

24. Thus on the basis of the aforesaid discussion this Court also comes to the conclusion that a monthly rent of the house in suit was Rs.500/- and not Rs.1,000/- per month as alleged by the plaintiff land-lord

25. Point No.4--It is said by the defendant that he had provided Rs.20,000/- to the plaintiff land-lord for construction of kitchen with condition that this amount would be adjusted in the rent. This point has also been decided against the tenant. In this respect there is only oral evidence of defendant DW-1 and Urmila, DW-2. Urmila is maid servant of the defendant, therefore, it appears that being maid servant of the defendant she is deposing in his favour. The trial court has noted the fact that if actually Rs.20,000/- were provided to the plaintiff, why date of payment was not mentioned in the written statement. This aspect has also been considered by the trial court that if such amount would have been given to the plaintiff, certainly any receipt or document would have been reduced in writing.

26. Considering the aforesaid circumstances and evidence the trial court concluded that a prudent person cannot believe the evidence of the defendant and his maid servant in this regard.

27. According to the trial court it was a concocted story. Hence, this point has been decided against the tenant. According to this Court if Rs.20,000/- would have been provided certainly it would have been provided either in bank account or at least by affixing revenue stamp. If it was given to the plaintiff land-lord it would have been withdrawn from the bank. In this regard document regarding withdrawal of the money from the bank would have been produced. If such money was already with tenant in cash, he has to explain as to how such amount was available with him.

28. On the basis of aforesaid discussion this Court is of the view that the finding recorded regarding non-payment of Rs.20,000/- to the plaintiff land-lord by the tenant has been correctly decided by the trial court.

29. Point No.5--This issue is as to whether the defendant has not paid the rent since May, 1996. The trial court has rightly concluded that the burden of proving the payment of rent is on the tenant. He has to prove that he has made the payment of rent. The trial court noticed that in this regard defendant tenant has not produced any receipt while according to the plaintiff land-lord the defendant has not paid the rent since May 15, 1996. The trial court found that the fact of non-payment of rent since May 15, 1996 has been sufficiently proved by the plaintiff by adducing her evidence and evidence of PW-2. It is a matter of surprise that plaintiff is neither taking any receipt regarding giving Rs.20,000/- for the construction of kitchen to the plaintiff and also not taking receipt of rent from the plaintiff land-lord.

30. In this regard no sufficient and cogent evidence has been produced by the defendant tenant that he was paying the rent and he has paid the rent before any

person. It cannot be assumed that a maid servant who occasionally comes to the defendant's rented house for an hour for washing, cleaning and dusting before whom the rent would have been provided continuously by the tenant. Hence, the finding recorded in this regard by the trial court is also affirmed by this Court.

31. In the last the trial court concluded that the property in suit is not covered by the provisions of UP Act No.13 of 1972. The tenant defendant could not prove payment of rent. By the notice under Section 106 of Transfer of Property Act the tenancy was rightly terminated by the plaintiff. The defendant tenant could not prove the payment and was found to be a defaulter. Hence, the petition was allowed and an order of eviction was passed but it has been concluded that since the plaintiff could not succeed in proving that the rate of rent is Rs.1,000/- hence it was directed that since May 15, 1996 till the date of eviction the plaintiff land-lord would be entitled to receive the amount of rent and for damages at the rate of Rs.500/- per month.

32. If the plaintiff land-lord was aggrieved by the finding regarding determination of rent to be only Rs.500/- per month instead of Rs.1,000/- per month, the plaintiff land-lord had option to file a cross revision. Hence, it would be concluded that she has accepted the finding given by the trial court regarding rate of rent. Therefore, this Court cannot and should not enter into the question regarding rate of rent any more.

33. So far as the finding regarding rest points for determination are concerned, this Court is in conformity with the finding given by the trial court as a whole. The revisionist could not establish any error, mistake regarding facts or applicability of law applied by the trial court. Thus, on the basis of the aforesaid discussion, this Court is of the opinion that the trial court's judgment is liable to be affirmed. The revision preferred by the defendant tenant has no merit and is liable to be dismissed with costs.

ORDER

34. The revision is **dismissed** with costs.

35. Let the lower court record be sent back to the District Judge, Bareilly with a copy of this judgment.

36. The respondent land-lord is entitled to execute the judgment and decree of the lower court and this Court as well.

(2023) 4 ILRA 153
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.04.2023

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Revision No. 145 of 2008

Ajay Kumar ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Virendra Singh, Ashwani Kumar Srivastava, Sharad Kumar Vaish

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 313, 360, 361, 397 & 401 - Indian Penal Code.1860 – Sections 457,

380 & 411, - Probation of Offender Act, 1958 - Sections 4 & 5 - Criminal Revision - unnamed FIR u/s 457, 380 of IPC - investigation - alleged stolen generator was recovered from the joint possession of revisionist & anr. accused - charge-sheet framed u/s 457, 380, 411 of IPC - trial court acquitted accused for offence punishable u/s 457 & 380 of IPC - but, punished them with rigorous imprisonment for one year u/s 411 of PC - Revisionist has no criminal history apart from this case - revisionist preferred revision U/s 397/401 of Cr.P.C. confined himself only with respect to the order of sentence passed by learned trial court, on the ground that, trial court neither invoked the provisions of Probation of Offenders Act, nor the provisions u/s 360 Cr.P.C. while sentencing the accused-revisionist - as such trial court is violative of provisions u/s 361 of Cr.P.C. - Court finds that, Trial Court did not considered the fact that this is a fist case against the accused and he is not convicted earlier and merely on the ground that the generator, which was too costly was recovered from the possession of accused-appellant, the benefit of section 4 of Act, 1958 is withheld - hence, revisionist is entitled to granted the benefit of section 4 of the Probation of Offenders Act, - direction issued accordingly. (Para – 11, 12, 13)

Criminal Revision Dismissed with directions. (E-11)

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. Instant revision is filed under Section 397/401 Cr.P.C. against the judgment and order dated 8.02.2008 passed by Additional sessions Judge/Special Judge, Lucknow in Criminal Appeal No. 208 of 2000, Guddu @ Ratan Lal and another Vs. State of U.P. dismissing the appeal preferred against the judgment and order dated 19.10.2000 passed by Vth Additional Chief Judicial Magistrate, Lucknow in case No. 1793 of 1996 under Sections 457, 380 and 411 I.P.C. sentencing revisionist to undergo one rigorous imprisonment under Section 411 I.P.C.

2. As per prosecution story, F.I.R. was lodged against unknown persons on the ground that someone has stolen Shri Ram Honda Model EBK 1200 Engine No.0899537 Generator set of red colour by breaking the door of the shop in the night of 10/11-03-1996. A report was registered at police station on 21.03.1996 in crime No. 81 of 1996 under Section 457 and 380 I.P.C.

3. The investigation was conducted by investigating officer-Y.P. Singh, who recovered the alleged generator from the joint possession of Arun Kumar, Guddu and Ajay Kumar and prepared recovery memo thereof, recorded the statements of witnesses, prepared site plan and submitted charge-sheet under Section 457, 380 and 411 I.P.C. The trial court framed the charges under the above mentioned Sections and read over to accused to which the accused abjured from the charges and claimed to be tried.

4. Prosecution adduced P.W.1-Rajendra Kumar Agarwal (complainant), P.W.2-Constable Ghanshyam Yadav, P.W.3-S.I., Bedhadak Singh, P.W.4-S.I., Yogendra Pal Singh, investigating officer and P.W.5- R.K. Singh, Station Officer.

5. Statements of accused were recorded under Section 313 Cr.P.C. wherein the accused denied all the allegations levelled against them and stated that nothing incriminating has been recovered from their possession and witnesses have wrongly implicated them and the false evidence is given by witnesses against them. No defence witness was produced, however, opportunity to produce defence evidence was provided.

6. After hearing the arguments on behalf of the accused and ADGC, learned

trial court acquitted the accused Guddu and Ajay Kumar for the offences punishable under Section 457 and 380 I.P.C and convicted them under Section 411 I.P.C. and punished them with rigorous imprisonment for one year. It is also mentioned in the operative portion of the judgment that the accused have remained in jail since 22.03.1996 to 11.04.1996 and the period already undergone in jail shall be adjusted towards the sentence.

7. Learned counsel for the revisionist submitted that the revisionist is not challenging the impugned order confirming the order of conviction passed by the Trial Court and he confined himself only with respect to the order of sentence passed by the learned trial court. It is further submitted that revisionist is not a previous convict and he has no criminal history apart from this case, therefore, in view of the above facts and circumstances, trial court ought to have invoked the provisions of Probation of Offenders Act, 1958. It is submitted that learned Trial Court neither invoked the provisions of Probation of Offenders Act nor the provisions under Section 360 Cr.P.C. while sentencing the accused-revisionist. Trial Court has not given any specific reason why the present accused is not given the benefit of above mentioned provisions. Therefore, the judgment and order passed by the learned Trial Court suffers from serious illegality as the order of learned trial court is violative of provisions under Section 361 Cr.P.C., therefore, the impugned judgment is liable to be set-aside.

8. Section 361 Cr.P.C. is read as under:-

"361. Special reasons to be recorded in certain cases -- Where in any case the Court could have dealt with

(a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or

(b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so."

9. From the perusal of the judgment, it transpires that learned Trial Court, while dealing with the sentence recorded that the Generator Set, recovered from the possession of accused was very costly and, therefore, the benefit of Section 4 of Probation of Offenders Act cannot be given to the accused.

10. Learned AGA appearing on behalf of the State did not dispute the fact that accused-revisionist is a first time offender and was not previously convicted in any other case and the time period which has lapsed since the date of incident, the benefit of Section 4 of the Probation of Offenders Act can be granted in this case.

11. It is apparent from the impugned judgment that learned Trial Court mentioned the special reason to deny the benefit of section 4 of the probation of offenders act to the revisionist but learned trial court did not considered the fact that this is a first case against the accused and he is not convicted earlier and merely on the ground that the generator, which was too costly was recovered from the possession of accused-appellant, the benefit of section 4 of the probation of offenders act is withheld. Hence, learned learned trial court did not consider the facts and circumstances of the case as a whole, the

age of revisionist, the possibility for his improvement and passed the judgment without considering the above mentioned circumstances.

12. In view of the facts and circumstances and considering the scope of Section 4 of the Probation of Offenders Act, and the time period which has elapsed since the date of occurrence, the Revision is according **dismissed** by upholding the conviction of accused-revisionist. However, he is granted the benefit of Section 4 of the Probation of Offenders Act.

13. Revisionist is directed to appear before the court concerned and CJM concerned is directed to extend the benefit of Section 4 of the Probation of Offenders Act to the accused-revisionist and release him on probation on the execution of personal bond and sureties to the tune of Rs. 20,000/- (Twenty thousand) along with undertaking to keep peace and tranquility in society and not to commit any offence in future for one year.

14. Accused-revisionist shall appear before the CJM within a period of one month from today for compliance of the present order.

15. As provided under Section 5 of the Probation of Offenders Act, revisionist shall pay a compensation of Rs. 15,000/- (Fifteen thousand) in DLSA within one month from today.

16. In case of breach of any of the said condition, the accused-revisionist shall subject himself to undergo the sentence.

17. Let the copy of the judgment as well as lower court record be transmitted to concerned trial forthwith for necessary compliance.

(2023) 4 ILRA 156
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.04.2023

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Revision No. 338 of 2009

Ali Sher ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Saurabh Srivastava, Abdul Samad

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 313, 360, 361, 397 & 401 - India Penal Code, 1860 - Sections 326 & 304(2) - India Evidence Act,1872 – Section 106 - Probation of Offender Act, 1958 - Sections – 4 & 5: : - Criminal Revision - an FIR u/s 326 of IPC - investigation - charge-sheet - conviction & sentenced u/s 326 IPC with simple imprisonment of 3 year with fine - court finds that, victim expressed her desire to divorce her husband and re-marry - and the trial court found the accused guilty based on the Victim's testimony and medical evidence - the issues revolved around the assault on the victim, the credibility of witnesses, and the applicability of the Probation of Offenders Act, - accused is not previously convicted, nor other case apart from this case, is registered against him - The trial court while dealing with the sentence did not discussed why the benefit of Section 4 of Probation of Offenders Act, 1958 cannot be given to the accused - hence, The court upheld the conviction of the accused but, granted the benefit of section 4 of Probation of offenders Act, 1958, directing to the accused to appear before the Chief judicial Magistrate for compliance and payment of compensation -

direction issued accordingly. (Para – 26, 28, 29, 30)

Criminal Revision Dismissed. (E-11)

List of Cases cited:

1. Mohd. Monir Alam Vs St. of Bihar - (2010) 12 SCC 26),

2. St. of Karnataka Vs Mudappa - 1999 SCC (CRI) 1028.

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. The present Criminal Revision is moved by revisionist u/s 397, 401 CrPC against the judgment and order dated 11.06.2009 passed by Additional Sessions Judge Barabanki in Criminal Appeal No.5 of 2007 (Ali Sher and others vs State of U.P.) u/s 326 IPC in Case Crime No.89 of 1998, P.S.- Deeh, District- Raebareli upholding the conviction of Section 326 IPC for 3 years and fine of Rs. 1000/- each and in default of payment of fine, imprisonment for one month passed by the learned First Judicial Magistrate, Court No.17, Raebareli on 17.04.2007 in Case Crime No.1820 of 2006 (State vs Sher Ali and Others).

2. Wrapping the facts in brief, the victim was married to the revisionist Ali Sher son of Mohammad Zama 14 months ago. Ali Sher was jobless and was doing nothing for rearing his family, therefore, the victim complained his husband and father-in-law that she could not live with Ali Sher in such circumstances and expressed her desire to divorce her husband and remarry another person. When she expressed such desire, her husband and father-in-law came in the courtyard in the night where she was sleeping. Her father-in-law ride on her stomach and her husband amputated her nose. When she made hue and cry, her brother-in-law Mohd. Abbas came to the scene and saw the incident.

3. On the basis of written report, the case was registered on 26.07.1998 as Case Crime No.89 of 1998 u/s 326 IPC and was investigated by Investigating Officer to record the statements of witnesses. He investigated the spot and prepared site plan and produced the victim/injured before the Medical Officer and got her medically examined. Thereafter, he submitted charge-sheet u/s 326 IPC.

4. Learned Trial Court framed and explained charges against the accused who abjured from the charges and claimed to be tried.

5. The prosecution in order to prove their case, adduced PW-1 Mustafa, PW-2 Abbas, PW-3 Zahida Bano and PW-4 Dr. R.P. Maurya, PW-5 Constable/Moharrir Subhash Chandra Tiwari.

6. After the conclusion of prosecution witnesses, statements of accused were recorded u/s 313 CrPC whereby they denied the allegation levelled against them and they refused to adduce any defence, however, the opportunity was awarded to them.

7. Learned Trial Court, after the perusal of record and evidence adduced by the prosecution, reached to the conclusion that the medical report is proved by PW-4 Dr. R.P. Maurya and the face of victim was deformed due to deep cut on nose. The victim herself appeared as PW-1 and she corroborated the contents of the FIR, hence the learned Trial Court convicted both the accused u/s 326 IPC and sentenced them with simple imprisonment of 3 years and fine to the tune of Rs. 1000/- each and with

additional simple imprisonment of one month each in default of payment of fine.

8. Aggrieved with the judgment and order dated 13.04.2017 passed by the Judicial Magistrate, Court No.17, First Appeal was filed.

9. First Appellate Court perused the statements of PW-1 Mustafa, PW-2 Abbas who were declared hostile during trial. PW-1 Mohd. Mustafa admitted that he accompanied the injured to the police station. He is also close relative to Ali Sher and Mohammad Zama who is uncle and brother of the accused respectively, consequently, he did not corroborate the prosecution version. PW-2 Abbas is the real brother of accused/revisionist Ali Sher and son of accused/revisionist Mohammad Zama, who has not supported the prosecution version and were declared hostile. It is very natural that he did not corroborate the testimony of the injured as he is in the blood relation of the revisionist.

10. PW-4 Dr. R.P. Maurya proved injury report and found the following injuries:-

11. (i) cut injury of 2.5 cm X 0.5 cm X muscle deep in the middle of right side of nose of the victim/injured the edges of which were averted.

12. (ii) cut wound of 2 cm X 0.5 cm X muscle deep in the middle of left side of nose the edges of which were sharp and averted and;

13. (iii) cut wound of 5.5 cm long cutting left nostril, deep into nose and to the septum of nose.

14. PW-4 Dr. R.P. Maurya opined that some part of nose was severed from nose and was not found at the time of medical examination. The face was deformed and all the injuries were caused by sharp edged weapon and are 12 hours old. First Appellate Court analyzed the statement of the victim/injured.

15. Injured Zahida Bano proved the incident beyond suspicion. First Appellate Court held that the incident occurred in the house of the accused, therefore, the burden of proof u/s 106 of Indian Evidence Act lies upon the accused to explain how Zahida Bano sustained such injuries. The motive is self-evident that victim wanted to divorce the revisionist Ali Sher and wanted to remarry another person, therefore, the accused deformed the face of victim/injured so that she may be refrained from remarriage. During cross-examination, Smt. Zahida Bano admitted that she knew before marriage that her husband was physically challenged by right leg and the family of both the bride and groom were agreed that both the bride and groom will get divorced if the bride is not agree to reside with her husband. Later on, she expressed her desire to divorce her husband after 14 month of marriage.

16. Aggrieved with the judgment and order dated 11.06.2009 passed by Judicial Magistrate and the order of First Appellate Court dated 13.04.2017, the present revision has been filed.

17. Heard learned counsel for the revisionist Sri Abdul Samad and learned AGA for the State and perused the record.

18. Learned counsel for the revisionist submitted that the Trial Court and the First Appellate Court did not look into the fact that PW-1 Mustafa and PW-2 Abbas turned hostile during the trial and injured Zahida

Bano admitted in her cross-examination that she was sleeping inside the house and closed the main door from inside and revisionist no.1 was sleeping outside at the time of occurrence, therefore, it is not possible that revisionist broke the door from outside and committed the alleged offence at 02:00 am in the night.

19. It is also submitted that occurrence had taken place at 02:00 am on 26.07.1998 which goes to show that Zahida Bano did not sustain grievous injuries. Revisionist no.1 is physically handicapped and Zahida Bano married to revisionist no.1 having full knowledge that revisionist no.1 is handicapped before marriage.

20. It is also submitted that Dr. Arun Kumar Singh performed plastic surgery of the nose of Zahida Bano at Raj Nursing Home and she has solemnized second marriage after getting divorced from Ali Sher. It is also submitted that there is no opportunity awarded to revisionist to explain the circumstances appearing in evidence against them, therefore, it is prayed to set aside the judgment and order of conviction passed by learned First Judicial Magistrate, Court No.17 on 17.07.2007 and the judgment passed by Additional Sessions Judge, Raebareli in Criminal Appeal No.5 of 2007 on 11.06.2009 convicting the revisionist u/s 326. It is also contented that if learned Trial Court do not award benefit of Probation of Offenders Act, 1958 to accused, he must mention the reason of not awarding the benefit of Probation of Offenders Act, 1958. Learned counsel relied on ***Mohd. Monir Alam vs State of Bihar (2010) 12 Supreme Court Cases 26,*** Hon'ble Apex Court held that:

"...His conduct and attainments after his involvement in the matter justifies his release on probation..."

21. And Hon'ble Apex Court awarded the benefit of Section 4 of Probation of Offenders Act, 1958.

22. Learned Counsel for the revisionist relied upon ***State of Karnataka vs Mudappa,*** wherein Hon'ble Supreme Court considered the question as to whether the benefit of Probation of Offenders Act, 1958 could be extended to offence u/s 304(2) of IPC and concluded that there is no statutory bar for the application of Probation of Offenders Act, 1958 to an offence u/s 304(2) where maximum punishment is neither death, nor imprisonment for life.

23. During the argument, learned counsel for the revisionist did not dispute the conviction of revisionist. Arguing on the point of sentence, learned counsel submitted that it was a family dispute and the incident happened in deep depression of accused/revisionist Ali Sher when his wife desired to divorce him and remarry another person. Learned Trial Court did not explain why the benefit of Section 4 of Probation of Offenders Act, 1958 must not be granted to present revisionist. It is further submitted that revisionist is not previous convict and he has no criminal history apart from this case, therefore, in view of the above facts and circumstances, learned Trial Court ought to have invoked the provision of Probation of Offenders Act, 1958.

24. Per contra, learned AGA submitted that there is concurrent finding of both the Courts that revisionist with the help of his father, chipped off the nose of victim/injured deforming her face, however, it was agreed between the parents of both the sides that the party shall divorce if the bride is not agree to reside with her husband after marriage and when she

expressed her willingness to divorce her husband, present revisionist chipped off her nose so as to deform her face.

25. Nothing is on record to show that the revisionists are falsely implicated in the case, therefore, from the perusal of the judgment of both the Courts, it transpires that the concurrent finding is given by both the Courts and the revisionists were held guilty u/s 326 IPC. Court agreed with the aforesaid finding of the learned Sessions Judge especially in the opinion of PW-4 Dr. R.P. Maurya.

26. From the perusal of the judgment, it transpires that learned Trial Court while dealing with the sentence recorded, did not discuss why the benefit of Section 4 of Probation of Offenders Act, 1958 cannot be given to the accused.

27. It transpires from the finding of Court that learned Trial Court neither invoked Probation of Offenders Act, 1958, nor the provision u/s 360 CrPC while sentencing the accused revisionist, Trial Court has not given a specific reason why the present accused should not be given to benefit of above mentioned provisions. Therefore, the judgment and order passed by learned Trial Court suffers from serious illegality as the order of learned Trial Court is violative of provisions under Section 361 CrPC, therefore, the impugned judgment is liable to be set aside. Section 361 CrPC is read as under:

"361. Special reasons to be recorded in certain cases -

Where in any case the Court should have dealt with

(a) an accused person u/s 307 or under the Probation of Offenders Act, 1958(20 of 1958), or

(b) A youthful offender under the Children's Act, 1960(60 of 1960), or another like for the time being in force for the treatment, training of Rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so."

28. It is apparent that the accused is not previously convicted, no other case apart from this case, is registered against him. The offence committed in the desperate state of mind when his wife desired to divorce him and remarry another person and to the fact that respondent Zahida Bano had already remarried another person, the benefit of Probation of Offenders Act, 1958 can be extended to the present revisionist also.

29. In view of the above facts and circumstances and considering the scope of Section 4 of Probation of Offenders Act, 1958 and the time which is already lapsed from the date of occurrence, the revision is accordingly dismissed by upholding the conviction of accused/revisionist, however, he is granted the benefit of Section 4 of Probation of Offenders Act, 1958.

30. Revisionist is directed to appear before the Court concerned and Chief Judicial Magistrate concerned is directed to extend the benefit of Section 4 of Probation of Offenders Act, 1958 to the accused/revisionist and released him on probation on the execution of personal bond and sureties to the tune of Rs.20,000/- along with the undertaking to keep peace and tranquility in society and not to commit any offence in future during the period of one year.

31. Accused/revisionist shall appear before the CJM within the period one one

month from today for compliance of the present order. As provided u/s 5 of Probation of Offenders Act, 1958, revisionist shall pay a compensation of Rs.10,000/- which shall be deposited in District Legal Services Authority, within one month from today.

32. In case of breach of any said conditions, the accused/revisionist shall subject himself to undergo the sentence.

33. Let the copy of this judgment as well as Lower Court record be transmitted to the concerned Trial Court forthwith for necessary compliance.

(2023) 4 ILRA 161
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Revision No. 1848 of 2010

Pawan Singhania ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri A.P. Tewari, Sri S.S. Tripathi, Sri Sudhanshu Pandey

Counsel for the Opposite Parties:
G.A., Sri B.K. Tripathi

Criminal Law – Criminal Procedure Code, 1973 - Sections 145 & 146(1) - Criminal Revision - - Civil Suit - Right to possession - revisionist challenged the order passed by Additional Sessions Judge in Criminal Revision filed by opposite party no. 2 by which Revisional court set aside the order passed by the City Magistrate, U/s 145 & 146(1) Cr.P.C. merely on the ground that civil suit, which was subsequently filed, is pending between the parties - There is apprehension that civil suit is pending between parties and they can adjudicate their rights through civil court - , there is no purpose for proceeding under Section 145 Cr.P.C. - Apex Court clearly held that, proceeding u/s 145 of Cr.P.C. cannot be dropped merely on the ground that one party had approached civil court not with regard to title or right to possession therefore in view of law and fact, the impugned order passed by the Additional Sessions Judge, in Criminal Revision is absolutely erroneous and passed on non-application of mind - hence, impugned order is liable to be quashed and it is accordingly quashed - The matter is remanded back and the City Magistrate is directed to conclude the proceeding, preferably within a period of six months - directions issued accordingly. (Para – 5, 7)

Criminal Revision is disposed of. (E-11)

List of Cases cited:

1. Prakash Chand Sachdeva Vs St. & anr. reported in AIR 1994 SC 1436

2. Amresh Tiwari Vs Lalta Prasad Dubey & ors. (AIR 2000 Supreme court 1504),

3. Jhummamal @ Devandas Vs St. of M. P. reported in, (AIR 1988 SC 1973),

4. Ganga Bux Singh Vs Sukhdin, AIR 1959 All 141

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

1. Heard Sri Sudhanshu Pandey, learned counsel for the revisionist and Sri Hari Pratap Gupta, learned AGA for the State.

2. By means of present revision, the revisionist has challenged the order dated 28.04.2010 passed by the Additional Sessions Judge/Court No.10, Gorakhpur in Criminal Revision No.217 of 2010

(Deepankar Pandey vs the State of U.P. and another) filed by the opposite party no.2 by which the revisional court set aside the order passed by the City Magistrate, Gorakhpur, under Sections 145 and 146(1) Cr.P.C. merely on the ground that civil suit, which was subsequently filed, is pending between the parties.

3. Contention of learned counsel for the revisionist is that impugned order passed by the Additional Sessions Judge, Gorakhpur is absolutely erroneous as learned court below has failed to consider that the civil suit is not in the right to possession but simply on the question of possession and prayer was made in that suit that he may not be evicted except adopt due procedural law. It was further contended that the Apex Court in the judgement of **Prakash Chand Sachdeva vs State and another reported in AIR 1994 Supreme Court 1436** has held that merely pendency of civil suit between the parties can not be a ground for dropping the proceeding under Section 145 Cr.P.C. if there is no title or right of possession to the subject matter of suit. The civil suit was filed by the opposite party no.2 subsequent to the initiation of proceeding under Section 145 Cr.P.C. merely on the ground that there is some dispute between the parties on the basis of agreement to sale cannot be a ground to drop the proceeding under Section 145 Cr.P.C.

4. Learned counsel for the revisionist further relied on the case of **Amresh Tiwari vs Lalta Prasad Dubey and another reported in AIR 2000 Supreme Court 1504,** wherein the Apex Court has already held in the case of Jhummamal alias Devandas vs. State of Madhya Pradesh reported in, (1988) 4 SCC 452 : (AIR 1988 SC 1973 : 1989 Cri LJ 82) that *"this authority lays down that merely because a civil suit is pending does not mean that proceedings under Section 145, Criminal Procedure Code should be set a naught. In our view this authority does not lay down any such broad proposition. In this case the proceedings under Section 145, Criminal Procedure Code had resulted in a concluded order. Thereafter the party, who had lost, filed civil proceedings be quashed. It is in that context that this Court held that merely because a civil suit had been filed did not mean that the concluded order under Section 145 Criminal Procedure Code should be quashed. This is entirely a different situation. In this case the civil suit had been filed first. An order of status quo had already been passed by the competent civil court. Thereafter Section 145 proceedings were commenced. No final order had been passed in the proceedings under Section 145. In our view on the facts of the present case the ratio laid down in Ram summers case (AIR 1985 SC 472 : 1985 Cri LJ 752) (supra) fully applies. We clarify that we are not stating that in every case where a civil suit is filed. Section 145 proceedings would never lie. It is only in cases where civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property concerned can be applied for and granted by the civil Court that proceedings under Section 145 should not be allowed to continue. This is because the civil court is competent to decide the question of title as well allowed to continue. This is because the civil court is competent to decide the question of title as well as possession between the parties and the orders of the civil Court would be binding on the Magistrate."*

5. On the other hand, learned AGA for the State submits that there is apprehension that civil suit is pending between the parties and they can adjudicate

their rights through civil court, therefore, there is no purpose for proceeding under Section 145 Cr.P.C.

6. Considering the rival contention of the parties, I am of the view that impugned order was passed mainly on the ground that civil suit is pending between the parties without looking to the nature of leave of civil suit and without even going into the question that civil suit is not regarding the possession but merely to protect the possession till the process of law adopted and from perusal of plaint of the suit No. 709 of 2009, it appears that there is no title dispute between the parties and private respondents did not claim ownership or possession on the basis of any right, therefore, there is no occasion to drop the proceeding under Section 145 Cr.P.C. when there is purely question of possession is pending before the Magistrate even in the judgement relied upon by the counsel for the revisionist. The Apex Court clearly observed that question of possession is involved then the Magistrate is empowered to take cognizance under Section 145 Cr.P.C. Even in the judgement of Full Bench of this court reported **AIR 1959 All 141, Ganga Bux Singh vs Sukhdin** has settled the issue.

"It has been held that the proceedings under Sections 145 Cr.P.C. are only in the interest of the maintenance of peace and not in the interest of the preservation of the rights of any party. It was further held that the proceedings under Section 145 of the Code of Criminal Procedure are materially different from the proceedings in a proper suit.

From the nature of the provisions it is clear that the Magistrate has been given this power primarily to preserve peace. The individual rights are affected only incidentally.

The nature of the enquiry is quasi civil. It is an incursion by the criminal court in the jurisdiction of the civil court. It is, therefore, necessary that this incursion should be carefully circumscribed to the extend absolutely necessary discharging the function laid on the Magistrate of preserving the peace. The provisions of Section 145, Code of Criminal Procedure make that ample clear.

The Magistrate does not enquire into the merits of the claims of the parties or even their right to possess the subject of the dispute. He is only concerned with the question as to who was in actual physical possession on the relevant date. This also indicates that the starting point of the proceedings) must be the date when he was satisfied that an apprehension of a breach of the peace existed and not even he received the first information."

7. The Apex Court clearly held that proceeding under Section 145 Cr.P.C. cannot be dropped merely on the ground that one party had approached civil court not with regard to title or right to possession therefore in view of law and fact, the impugned order dated 28.04.2010 passed by the Additional Sessions Judge, Gorakhpur in Criminal Revision No. 217 of 2010 is absolutely erroneous and passed on non-application of mind, therefore, the impugned order is liable to be quashed and it is accordingly quashed.

8. The matter is remanded back and the City Magistrate is directed to conclude the proceeding under Section 145 as well as 146 Cr.P.C. preferably within a period of six months from the date of production of a certified copy of this order, strictly in accordance with law.

9. The revision is finally **disposed of.**

(2023) 4 ILRA 164
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 2608 of 2022

Smt. Suman ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Pankaj Kumar Shukla

Counsel for the Opposite Party:
G.A., Sri Devesh Kumar Sharma

Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 293, 311, 313 & 482 - India Penal Code, 1860 - Sections 323, 325, 504 & 506 - Criminal Revision - revisionist challenged the order passed by the trial court by which the application moved u/s 311 of Cr.P.C. by the informant requesting to summoned the Doctor as witness who had examined the injured person was rejected on the ground that the injuries alleged to be caused to the injured are said to be simple in nature and it is not necessary that if the investigator has not taken the St.ment u/s 161 Cr.P.C., a person cannot be summoned as well as on the ground that the prosecution is itself opposing the application on the ground that an advocate can be appointed by the informant to assist the prosecution, but they cannot act as prosecution officer - maintainability of application – Held, it was the duty of the Trial Court to summon the witness of concern doctor *suo-moto*, - and - the judge of a criminal court is not a silent spectator - it is his duty to be vigilant and conscious and if there is apprehension of injustice during the court of trial - further, the charge-sheet is not a borderline, which cannot it crossed by the trial court, it is not a Holy Bible, Quran or Gita or any other mandatory enactment, which must be obeyed in every event, if the learned trial court finds that the injured were medically examined by a particular doctor and he has prepared the injury report, it was the duty of court to summon him instead of fact that his St.ment was not recorded by the I.O. and he was not arrayed in the list of witnesses of charge-sheet - Hence, any person and any such person can be summoned as witness, which shows that there is not limit in exercising the discretion of the court in any way - Revision is allowed and impugned order is quashed. (Para – 12, 13, 16, 18, 22, 32)

Criminal Revision allowed. (E-11)

List of Cases cited:

1. Rekha Murakka Vs St. of W. B .& ors., J.T 2019 (11) S.C 291

2. Mohan Lal Shamji Soni Vs U.O.I., A.I.R 1991 S.C. 1346

3. R.B. Mithani Vs St. of Mah., A.I.R 1971 S.C 1630

4. Rama Paswan Vs St. of Jharkhand, 2007 Cr.L.J 2750

5. Raku Manjal Vs St. of Jharkhand, 2006 Cr.L.J 293

6. Raj Deo Sharma Vs St. of Bihar, AIR 1999 SC 3524

7. Shailendra Kumar Vs St. of Bihar, AIR 2002 SC 270

8. Govind Ram Vs St. of U.P., 1999 Cr.L.J 1955 (Allahabad)

9. Ramasami Vs Sriniwasan, 1987 (3) Crimes 89 Madras.

10. Bhima Mudali and Ors. Vs St. of Orissa & anr., 1996 Cr.L.J. 1899 Orrisa

11. Chemo Steel Limited Vs St. of Andhra Pradesh 2005 Cr.L.J 716

12. Om Prakash Vs St. of Raj. 2003 Cr.L.J 4704

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

1. This criminal revision has been instituted by the revisionist to set aside the order dated 31st May, 2022 passed by A.S.J-VI, Mathura in S.T. No. 433 of 2012 *(Smt. Suman Vs. Krishna Murari & Ors.)* under Sections 323, 325, 504, 506 I.P.C. Police Station Vrindaban, District Mathura, by which the Trial Court has rejected the application 136-B by the informant under Section 311 Cr.P.C.

2. In brief facts of the case are that the aforementioned Sessions Trial is pending in the Court of A.S.J-VI, Mathura, in which the informant moved an application 136-B that injured Rajan Lal was examined on 03rd July, 2009 in Swarna Jayanti Community Hospital. Medical report 4-A/17 is on record, he was examined by Dr. Ajai Gopal, during the medical examination ***Mild Subarachnoid Hemorrhage*** was found on the head and he was carried out in unconscious position/stage to the hospital therefore the statement of concerned doctor is necessary. Hence, Dr. Ajai Gopal be summoned as witness. The concerned I.O. has not arrayed him as witness, therefore Dr. Ajai Gopal be summoned under Section 311 Cr.P.C.

3. Learned counsel for the accused had vehemently opposed the application and had stated that this file is under Section 313 Cr.P.C on 01.01.2014 and is being delayed intentionally. The injury of Rajan Lal is simple in nature and the statement of Dr. Ajai Gopal has not been been recorded by the concerned I.O. under Section 161 Cr.P.C.

4. By the impugned order, the learned trial court has rejected the application on the ground that the injuries alleged to be caused to the injured are said to be simple in nature. The learned A.D.G.C has objected the summoning of the said witness in such a situation when the statement of the victim has been made and the trial relates to Sections 323, 325, 504, 506 I.P.C, therefore calling or not calling of the aforesaid doctor would have not special effect on the prosecution. It is also clarified that this sessions trial is connected with another cross case, which is under the action plan laid down by the Hon'ble High Court, which has to be decided expeditiously, therefore, the application is not maintainable and is liable to be rejected.

5. It has also been concluded by the trial court that the application under Section 311 Cr.P.C has been opposed by the learned ADGC (Criminal) what evidence the prosecution wants to present in the court, it is the responsibility of the prosecution. It is not necessary that if the investigator has not taken the statement under Section 161 Cr.P.C, a person cannot be summoned but in this case, the prosecution itself is opposing it. The advocate appointed by the informant can assist the prosecution, but they can not act as prosecution officer. The learned trial court has referred the judgment ***Rekha Murakka Vs. State of West Bengal & Ors. J.T 2019 (11) S.C 291,*** in which it has been held that the learned counsel for the victim//informant plays only a secondary role in advancing the prosecution case.

6. Being aggrieved the revisionist has filed the present revision.

7. In the application, the applicant has taken ground that the impugned order has been passed without application of mind by wrongly interpreting the judgement of ***Rekha Murakka (supra)*** and thus rejected the legal and genuine claim of the revisionist.

8. Dr. Ajai Gopal is the sole witness, who has medically examined the injured Rajan Lal on 03rd July, 2009 in Swarna Jayanti Community Hospital and has given opinion in which he has contended that the injury cannot be seen due to plaster and referred the injured to District Hospital, Mathura for x-ray about the opinion regarding injury no. 1. In this incident, Rajan and Sunder Lal, two persons had sustained grievous injury and both were examined by Dr. Ajai Gopal, therefore his deposition is more important for conclusion of the case.

9. Since, the learned trial court is also adjudicating the cross version, therefore, it is duty of the trial court to scrutinize the injuries thoroughly, but the trial court adopting the process in harried manner only on the ground that it is cross case and referring the High Court action plan, rejected the claim of the revisionist in violation of statutory provisions under the garb of action plan. The impugned order is wholly illegal and arbitrary and against the principles of natural justice, hence the revision be allowed and the order dated 31st may, 2022 be set aside.

10. Heard Sri Pankaj Kumar Shukla, learned counsel for the revisionist, Sri Pankaj Kumar Tripathi, learned A.G.A for the State and perused the material available on record.

11. The injury reports have been filed through annexure no. 2, which are said to be prepared after medical examination by Dr. Ajai Gopal. As per the injury report the victim Rajan Lal has sustained three injuries, he could not see injury no. 1 properly as there was plaster of paris thereon, hence he referred the patient to District Hospital, Mathura for expert opinion. He found that injury no. 2 is simple in nature caused by hard and blunt object. Injury no. 3 was the stitched wound. At page no. 28 there is a copy of x-ray report form. At page 30 there is photocopy of the injury report of Sundar Lal, he has sustained two injuries, out of which injury no. 1 was kept under observation and it was referred for x-ray and expert opinion. At page 30, there is x-ray form regarding the injured Sundar Lal.

12. This court is of the view that it was the duty of I.O. to record the statement of the concerned Doctor and array his name in the column of witness in the charge-sheet. If it has not been done, it is not a fault of the informant/revisionist, if Dr. Ajay Gopal is not examined, the injury reports prepared by him would not be proved and would not be admissible in evidence. If no objection has been raised on the said injury report, it may be exhibited but it is not liable to be exhibited under Section 293 Cr.P.C. Therefore, it was the duty of the trial court to summon the witness Dr. Ajay Gopal suo-moto. He was also under the obligation to record a finding that it is fault on the part of I.O that he did not record the statement of Dr. Ajay Gopal and has not copied the injury reports in case diary.

13. The judge of a criminal court is not a silent spectator, it is his duty to be vigilant and conscious and if there is apprehension of injustice during the course of trial, it is his duty to be vigilant. The charge-sheet is not the borderline, which

cannot it cross by the trail court, it is not a Holy Bible, Quran or Gita or any other mandatory enactment, which must be obeyed in every event, if the learned trial court finds that the injured were medically examined by Dr. Ajay Gopal and he has prepared the injury report, it was the duty of the trial court to summon him instead of fact that his statement was not recorded by the I.O and he was not arrayed in the list of witnesses in charge-sheet.

14. Section 311 Cr.P.C provided wide power to the court to summon the material witness, which is as under:-

"Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."

15. The second part of Section 482 Cr.P.C is mandatory and it casts duty on the court to summon, examine or call or re-examine any such persons, if his evidence appears to be essential to the just decision of the case.

16. This court is of the view that the evidence of Dr. Ajay Gopal in the aforesaid circumstances is very much essential for the just decision of the case otherwise the prosecution would be deprived of its valuable right. There might be direction under the action plan to decide the case as early as possible, but solely on this reason either of the parties cannot be deprived of his valuable legal right and a trial cannot be finished in illegal and hurried manner. If Dr. Ajay Gopal is not examined certainly the injury reports would be of no avail and inadmissible in evidence.

17. It has not been said by the learned trial court that the accused persons have admitted the genuineness of the injury reports or they have dispensed with the formed proof of the injury reports, it appears that till now the injury reports has not been proved in due course of law, therefore, it was the bounden duty of ADGC (Crl.) and the concerned court not to oppose such necessary application, if was duty of A.D.G.C (Crl.) to move an application to summon Dr. Ajay Gopal as a witness and if this duty was omitted by him, it was the duty of the trial court to summon the concerned doctor for proving the medical report.

18. In ***Mohan Lal Shamji Soni Vs. Union of India A.I.R 1991 S.C. 1346,*** it is held that Section 311 is enacted which enables the Court to find out the truth and render a justice decision where-under any court by exercise of it's discretionary authority at any stage of inquiry, trial or other proceedings can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined, who are able to through light upon the matter in dispute .

19. Opportunity to rebuttal would be provided to the other party.

20. In this case on the basis of above decision and provision following ingredience are found which are as under:-

1. To summon any person as a witness, Or

2. To examine any person in attendance, though not summoned as witness or to re-call, re-examine any person, who already examined.

21. The second part which is mandatory imposes obligation on the Court: -

to summon and examine or to recall, re-examine any such person, if his evidence appears to be essential to the just decision of the case. This Section is in two parts and wide discretion has been given to the Court to exercise it's jurisdiction at any stage or any inquiry or trial in the proceedings.

22. Any person and any such person can be summoned as witness, which shows that there is not limit in exercising the discretion of the court in any way.

23. In ***R.B. Mithani Vs. State of Maharashtra A.I.R 1971 S.C - 1630,*** it is held that additional evidence must be necessary, not because it would be ample to pronounce judgment, but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable case. Once such action is justified there is no restriction in the kind of evidence, which must be received. It may be formal or substantial.

24. In ***Rama Paswan Vs. State of Jharkhand 2007 Cr.L.J 2750,*** the Apex Court held that the determine factor is whether summoning or re-calling of the witness is essential to the just decision of the case. The Section is not limited only for the benefit of the accused and it will not be improper of the power of the Court, to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The Section is a general Section which apply to all proceedings, inquiries and trials under the court and empowers the Magistrate to issue summon to any witnesses at any stage of such proceedings, trial or inquiry.

25. In ***Raku Manjal Vs. State of Jharkhand 2006 Cr.L.J 293,*** the case was pending for the last 25 years and the prosecution evidence had already been closed. The I.O. and the Doctor, who had performed postmortem examination, were summoned under Section 311Cr.P.C. as their examination was found necessary for the justice decision of the case.

26. In ***Raj Deo Sharma Vs. State of Bihar, A.I.R 1999 Supreme Court 3524,*** it is held that once it is found that the evidence is essential for the just decision of the case, the witness can be recalled at any time before pronouncement of the judgment, the time factor would not come for the way. It is not a case where if Dr. Ajay Gopal is summoned it would be an attempt to fill up the lacuna in the prosecution case as the injury report has been prepared by him. It would also not cause prejudice to the accused as he would have an opportunity to cross examine the witness.

27. In ***Shailendra Kumar Vs. State of Bihar, A.I.R 2002 (Supreme Court) 270,*** it is held that if there is any negligence, latches or mistake by not examining material witness, the Courts function to render just decision by examining such witness at any stage is not, in any way impaired.

28. In ***Govind Ram Vs. State of U.P. 1999 Cr.L.J 1955 (Allahabad),*** it is held

that the court had a duty to see that the witnesses are examined for just decision of the case and the court has to call and examine a witness as court witness even if the prosecution does not produce him would be fine that the evidence of the witnesses had an important bearing on the case.

29. In ***Ramasami Vs. Sriniwasan 1987 (3) Crimes 89 Madras,*** it is held that the criminal court is not just umpire to deal only the material brought by the parties before it. The court has to play an active role in the administration of criminal jurisprudence. Though, it is not normal duty of the court to collect evidence, in cases where justice requires, the Court has power to further inquire into the matter in order to ascertain the truth.

30. In ***Bhima Mudali and Ors. Vs. State of Orissa & Anr.1996 Cr.L.J. 1899 Orrisa,*** In ***Chemo Steel Limited Vs. State of Andhra Pradesh 2005 Cr.L.J 716*** and in ***Om Prakash Vs. State of Rajasthan 2003 Cr.L.J 4704,*** it is held that a person not examined under Section 161 Cr.P.C. can also be summoned as witness under Section 311.

31. In view of the above, this Court is of the considered view that the impugned order is perverse and bad in law and is liable to be quashed and the revision is liable to be allowed.

O R D E R

32. This criminal revision is allowed and the impugned order dated dated 31.05.2022, passed by Additional District Judge-VI, Mathura in S.T. No. 433 of 2012 - *(Smt. Suman Vs. Krishna Murari & Ors)*, under Sections 323, 325, 504 and 506 I.P.C, Police Station Vrindavan, District Mathura, is hereby quashed.

33. The learned court is directed to summon Dr. Ajay Gopal, to prove the medical reports.

34. This order be sent to the trial court ASJ-VI, Mathura, forthwith for immediate and strict compliance.

(2023) 4 ILRA 169
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Revision No. 3212 of 2009

Uma Shankar & Ors. ...Revisionists
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionists:
Sri D.K. Singh, Sri A.K. Rai, Sri Bimal Prasad

Counsel for the Opposite Parties:
G.A., Sri A.K. Srivastava

Criminal Law – Criminal Procedure Code, 1973 - Sections 145 & 146 - Criminal Revision - Challenging the order passed by S.D.M. in a proceeding u/s 145 of Cr.P.C. by which Application of revisionist, to drop the proceedings, was rejected - court finds that, title of the suit property is already decided in favour of the revisionist and a Civil Suit is also pending between parties an interim injunction is also passed in favour of the revisionist - held, in view of legal position highlighted by the full bench in a case of 'Ganga Bux Singh' the proceeding u/s 145 Cr.P.C. are materially different from proceedings in proper suit and as such when the proceedings in Civil Suit is pending regarding a

property then SDM has no jurisdiction to proceed u/s 145 of Cr.P.C. - therefore, order impugned is set-aside and the impugned proceeding u/s 145 Cr.P.C. are hereby dropped - however, parties are at liberty to pursue their cases in Civil Court - revision stands allowed.
(Para – 7, 10, 11)

Criminal Revision Allowed. (E-11)

List of Cases cited:

1. Ram Sumer Puri Mahant Vs St. of U.P. & ors. (AIR 1985 SC 472)

2. Kunj Bihari Vs Balram & anr., reported in (2006) 11 SCC 66,

3. Mohd. Abid & ors. Vs Ravi Naresh & ors. (SLP (Criminal) No. 544/2022,

4. Ganga Bux Singh Vs Sukhdin, AIR 1959 All 141.

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

1. Heard Sri Bimal Prasad, learned counsel for the revisionists and Sri Hari Prasad Gupta, learned counsel appearing for the State. No one appears on behalf of the private respondents.

2. The revisionists have challenged the order dated 15.7.2009, passed by the S.D.M., Chakia, Chandauli by which the application of the revisionists for dropping the proceedings u/s 145 Cr.P.C., on the ground that civil proceeding regarding the land in dispute is already pending and injunction has been granted in his favour and issue of title has been decided by the D.D.C., Chandauli, has been rejected.

3. Learned counsel for the revisionists submitted that D.D.C., Chandauli by order dated 23.8.1983, had already decided the title in favour of the revisionists against which a review application was filed by the private respondents which was rejected on 11.2.2011 by the D.D.C. against which Writ Petition No. 13761 of 2011 was preferred before this court which was also dismissed by order dated 8.3.2011.

4. It is further submitted that a civil suit No. 182 of 1994 was also filed by the revisionists for permanent injunction in which application of the revisionists for temporary injunction was allowed by the civil court by order dated 8.4.1996 and injunction order is also continuing. It is also submitted that the name of the revisionists have already been mutated in the revenue record and Khatauni 1409-1414 fasali of the same has been annexed at Page-55 of the revision. The contention of the counsel in a nutshell is that once the civil proceeding regarding property is pending and title regarding same property was also decided by the D.D.C., then the S.D.M. has no jurisdiction to proceed u/s 145 Cr.P.C.

5. On the other hand learned A.G.A. submitted that there is a report of police station that there is apprehension of breach of peace for taking the possession of the property in dispute, therefore, proceeding was rightly initiated.

6. I have considered the rival submissions and it is clear from the record that a civil suit No. 182 of 1994 regarding same property is pending before the Civil Judge, Chakia and an interim injunction was also granted in favour of the revisionist and also D.D.C. Chandauli by order dated 23.8.1983 has also decided the title regarding the property in dispute in favour of the revisionists. This order has been affirmed up to this Court, therefore, there is no occasion on the part of the S.D.M. to

further proceed u/s 145 Cr.P.C. after knowledge of the above fact.

7. The Apex Court in the judgement of ***Ram Sumer Puri Mahant vs. State of U.P. and others (AIR 1985 Supreme Court 472)*** has observed that when the proceeding in civil court is pending regarding a property then S.D.M. has no jurisdiction to proceed u/s 145 Cr.P.C. against the said property.

8. In the case of ***Kunj Bihari vs. Balram and another,*** reported in ***(2006) 11 SCC 66,*** the Apex Court observed that once the right of parties is settled by a forum then proceeding u/s 145 Cr.P.C. cannot be allowed to continue as the same would be abuse of process.

9. In the case of ***Mohd. Abid and other vs. Ravi Naresh and others*** passed in ***SLP (Criminal) No. 5444 of 2022,*** the legal position explained by the Apex Court in paragraph-4 of the judgement is quoted below:-

"4. It is, however, an admitted fact that the petitioners have already filed a suit for injunction in which ex-parte adinterim injunction has been granted by the Civil Court, Faizabad, Uttar Pradesh on 05.12.2020. Once the Civil Court is seized of the matter, it goes without saying that the proceedings under Section 145/146 Cr.P.C. cannot proceed and must come to an end. The interse rights of the parties regarding title or possession are eventually to be determined by the Civil Court."

10. A full Bench of this Court in its judgement reported in ***AIR 1959 All 141 (Ganga Bux Singh vs. Sukhdin)*** has settled the position regarding proceeding u/s 145 Cr.P.C. and observed that it is only in the interest of maintenance of peace and not in the interest of preservation of right of any party. It was further held that the proceedings u/s 145 Cr.P.C. are materially different from proceedings in proper suit and legal position was highlighted by the full Bench in paragraph-13 which is being quoted below:-

"13. From the nature of the provisions it is clear that the Magistrate has been given this power pri-mirily to preserve peace. The individual rights are affected only incidentally.

The nature of the enquiry is quasi civil. It is an incursion by the criminal court in the jurisdiction of the civil court. It is, therefore, necessary that this incursion should be carefully circumscribed to the extent absolutely necessary discharging the function laid on the Magistrate of preserving the peace. The provisions of Section 145, Code of Criminal Procedure make that amply clear.

The Magistrate does not enquire into the merits of the claims of the parties or even their right to possess the subject of the dispute. He is only concerned with the question as to who was in actual physical possession on the relevant date. This also indicates that the starting point of the proceedings) must be the date when he was satisfied that an apprehension of a breach of the peace existed and not when he received the first information."

11. In view of the above fact, the impugned order dated 15.7.2009, passed by the S.D.M. Chakia, Chandauli is set aside and proceeding before him u/s 145 Cr.P.C. are hereby dropped and parties are at liberty to pursue their cases in civil court.

12. Accordingly, the revision stands **allowed**.

(2023) 4 ILRA 172
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 3318 of 2022

Nizamuddin & Ors. ...Revisionists
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionists:
Sri Safiullah

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 83, 446 & 446(3) - Criminal Revision - filed on the ground that, the order impugned is illegal and against the weight of evidence on record - maintainability of revision – court finds that, when the sureties produced the accused in the Court before that the amount of the surety bonds had been forfeited - From the principles laid down in the aforesaid judicial precedents, it is clear that, even after forfeiture of the surety bonds, order of remission may be passed adopting lenient view if the accused had been produced by the sureties in the Court concerned – Revision disposed of - impugned order modified, direction accordingly.
(Para – 14, 19, 20)

Criminal Revision Disposed of. (E-11)

List of Cases cited:

1. Rajpal Vs St. of U.P., 2009 Crl.L.J. 160,

2. Jagannath Vs St. of U.P., 2008 (6) AllLJ 696 (All),

3. Jamila Khader Vs St. of Kerala, 2004 CrLJ 3389 Kerala,

4. Mohd. Kunju Vs St. of Karn., AIR 2000 SC 6,

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

1. Heard Shri Safiullah learned counsel for the revisionists and Shri Pankaj Kumar Tripathi, learned A.G.A. for the State.

2. This revision has been preferred against judgement and order dated 12.5.2022 passed by Special Judge POCSO Act Sambhal at Chandausi in Criminal Misc. Case No. 09 of 2022, Computer Case No. 76 of 2022 (State Vs. Chandrapal and Others) arising out of S.S.T. No. 34 of 2020 (State Vs. Faisal) Case Crime No. 207 of 2020 Police Station- Behjoi Disttrict-Sambhal.

3. By the impugned order, the Court below has ordered the revisionists to deposit Rs. 50,000/- as surety amount after forfeiture of surety of entire amount of Rs. 1,00000/-.

4. The present revision has been filed on the ground that the order is illegal and against the weight of evidence on record and based on surmises and conjuncture. The revisionists were not aware of the proceedings under Section 446 Cr.P.C. against them, when they came to know, they searched the accused -Faisal and asked him to surrender before the Court below. The revisionists are very poor persons and do labour work to earn their livelihood. They went to Delhi for labour work and their family had no knowledge of the aforesaid proceedings launched against them. The revisionists moved an application 9 B before the Court below to remit the amount on the aforesaid ground but the Court below remitted the amount to

the tune of Rs. 50,000/- to be deposited within two days. The Court below taken the custody of accused and sent him to jail, therefore , the impugned order is against the law and not sustainable in the eye of law and liable to be set-aside. If this Court does not remit the surety amount of Rs 50,000/-, the revisionists shall suffer irreparable loss and injury.

5. The copy of the impugned order alongwith affidavit has been annexed with the revision.

6. Vide order dated 15.10.2022 this Court had allowed Criminal Misc. Bail Application No. and both the revisionists had executed surety bond in compliance of order of this Court for release of the accused Faisal. Perusal of order dated 31.3.2022 shows that in spite of process under Section 83, the accused Faisal did not appear, therefore, notices were issued to the revisionists which were served upon them; consequently surety bonds were forfeited and a criminal misc. Case U/S 446 Cr.P.C. was registered and an order was passed to recover the surety amount of Rupees one lakh through District Magistrate Sambhal.

7. On 10.5.2022 accused-Faisal appeared and requested to take him into judicial custody and thereafter further proceeding of the sessions trial was conducted. It is orally informed by learned counsel for the revisionists that after conclusion of the trial, the accused Faisal has been convicted.

8. Before the trial Court, both the revisionists moved an application on 10.5.2022 stating that they were not knowing that accused Faisal is absconding; after coming to know, they searched the accused at the probable places but he had gone to the eastern part of the country. They could not know about the recovery proceeding, when they found the accused, they brought him before the Court and prayed that the accused may be taken into custody and recovery proceeding against them be terminated.

9. After hearing the revisionists, the trial Court concluded that though the sureties have produced the accused on 10.5.2022 but before that the surety amount of the surety bond had already been forfeited in favour of the State under Section 446 (3) Cr.P.C. After recording the reason, the Court remitted the amount to the extent of Rs. 50,000/- and directed to deposit the amount of Rs. 50,000/- instead of Rs. 1,00000/- within two days.

10. Against the aforesaid order the revisionists have preferred this revision on the ground that they are very poor labour and anyhow they are pulling on their life and anyhow feeding themselves and their family members; they are unable to pay such a huge amount; they should either totally be exempted from depositing such amount or a meagre amount may be directed to be deposited by them within reasonable time.

11. ***Section 446 (3) Cr.P.C.*** reads as under;

"the Court may after recording its reason for doing so, remit any part of the penalty mentioned and enforce payment in part only."

12. In ***Rajpal Vs. State of U.P., 2009 Crl.L.J. 160,*** "where the sureties have produced the accused before the Court, a

lenient view may be taken in matter of recovery of surety amount.

13. In ***Jagannath Vs State of U.P., 2008 (6) ALJ 696 (All),*** it has been held that "where the surety appeared before the Court, his application for discharge and remission of penalty would not be rejected merely on the ground that the Court has already passed order for forfeiture of whole amount."

14. In this case though the trial Court has exercised its jurisdiction under Section 446 (3) Cr.P.C., it has also been noted that when the sureties produced the accused in the Court before that the amount of the surety bonds had been forfeited. From the principles laid down in the aforesaid judicial precedents, it is clear that even after forfeiture of the surety bonds, order of remission may be passed adopting lenient view if the accused had been produced by the sureties in the Court concerned.

15. In ***Jamila Khader Vs. State of Keral, 2004 CrLJ 3389 Kerala,*** it has been held that *"the Appellate or Revisional Court, as the case may be, can always consider, even at a later stage, where there are circumstances warranting remission of penalty."*

16. In ***Mohd. Kunju Vs. State of Karnataka, AIR 2000 SC 6,*** *"the surety amount of Rs. 25,000/- was remitted to Rs.5,000/- only i.e. 1/5th of the total amount"*

17. In Jamila Khader (supra) instead of ordering to pay whole amount of Rs. 5,000/- only Rs. 5,00/- was directed to be deposited, after remission.

18. During the course of argument, learned A.G.A. opined that if 1/5th of the total amount is directed to be deposited by the revisionists and rest amount is remitted, it would meet the ends of justice.

19. Considering the overall facts and circumstances, the order dated 12.5.2022 passed by the trial Court is modified to the extent that instead of depositing Rs. 50,000/-, the revisionists shall pay Rs. 20,000/- within a month from the date of this order.

20. In case of the compliance of this order as indicated above, proceedings under Section 446 Cr.P.C. would be terminated by the Court below by passing a speaking order. Let a copy of this order be transmitted to the Court below for compliance and necessary action.

21. With the aforesaid observations, the revision stands disposed of.

(2023) 4 ILRA 174
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Second Appeal No. 1087 of 2015

Sarnam Singh, Lekhpal Chakbandi
...Plaintiff/Appellant
Versus
Preetam Kumari & Anr.
...Defendants/Respondents

Counsel for the Appellant:
Sri Manoj Kumar Sharma, Smt. Krishna Singh, Sri Vijendra Pal Singh

Counsel for the Respondents:
Sri Manoj Kumar Gupta, Sri Mahesh Narain Singh

Civil Law- Code of Civil Procedure, 1908 - Section 100 - Hindu Marriage Act, 1955 -

Section-25 - Second appeal against the part of the judgment & decree of the lower appellate by which the permanent alimony has been granted to defendant against plaintiff- Trial court decreed the suit filed for declaration of the marriage as null and void and also dismissed the suit filed for restitution of conjugal rights- Since the trial court passed the decree declaring the marriage as void / ineffective, as such, there was no occasion to order for maintenance / permanent alimony in favour of respondent – wife while dismissing the civil appeal filed by respondent – wife- No application u/s 25 of the H.M Act on record as such exercise of power u/s 25 of the H.M Act by the lower appellate court while dismissing the civil appeals filed by respondent – wife, affirming the decree of trial court, declaring the marriage as void and ineffective is vitiated by manifest error of law. (Para 15, 16, 17, 20 & 21) (E-15)

List of Cases cited:

1. Abbayolla M. Subba Reddy Vs Padmamxna, 1998 0 Supreme (AP) 477;

2. J. Rajeshwarkant Shahdev Vs Neelam Shahdev, 1980 0 Supreme (MP) 364;

3. Jai Krishan Pandita Vs Nana Kumari, 2007 0 Supreme (J & K) 190; &

4. Amar Chand Sharma Vs Smt. Sita Devi, 2005 0 Supreme (Raj) 291.

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Manoj Kumar Sharma and Smt. Krishna Singh, learned counsel for the appellant and Mr. Manoj Kumar Gupta, Advocate, holding brief of Mr. Mahesh Narain Singh, learned counsel for defendant-respondent no.1.

2. The instant second appeal has been filed against the part of the judgment and decree dated 17.10.2015, by which the permanent alimony has been granted to defendant / respondent no.1 (Preetam Kumari) against plaintiff-appellant (Sarnam Singh) in Civil Appeal No. 44/2010 and Civil Appeal No.45/2010, decided by a common judgment arising out of Original Suit No.257/1997.

3. Original Suit No.257/1997 has been filed by plaintiff-appellant (Sarnam Singh) for declaring the marriage as void and ineffective. Original Suit No.213 of 2003 was filed under Section 9 of the Hindu Marriage Act by defendant respondent no.1 (Preetam Kumari) for restitution of conjugal rights.

4. Plaint case of O.S. No.257 of 1997 in brief is that talk of marriage between the plaintiff and defendant has taken place but due to fraudulent act of the wife- Preetam Kumari and their family members, the mediation has taken place and the proposal of the marriage has come to an end but the father of the Preetam Kumari has illegally kidnapped the plaintiff (Sarnam Singh) and illegally solemnized the marriage which is not a legal marriage as prescribed under the Hindu Marriage Act. It is also mentioned in the plaint that there was no relation of husband and wife between them, as such, the alleged marriage be declared null and void. In the written statement, Preetam Kumari denied the plaint allegations and submitted that the valid marriage has taken place, as such, the suit for declaring the marriage null and void be dismissed. Plaint case of O.S. No.213 of 2003 in brief was that Preetam Kumari was married to Sarnam Singh according to the custom on 5/6.7.1997 but husband Sarnam Singh has deserted her, as such, the instant suit for restitution of conjugal rights has been filed by wife Preetam Kumari. In the written

statement, husband Sarnam Singh denied the plaint allegations and stated that no valid marriage according to the Hindu Marriage Act has taken place between them, as such, the plaintiff is not entitled to the relief claimed in the suit for restitution of conjugal rights. It is also mentioned in the written statement that defendant has already filed a Suit No.257/1997 for declaring the marriage as null and void.

5. Both the aforementioned suits were consolidated and heard together. Parties filed oral and documentary evidence in support of their cases. The trial court vide judgment and decree dated 26.8.2010 decreed the Suit No.257/1997 and declared the marriage as null and void and dismissed the Suit No.213/2003 (Preetam Kumari vs. Sarnam Singh) filed for restitution of conjugal rights. Against the judgment and decree dated 26.8.2010, passed by the Civil Judge (S.D.), Etah, Preetam Kumari filed two civil appeal i.e. Civil Appeal No.44/2010 and Civil Appeal No.45/2010 in respect to Suit Nos. 213/2003 and 257/1997. Both the civil appeals were consolidated and heard together by the District Judge, Etah. The District Judge, Etah vide judgment and decree dated 17.10.2015 dismissed both the appeals but directed that respondent (Sarnam Singh) shall pay Rs.6500/- per month as maintenance and Rs.2 lacs to the appellant (Preetam Kumari) towards permanent alimony. Hence this second appeal on behalf of Sarnam Singh (plaintiff).

6. No second appeal has been filed by defendant Preetam Kumari before this Court.

7. This Court on 15.12.2015 admitted the second appeal after formulating the substantial questions of law and granted the interim order to the effect that half of the amount of the order of the maintenance granted by the 1st appellate court shall remain stayed. The records of the district courts were also summoned by this Court. The substantial questions of law are quoted hereunder:-

"1.Whether the order of maintenance under Section 25 of the Hindu Marriage Act can be passed without such relief being asked by the person in whose favour such order is being passed ? If so, its affect.

2. Whether the first appellate court had not afforded opportunity of hearing to parties on the point of maintenance under Section 25 of the Hindu Marriage Act. ? If so, its affect.

8. In pursuance of the order dated 15.12.2015, records of the district courts have been received to this court which has been perused by me. The respondent - Preetam Kumari has already put in appearance through caveat in this appeal.

9. Counsel for the appellant submitted that once the suit for declaring the marriage as null and void / ineffective, has been decreed and decree has been affirmed in 1st appeal, the grant of maintenance by the 1st appellate court is manifestly erroneous. He further submitted that the appellate court has not formulated point of determination while deciding the 1st appeal as provided under Order 41 Rule 31 of the C.P.C., as such, the order for grant of maintenance by the 1st appellate court is manifestly erroneous. He also submitted that the order of maintenance under Section 25 of the Hindu Marriage Act cannot be passed unless there is an application and relief claimed by the party concerned in the proceeding. He further submitted that no

opportunity has been afforded by the appellate court on the point of maintenance under Section 25 of the Hindu Marriage Act, as such, the judgment and decree passed by the lower appellate court is erroneous. Counsel for the appellant placed the finding of the trial court recorded while deciding the issue no.2 in Suit No.213 of 2003 and issue no.1 in Suit No.257/1997 to the effect that marriage between Sarnam Singh and Preetam Kumari has not taken place according to the Hindu Marriage Act, as such, the marriage is held to be void and ineffective. The oral and documentary evidence were taken into consideration by the trial court while decreeing the suit of the appellant Sarnam Singh and dismissing the suit of respondent Preetam Kumari. The finding of fact recorded by the trial court was affirmed in appeal but the appellate court has arbitrarily granted monthly maintenance of Rs.6500/- and a lumpsum amount of maintenance of Rs.2 lacs to the respondent Preetam Kumari which is manifestly erroneous. Counsel for the appellant placed reliance upon the decisions of the other High Courts, which are hereunder:-

1. Abbayolla M. Subba Reddy vs. Padmamxna, 1998 0 Supreme (AP) 477;

2. J. Rajeshwarkant Shahdev vs. Neelam Shahdev, 1980 0 Supreme (MP) 364;

3. Jai Krishan Pandita vs. Nana Kumari, 2007 0 Supreme (J & K) 190; &

4. Amar Chand Sharma vs. Smt. Sita Devi, 2005 0 Supreme (Raj) 291.

10. On the other hand, learned counsel for the respondent submitted that the appellant has not complied the conditions of the interim order passed by this Court for paying the half of the maintenance amount to the respondent, as such, the appellant is not entitled to be heard and the second appeal is liable to be dismissed. He further submitted that the monthly maintenance / lumpsum maintenance has been granted by the lower appellate court in accordance with law as appellant has failed to maintain the respondent on the basis of valid marriage taken place between them. He also submitted that the finding of fact recorded by the lower appellate court cannot be interferred with in the second appeal and the second appeal is liable to be dismissed. He also submitted that the substantial questions of law as framed by this Court are not involved in the second appeal, as such, the second appeal is liable to be dismissed. He further submitted that the amount of maintenance of Rs.500/- granted by the trial court during the pendency of the proceedings, has not been timely paid to the respondent, as such, the appellant is not entitled to any relief in the matter.

11. In reply, counsel for the appellant submitted that the monthly amount of maintenance granted during the pedency of the proceeding before the trial court has been paid to the respondent and the receipt has been annexed along with the affidavit filed in support of the stay application along with the second appeal, as such, it cannot be said the appellant has not complied the conditions before the trial court. He further submitted that so far as the compliance of the additional interim order passed by this Court is concerned, the appellant has filed a modification application no.332915 of 2017 to modify the order dated 15.12.2015 which is still pending before this Court. He further submitted that no counter affidavit to the stay application has been filed by

respondent no.1 denying the averment made in the affidavit to the effect that plaintiff has complied the condition imposed during the trial.

12. I have considered the arguments advanced by learned counsel for the parties and perused the records.

13. The instant second appeal has been admitted on the following two substantial questions of law, as such, the same shall be heard on the substantial questions of law which were framed at the time of the admission of the appeal, same are as under:-

"1.Whether the order of maintenance under Section 25 of the Hindu Marriage Act can be passed without such relief being asked by the person in whose favour such order is being passed ? If so, its affect.

2. Whether the first appellate court had not afforded opportunity of hearing to parties on the point of maintenance under Section 25 of the Hindu Marriage Act. ? If so, its affect.

14. In order to answer the substantial question of law as framed by this Court, the perusal of the relevant portion of finding of fact recorded by trial court will be necessary which are as under:-

वाद सं०-213/03 के वाद बिन्दु सं०-2 एंव वाद सं०357/97 के वाद बिन्दु सं०-1 का निस्तारणः-

वाद सं० 213/03, श्रीमती प्रीतमकुमारी बनाम सरनामसिंह में वाद बिन्दु सं०-2 इस आशय का विरचित है कि,- " क्या वादनी के पिता व सहयोगियों ने विपक्षी का अपहरण करके बिना विपक्षी की सहमति के, जबरन शादी सम्पन्न करायी?" जबकि वाद सं. 357/97 सरनामसिंह बनाम प्रीतम कुमारी में वाद बिन्दु सं०-1इस आशय का विरचित किया गया है कि- " क्या वादी की शादी, प्रतिवादिनी के साथ अनुचित दबाव डालकर सम्पन्न करायी गयी?"

"**उपरोक्त विवेचना एंव पत्रावली पर उपलब्ध मौखिक व अभिलेखीय साक्ष्य से यह तथ्य साबित पाया जाता है कि, वादिया प्रीतमकुमारी के पिता व सहयोगियों ने विपक्षी सरनामसिंह का अपहरण कर उस पर अनुचित दबाव डालकर जबरन उक्त शादी सम्पन्न करायी। तदनुसार वाद सं० 213/03 का वाद बिन्दु सं०-2 व वाद सं० 357/97 का वाद बिन्दु सं०-1 सकारात्मक रूप में निर्णित किया जाता है।**"

Operative portion of the judgment of trial court is as under:-

जहां तक वाद सं० 357/97 का प्रश्न है, ऊपर की गयी विवेचना से यह निष्कर्ष निकलता है कि , वादी सरनामसिंह की शादी प्रतिवादिनी प्रीतमकुमारी के साथ अनुचित दबाव डालकर, उसकी इच्छा के विरूद्ध सम्पन्न करायी गयी थी। ऐसी स्थिति में पक्षों के मध्य सम्पन्न हुयी उक्त शादी,शून्य व निष्प्रभावी घोषित किये जाने योग्य है। इस प्रकार यह वाद सव्यय आज्ञप्त किये जाने योग्य है।

आदेश

वाद सं० 213/03 प्रीतमकुमारी बनाम सरनामसिंह, स्वयय खारिज किया जाता है।

वाद सं० 357/97सरनामसिंह बनाम प्रीतमकुमरी आदि सव्यय आज्ञप्त करते हुये याची व विपक्षी प्रीतमकुमारी के मध्य हुये वाईडेविल विवाह को शून्य व निष्प्रभावी घोषित किया जाता है।

इस निर्णय की एक प्रति वाद सं० 357/97 सरनामसिंह बनाम प्रीतमकुमारी में रखी जाये।

दिनांकः 26.08.2010
(वंशबहादुर यादव)
सिविल जज(सी.डि.)
एटा।

आज यह निर्णय मेरे द्वारा खुले न्यायालय में दिनांकित व हस्ताक्षरित करके उद्घोषित किया गया।

दिनांकः 26.08.2010
(वंशबहादुर यादव)
सिविल जज(सी.डि.)
एटा।

The relevant / operative portion of the judgment of lower appellate court by which judgment and decree of trial court was maintained but decree of permanent alimony was granted is as under:-

पक्षकारों की बहस को सुनकर तथा पत्रावली का अवलोकन करने से यह विदित होता है कि चूंकि इस अपील में पक्षकार सन् 1997 से ही अलग रह रहे है और उन्हें अलग रहते हुए लगभग 18 वर्ष का समय व्यतीत हो चुका है तथा वे मुकदमें के विचाराधीन रहने के दौरान भी कभी साथ-साथ नही रहे और इस बीच उनके सम्बन्धों में भी काफी कडवाहट आ चुकी है और अब ऐसा प्रतीत होता है कि दोनों पक्षकार, पति व पत्नी की तरह साथ-साथ रह कर भी, एक- दूसरे के प्रति वैवाहिक दायित्वों का पालन नहीं कर सकते और ऐसा करना उनके लिये असंभव है। अतः मै विद्वान अधीनस्थ न्यायालय द्वारा पारित तलाक की डिक्री को निरस्त किये जाने योग्य नहीं पाता हूँ, अपितु उसकी बजाय तलाक की डिक्री ज्यो-की त्यों रखते हुए, धारा-25 हिन्दू विवाह अधिनियम के तहत, श्रीमती प्रतिमा कुमारी के लिये स्थाई भरण-पोषण की धनराशि की व्यवस्था किया जाना न्योयोचित होगा।

पक्षकारों को यह स्वीकार है कि सरनाम सिंह लेखपाल के पद पर नियुक्त है और उसे इस पद पर नौकरी करते हुए, लगभग 18 वर्ष का समय व्यतीत हो चुका है, इसलिये उसका वेतन इस समय किसी भी दशा में 20,000/- रूपये से कम नहीं होगा, अतः धारा 25 हिन्दू विवाह अधिनियम के तहत, श्रीमती प्रतिमा कुमारी के लिये, सरनाम सिंह मुव० 6500/- रूपये प्रतिमाह अदा करता रहेगा। यदि 3 माह तक यह धनराशि अदा करने में उसको ओर से डिफॉल्ट किया जाता है तो श्रीमती प्रतिमा कुमारी, इस संबंध में इज़राय दाखिल कर सकती है।

इसके साथ ही साथ, चूंकि पक्षकारों के मध्य पहले मूलवाद और फिर अपील चलते हुए लगभग 18 वर्ष का समय व्यतीत हो चुका है, इसलिये एकमुश्त धन राशि भी श्रीतमी प्रतिमा को दिलाया जाना न्यायोचित होगा और यह धनराशि मुव० 2 लाख रू० आज से अंदर 2, सरनामसिंह के द्वारा उसे प्रदत्त कर दी जायगी।

उपरोक्त विवेचना के आधार पर, दोनों अपील निरस्त किये जाने योग्य हैं।

तदनुसार, दोनों सिविल अपील्स, निरस्त की जाती है, किन्तु विपक्षी- सरनाम सिंह को यह निर्देश दिया जाता है कि वह, इस निर्णय व आदेश की दिनांक से मुव० 6500/- रूपये प्रतिमाह, बतौर भरण-पोषण धनराशि, प्रत्येक माह की 10 तारीख तक श्रीमती प्रीतम कुमारी को अदा करें। यदि 3 माह तक यह धनराशि अदा करने में उसकी ओर से डिफॉल्ट किया जाता है तो श्रीमती प्रीतम कुमारी, इस संबंध में इज़राय करके यह रकम प्राप्त कर सकती है।

इसके अतिरिक्त विपक्षी- सरनामसिंह, एकमुश्त धनराशि के रूप में, मु० 2 लाख रू० आज से 2 अंदर माह, श्रीमती प्रीतम कुमारी को अदा करना सुनिश्चित करे।

भरण-पोषण एंव वाद व्यय की धनराशि को प्राप्त करने के लिये, श्रीमती प्रीतम कुमारी, नियमानुसार कार्यवाही कर सकती है।

मूल अभिलेख, अविलंब विद्वान अधीनस्थ न्यायालय, वापस भेजा जाय।

इस निर्णय व आदेश की एक प्रति, सिविल अपील सं०-45 सन् 2010 श्रीमती प्रीतम कुमारी प्रति सरनामसिंह की पत्रावली पर रखी जाय।

अक्टूबर 17, 2015
(कमल किशोर शर्मा)
जिला न्यायाधीश, एटा

निर्णय एंव आदेश, आज मेरे द्वारा खुले न्यायालय में हस्ताक्षरित व दिनांकित कर, उद्घोषित किये गये।

अक्टूबर 17, 2015
(कमल किशोर शर्मा)
जिला न्यायाधीश, एटा

15. The perusal of the judgment of lower appellate court reveals that lower appellate court has ordered for maintenance/permanent alimony on the ground that there was divorce decree of the trial court although trial court passed the decree declaring the marriage as void / ineffective, as such, there was no occasion to order for maintenance / permanent alimony in favour of respondent - wife while dismissing the civil appeal filed by respondent - wife, as such, judgment and decree passed by lower appellate court for maintenance/permanent alimony is vitiated by manifest error of law.

16. So far as exercise of the jurisdiction under Section 25 of the Hindu Marriage Act while dismissing the civil appeal filed by wife is concerned, the perusal of Section 25 of the Hindu Marriage Act will be necessary which is as under:-

25. Permanent alimony and maintenance.--(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is, a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just].

17. The perusal of the lower court record reveals that there was no application under Section 25 of the Hindu Marriage Act, 1955 on record, as such, exercise of power under Section 25 of the Hindu Marriage Act, 1955 by the lower appellate court while dismissing the civil appeals filed by respondent - wife, affirming the decree of trial court, declaring the marriage as void and ineffective is vitiated by manifest error of law.

18. So far as grant of monthly maintenance by trial court is concerned, the same has come to an end while passing the final judgment and decree by trial court declaring the marriage as void and ineffective, as such, no reliance can be placed upon the monthly maintenance granted by trial court.

19. Since there was no application under Section 25 of the Hindu Marriage Act, 1955 by respondent-wife in civil appeal, as such, there was no question that lower appellate court has provided

opportunity of hearing to appellant - husband in civil appeal before passing order of maintenance in favour of wife.

20. The case law of the Andhra Pradesh High Court as cited by learned counsel for the appellant rendered in **Abboyolla M. Subba Reddy** (supra) is relevant. Paragraph Nos. 26, 31 & 32 of the aforementioned judgment rendered in **Abbayolla M. Subba Reddy** (supra) are as under:-

26. The learned Counsel for the respondent submitted that under Section 25 **of the Hindu Marriage Act, a wife whose marriage is void would be entitled, as of right, of relief of permanent maintenance once her marriage is annulled by a decree of nullity under** Section 11 **or passing a decree of a kind envisaged under** Sections 9 **to** 14 **of the Hindu Marriage Act, and therefore, it follows that the Hindu Marriage Act, 1955 recognizes, notwithstanding the fact that the marriage is null and void, that the wife has the status atleast for limited purpose of applying for alimony and maintenance. This statutory intention, according to the learned Counsel for the respondent, has to be borne in mind in considering the claim of the respondent in this case to maintenance. The support of this contention the learned Counsel relied on the decision of a learned single Judge of Bombay High Court in Smt. Rajesh Bai and others v. Shantha Bai. In that case, the first wife of the deceased filed a suit for partition against the brothers of her deceased husband and the 2nd wife of her husband by name Rajesh Bai. The defendants in that suit took the plea that the plaintiff was divorced by her husband as per the caste custom and after divorce, he married 2nd wife Rajesh Bai. The learned single Judge while holding that the marriage of Rajesh Bai is void in view of the subsisting first marriage of the deceased with Shantha Bai, granted maintenance to 2nd wife Rajesh Bai relying on the pari materia provisions of** Section 25 **of the Hindu Marriage Act and also relying on the inherent powers of the Court under Section 151 C.P.C. to meet the ends of justice. The learned single Judge observed thus: "The rights recognised by** Section 25 **of the Hindu Marriage Act can clearly be worked out in any civil proceedings subject to consideration of facts and circumstances so as to meet the ends of justice by resort to the inherent powers conferred upon the Courts by Section 151 C.P.C. The statutory references do not indicate that there is any prohibition or any specific Provision in this regard. On the other hand, the principle is statutorily recognised that upon a decree being passed for nullifying the marriage as void de jure, the Court is possessed with ample power to make order as to alimony and maintenance. What could, therefore, be available in special proceedings cannot be said to be not available when the same issue is involved collaterally in competent civil proceeding." The learned Judge further observed: "Ultimately, having based the relief under Section 151 C.P.C. with the aid of inherent powers and drawing upon the principle underlying** Section 25 **of the Hindu Marriage Act, it is implicit that before maintenance is granted, the need to grant such must exist as well as the grantee must fulfil the ordinary conditions like that of chastity, not being married with any other person and further of not being in a position to maintain herself." With due respect, we**

are not in a position to accept the said reasoning of the learned Judge. Firstly, the assumption that Section 25 **recognizes the right of a woman bigamously married to claim maintenance at the time when a decree of nullity is passed is not correct. Secondly in the absence of a proceeding under** Sections 9 **to** 14**, such a relief cannot be granted by invoking Section 151.** Section 151 **could have no application to such a situation.**

31. In view of the above decision taken by us, the claim of the respondent for maintenance, whose marriage is void ab initio, against the appellant is not maintainable. Hence, the decree and judgment in O.S. No.131/87 on the file of the Principal Subordinate Judge, Chittoor, is liable to be set aside.

32. In the result, the appeal is allowed. The judgment and decree in O.S.No.131 of 1987 on the file of the Principal Subordinate Judge, Chittoor, is set aside and the suit O.S.No.131 of 1987 is dismissed. In the circumstances of this case, parties are directed to bear their costs throughout.

21. Considering the entire facts and circumstances of the case, the grant of maintenance under Section 25 of the Hindu Marriage Act in favour of Preetam Kumari when marriage has been declared null and void by the trial court, cannot be maintained in the eye of law. The suit for declaring the marriage as null and void, has been decreed by the trial court and the decree has been affirmed in the first appeal, as such, the first appellate court has committed illegality in passing the order for maintenance under Section 25 of the Hindu Marriage Act. It is also material that finding of the trial court has been maintained in the appeal, as such, there was no occasion to grant maintenance under Section 25 of the Hindu Marriage Act in favour of the respondent Preetam Kumari coupled with the fact that there was no application under Section 25 of the Hindu Marriage Act, 1955 in civil appeal by respondent-wife.

22. In view of the finding of fact recorded by the trial court declaring the marriage as void and ineffective, the grant of maintenance under Section 25 of the Hindu Marriage Act in favour of the respondent Preetam Kumari is manifestly erroneous and illegal. The substantial questions of law nos. 1 & 2 are answered in favour of appellant and against the respondent.

23. In view of above, the part of the judgment and decree of the lower appellate court by which maintenance under Section 25 of the Hindu Marriage Act has been granted by the first appellate court in Civil Appeal No.44/2010 and 45/2010 is hereby set aside. **The second appeal stands allowed.** No order as to costs.

(2023) 4 ILRA 182
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2023

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 2211 of 2023

Saroj Kumari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satyendra Chandra Tripathi

Counsel for the Respondents:

C.S.C., Sri Sanjay Kumar Srivastava

Civil Law - Maternity Benefit - Maternity Benefit Act, 1961 - Sections 5(1), (3) & (4) - Right to payment of maternity benefit - Every woman has the right to maternity benefits - Her employer is liable to pay her during the time she is absent from work due to maternity - Provisions of the Act of 1961 also permits maternity benefit even after the birth of the child - Denial of maternity leave to the petitioner on the ground that the child has already been born and relegating the petitioner to avail Child Care Leave is totally unwarranted - Maternity benefit and Child Care Leave operate in different fields and are mutually exclusive - Availability of Child Care Leave to the petitioner or grant of the same cannot disentitle the petitioner from grant of maternity benefit - Child Care Leave can be availed not only at the point when the child is born but at any subsequent period - Impugned order quashed - District Basic Education Officer further directed to release the arrears of salary and pay the salary (Para 20, 22)

Allowed. (E -5)

List of Cases cited:

1 Smt. Anupam Yadav Vs St. of U.P. & ors.; Writ (A) No. 9535 of 2022

2. Deepika Singh Vs Central Administrative Tribunal & ors., AIR 2022 SC 4108

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

1. Heard Sri Satyendra Chandra Tripathi, learned counsel for the petitioner, Shri Shailendra Singh, learned Standing Counsel for the State-Respondent Nos. 1 & 2 and Sri Sanjay Kumar Srivastava, learned counsel for the Respondent Nos. 3 to 6.

2. By means of the present writ petition, the petitioner has prayed for issuance of a writ of certiorari quashing the orders dated 14.11.2022 and 25.11.2022 passed by the Respondent No.4, District Basic Shiksha Adhikari, Etah whereby and whereunder the sanction of maternity leave has been turned down by stating that *"after child birth ML is not allowed and now you are eligible for CLL according rule" and "for ML out of date. now you can apply for CCL."*

3. At the very outset, Sri Satyendra Chandra Tripathi learned counsel for the petitioner submits that the similar controversy, as raised in the present petition, has already been allowed by this Court in a bunch of writ petition, leading amongst them being ***Writ (A) No. 9535 of 2022 (Smt. Anupam Yadav vs. State Of U.P. And 2 Others).***

4. Learned counsel for the petitioner prays that the present writ petition may also be decided in terms of the aforesaid decision dated 21.10.2022 passed in ***Writ (A) No. 9535 of 2022 (Smt. Anupam Yadav vs. State Of U.P. And 2 Others).***

5. Shri Shailendra Singh, learned Standing Counsel for the State Respondents as well as Sri Sanjay Kumar Srivastava, learned counsel for the Respondent Nos. 3 & 4, have vehemently opposed the prayer made in the petition and submits that ratio laid down by this Court in Smt. Anupam Yadav (supra) heavily relied upon by the counsel for the petitioner is not applicable to the case at hand.

6. I have heard learned counsel for the parties and have perused the record.

7. Before the Court proceeds to examine the case of the petitioner on merits, it deems it appropriate to clear the mist that has engulfed the parties regarding the applicability of the ratio laid down by this Court in the case of ***Smt. Anupam Yadav (supra).***

8. In the case of ***Smt. Anupam Yadav (supra)*** and the connected petitions the challenge laid was to order passed by the competent authority/District Basic Education Officer whereby and whereunder the sanction of maternity leave for 180 days was turned down by stating that the same was not admissible or on the ground that the period of 02 years had not elapsed from the date of expiry of the last maternity leave granted to the petitioners under the proviso to Rule 153 (1) of Chapter XIII of the U.P. Fundamental Rules in Financial Handbook Volume-II, Part 2 to 4. The moot question was regarding the applicability of the Maternity Benefit Act, 1961. There was no dispute with regard to the applicability of Fundamental Rules i.e. Rule 153 (1) of Chapter XIII of U.P. Fundamental Rules in Financial Handbook Volume-II, Part 2 to 4. The parties were at variance only with regard to the applicability of Maternity Benefit Act, 1961. The Court after appreciating the respective contentions of the learned counsels for the parties and considering the provisions of the Maternity Benefit Act, 1961 as also the relevant provisions of the Financial Hand Book, particularly Rule 153 observed that the State Government exercising powers under Section 28 of the Maternity Benefit Act, 1961 had already adopted the provisions of the Maternity Benefit Act, 1961 for the benefits of its employees. Once the provisions of the Maternity Benefit Act, 1961 had been adopted by the State of U.P. then the Act of 1961 would apply with full force irrespective of the provisions contained in the Financial Handbook which were held to be merely executive instructions and subsidiary to the legislation made by the Parliament. The Court thus held that the provisions of the Maternity Benefit Act, 1961 would prevail over the provisions of the Financial Handbook and consequently, the provisions of Rule 153 (I) of the Financial Handbook Volume II to IV were to be read down with regard to the admissibility of leave to a woman with regard to second pregnancy which would be governed by the Maternity Benefit Act, 1961 and not Rule 153 (1) of the Financial Handbook Volume II to IV. The writ petitions were allowed accordingly.

9. In view of above, the Court finds substance in the stand taken by the learned counsel for the respondent. The only benefit the petitioner may derive from the ratio of the decision in ***Smt. Anupam Yadav (supra)*** is that the grant of maternity leave would be governed by the provisions of the Maternity Benefit Act, 1961.

10. Now, the Court proceeds to decide the *lis* on merits.

11. The undisputed facts are that the petitioner is posted as Headmistress at Primary School, Heerapur, Block Maarhara, District Etah on the institution run by the Board of Basic Education, U.P., Prayagraj. The service conditions of the petitioner are governed by the provisions of Uttar Pradesh Basic Education (Teachers) Service Rules, 1981.

12. Perusal of the record reveals that petitioner was admitted in the hospital on 15.10.2022 and gave birth to a girl child and after discharge from the hospital, she

immediately applied for maternity leave through online for the period 18.10.2022 to 15.4.2023 (for 180 days). But the same was rejected on the ground that annexures in support of maternity leave were incomplete. Thereafter, petitioner again applied for maternity leave on 30.10.2022 on the prescribed proforma, but surprisingly the same has been rejected by the District Basic Education Officer, Etah on 4.11.2022 and 25.11.2022 with remarks that *"after child birth ML is not allowed and now you are eligible for CLL according rule" and "for ML out of date. now you can apply for CCL,"* respectively. The above orders have been impugned in the instant writ petition.

13. Learned counsel for the petitioner contends that the Maternity Benefit Act, 1961 has been enacted by the Parliament to regulate the employment of women in certain establishment for certain period before and after child birth and to provide for maternity leave benefit and certain other benefits. The provisions of the Act of 1961 permit maternity benefit even after the birth of the child and as such, the denial of the maternity leave to the petitioner on the ground that the child has already been born, the petitioner is not entitled to the maternity leave is per se illegal and erroneous. It is also contended that the Child Care Leave is distinct to the maternity benefit and operate in different fields and relegating the petitioner to avail Child Care Leave is totally unwarranted. It is also contended that the respondents have also stopped the salary of the petitioner since November and December, 2022 which is also unwarranted.

14. Learned counsel for the respondent have tried to justify the impugned orders by submitting that the orders are just and proper and do not suffer from any infirmity or illegality warranting any interference by this Court.

15. Having heard the learned counsel for the parties and having perused the record, the Court deems it appropriate to refer to certain provisions of the Maternity Benefit Act, 1961 which are being reproduced below:

Section 3(h) of 1961 Act defins "maternity benefit" to mean the payment referred to in sub section (1) of section 5.

Section 5 of 1961 Act reads as under:-

"5. Right to payment of maternity benefit.-

(1) Subject to the provisions of this Act, every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.

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

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

(3) The maximum period for which any woman shall be entitled to maternity benefit shall be [Twenty six

weeks of which not more than eight weeks] shall precede the date of her expected delivery:-

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

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

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

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

16. The preamble of the Maternity Benefit Act, 1961 (Act No. 53 of 1961) reads as under:-

"An Act to regulate the employment of women in certain establishment for certain periods before and after child-birth and to provide for maternity benefit and certain other benefits."

17. Sub-section (1) of Section 5 of the Act confers and entitlement on a woman to the payment of maternity benefits at a stipulated rate for the period of her actual absence beginning from the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day. Sub-section (3) specifies the maximum period for which any woman shall be entitled to maternity benefit. These provisions have been made by Parliament to ensure that the absence of a woman away from the place of work occasioned by the delivery of a child does not hinder her entitlement to receive wages for that period or for that matter for the period during which she should be granted leave in order to look after her child after the birth takes place.

18. The Act of 1961 was enacted to secure women's right to pregnancy and maternity leave and to afford women with as much flexibility as possible to live an autonomous life, both as a mother and as a worker, if they so desire.

19. From the perusal of the Preamble of the Act, Section 5 (1), third proviso to sub-section 3 of Section 5, sub-section 4 of Section 5, it is more than apparent that the Maternity Benefit can be extended even after birth of a child. It can even be extended in a case of a legal adoption of a child or less than three months. The only restriction being that the maternity leave may not be granted for entire 180 days or 26 weeks. Further, in the opinion of the Court, availability of Child Care Leave to

the petitioner or grant of the same cannot dis-entitle the petitioner for grant of maternity benefit. Maternity benefit and Child Care Leave both operate in different fields and are mutually exclusive. The Apex Court in a recent case reported in ***AIR 2022 SC 4108 (Deepika Singh versus Central Administrative Tribunal and others)*** held that independent of the grant of maternity leave, a women is also entitled to the grant of Child Care Leave for taking care of her two eldest surviving children whether for rearing or for looking after any of their needs, such as education, sickness and the like. Child Care Leave can be availed of not only at the point when the child is born but at any subsequent period. Both constitute distinct entitlements. A purposive interpretation is required to be adopted. The object and intent of the grant of maternity leave would stand defeated. The grant of maternity leave is intended to facilitate the continuance of women in the work place. It is a harsh reality that but for such provisions many women would be compelled by social circumstances to give up work on the birth of the child if they are not granted leave and other facilitative measures. No employer can perceive child birth as detracting from the purpose of employment. Child birth has to be construed in the context of employment as a natural incident of life and the provisions of the Maternity Benefit Act are required to be construed in that perspective.

20. This Court is of the opinion that the District Basic Education Officer, Etah while rejecting the claim of the petitioner has overlooked the provisions of Maternity Benefit Act, 1961. In view of above, the impugned orders dated 14.11.2022 and 25.11.2022 passed by the Respondent No.4, District Basic Shiksha Adhikari, Etah is not sustainable in the eyes of law and are set aside. The writ petition is ***allowed***.

21. The District Basic Education Officer, Etah is directed to pass fresh orders keeping in mind the provisions of the Maternity Benefit Act, 1961, within a period of two weeks from the date of production of certified copy of this order.

22. The District Basic Education Officer, Etah is further directed to release the arrears of salary and pay the salary month to month to the petitioner as and when the same falls due.

(2023) 4 ILRA 187
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 2330 of 2023

Smt. Gopa Bahadur ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamlesh Kumar Yadav, Sri Vijay Kumar Srivastava, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra, Sri Chandan Sharma

(A) Civil Law - Maintainability of second writ petition - Code of Civil Procedure , 1908 - Order 2 Rule 2 - Suit to include the whole claim - while filing a petition or a suit, whole of the claim, which the plaintiff or the petitioner is entitled to make in respect of a cause of action - shall be required to be added failing which he shall not afterwards be entitled to sue in respect of the portion of the omitted or relinquished claim - Explanation IV of Section 11 - any matter which might and

ought to have been made a ground of defence or attack in such former suit or petition under Article 226 - shall be deemed to have been a matter directly or substantially in issue in such suit or proceedings.(Para - 6)

Petition filed for same cause of action - Petitioner foregone her claim and right - to challenge women reservation in earlier writ petition - issue and relief not claimed as an alternative. **(Para - 5,10)**

HELD:-C.P.C. is based on public policy and should be extended and made applicable in writ jurisdiction. Any relief not claimed in the earlier writ petition should be deemed to have been abandoned. Second writ petition for same cause of action not maintainable. **(Para - 11)**

Writ Petition dismissed. (E-7)

List of Cases cited:

1. Gramodyog Welfare Sanstha Vs St. of U.P. , (2008) 1 SCC 428

2. C.I.T., Bombay Vs T.P. Kumaran , (1996) 10 SCC 561

3. U.O.I. Vs Punnilal , (1996) 11 SCC 112

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard Shri Ashok Khare, learned Senior Advocate assisted by Shri Kamlesh Kumar Yadav and Shri Chandan Sharma, lerned counsel appearing for the respondent Nos. 2 and 3 and learned Standing Counsel for the State-respondent.

2. Petitioner by the instant writ petition, inter alia, seeks the following relief:

"To issue a writ, order or direction of a suitable nature commanding the respondent to forthwith recommend one additional candidate under the 20% reservation for women in pursuance to "Direct Recruitment" to the Uttar Pradesh Higher Judicial Service - 2018 (Part-II) within a period to be specified by this Hon'ble Court."

3. It is not in dispute that petitioner had earlier approached this Court by filing a writ petition being Writ - A No. 2650 of 2022 (Smt. Gopa Bahadur Vs. High Court of Judicature at Allahabad and Another). The aforesaid writ petition came to be dismissed vide order dated 4 April 2022.

4. On perusal of the aforenoted order, it appears that a direction was sought by the petitioner that the candidature of the petitioner be considered under Scheduled Caste category. The Court rejected the contention as in the application form, petitioner applied under the "General/Unreserved Category". Petitioner in the present writ petition has raised the correctness of twenty percent women reservation under horizontal quota.

5. Learned counsel appearing for the respondent Nos. 2 and 3 submit that the second writ petition would not be maintainable as the petitioner admittedly had foregone her claim and right to challenge the women reservation in the earlier writ petition. They submit that the principle enshrined under Order 2 Rule 2 of the Civil Procedure Code, 1908(for short "C.P.C.'), would apply in the matter.

6. Order 2, Rule 2 of C.P.C., provides that while filing a petition or a suit, whole of the claim, which the plaintiff or the petitioner is entitled to make in respect of a cause of action, shall be required to be added failing which he shall not afterwards

be entitled to sue in respect of the portion of the omitted or relinquished claim. Similarly, Explanation IV of Section 11 of the C.P.C., also provides that any matter which might and ought to have been made a ground of defence or attack in such former suit or petition under Article 226, shall be deemed to have been a matter directly or substantially in issue in such suit or proceedings.

7. The Hon'ble Supreme Court has also, on more than one occasion deprecated the practice of filing multiple writ petitions on same or similar cause of action. Reference in this regard can be made to the judgment rendered in the case of **Udyami Evam Khadi Gramodyog Welfare Sanstha Vs. State of U.P.** The question is *"Whether this Court should entertain second petition particularly in view of the defects pointed out above? The answer to the aforesaid question, in the considered view of this Court, has to be negative."*

8. Supreme Court in **Commissioner of Income Tax, Bombay Vs. T.P. Kumaran2; Union of India Vs. Punnilal,** observed as under:

"..... It is why the rule of judicial practice and procedure that a second writ petition shall not be entertained by the High Court on the subject matter respecting that the writ petition of the same person was dismissed by the same Court even if the order of such dismissal was in limine, be it on the ground of latches or on the ground of non-exhaustion of alternative remedy, has come to be accepted and followed as salutary rule in exercise of writ jurisdiction of the Court."

9. Therefore, in view of the above referred authorities, it is abundantly clear that even if the provisions of the C.P.C. are not applicable in writ jurisdiction, the principle enshrined therein can be resorted to for the reason that the principles, on which the C.P.C. is based, are founded on public policy and, therefore, require to be extended and made applicable in writ jurisdiction also in the interest of administration of justice. Any relief not claimed in the earlier writ petition should be deemed to have been abandoned by the petitioner to the extent of the cause of action claimed in the subsequent writ petition and in order to restrain the person from abusing the process of the Court, such an order/course requires not only to be resorted to but to be enforced.

10. On specific query, learned counsel for the petitioner does not dispute that the writ petition arises from the same cause of action and the issue and relief being claimed in the present writ petition could have been raised in the alternative in the earlier writ petition.

11. In view thereof, the second writ petition for the same cause of action is not maintainable, accordingly, **dismissed**.

(2023) 4 ILRA 189
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 2805 of 2023

Union of India & Ors. ...Petitioners
Versus
Amit Kumar Mishra ...Respondent

Counsel for the Petitioners:
Sri Pranay Krishna

Counsel for the Respondent:
Sri Mohan Upadhyay, Sri Babu Nandan Singh

Suspension-Tribunal directly set aside the order of suspension-allegations pertaining fraud and embezzlement of money of depositors-guidelines provide review of put off duty to be considered in the first instance by Superior Authority-revocation of suspension not automatic after lapse of a stipulated time-Tribunal committed an error in setting aside the order of suspension-should have remitted it to Superior Authority to take decision.

W.P. allowed. (E-9)

List of Cases cited:

Ajay Kumar Choudhary Vs U.O.I. through Secretary,2015 (7) SCC 291

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

1. Heard learned counsel for the respective parties.

2. The present writ petition has been filed by the Union of India / Senior Superintendent of Post Offices, Varanasi, assailing the order dated 01 August, 2022, whereby, the suspension / put off duty of the respondent-original applicant, has been set aside. Aggrieved petitioners filed a review petition, which came to be dismissed by order dated 21 September, 2022.

3. The learned counsel appearing for the petitioners has raised a short question that the Tribunal instead of directly setting aside the order of suspension / put off duty, should have remanded the matter to the authority to review the put off duty as the allegations against the respondent-original applicant was serious pertaining fraud and embezzlement of money of the depositors. In other words, it was not open to the Tribunal to have substituted itself for the competent authority.

4. It is not in dispute, inter se, parties that the provisions of the Department of Posts, Gramin Dak Sevaks (Conduct and Engagement) Rules, 2011, is applicable. In exercise of powers conferred under Rule 12, the respondent / original applicant came to be suspended / put off duty, by the appointing authority vide order dated 7 December, 2020.

5. The respondent / original applicant raised challenge to the order, inter alia, on the ground that the respondent / original applicant could not have continued under suspension / put off duty, as the order was not reviewed as per rule / directions issued by the Director General and in support of his submission, reliance was placed on the decision rendered by the Hon'ble Supreme Court in **Ajay Kumar Choudhary vs. Union of India through Secretary reported in 2015 (7) SCC 291.**

6. The reasoning assigned by the learned Tribunal, allowing the original application of the respondent reads thus :-

"6. It is not disputed that the applicant was placed under suspension on 03.01.2020. There is nothing on record to establish that his suspension was reviewed from time to time as prescribed under the rules. It is not understood as to what purpose will be served by keeping the applicant under further suspension. It is also a fact that almost 18 months have elapsed since the applicant had been placed under suspension without conducting a review as prescribed under the rules. Moreover, the said suspension order is in contravention of the judgement

*of the Hon'ble Apex Court in **Ajay Kumar Chaudhary's case (supra).***

*9. For the forgoing reasons, **the OA is allowed** and the impugned orders dated 03.01.2020 and 07.12.2020 are hereby quashed. The respondents are directed to reinstate the applicant in service within a period of two weeks from the date a copy of this order is produced before them by the applicant. The applicant shall be entitled for the arrears of TRCA as per rules."*

7. The original applicant came to be suspended / placed under put off duty, on allegations of fraud and embezzlement of the deposits made by the depositors. It is further alleged that the respondent manipulated the mobile numbers of the account holders and substituting it with his own mobile number and that of his relatives. On complaints received from the depositors, respondent / original applicant came to be placed under suspension / put off duty pending inquiry.

8. Rule 12 provides for put off duty which reads thus :-

"12. Put Off duty

(1) The recruiting Authority or any authority to which the Recruiting Authority is subordinate or any other authority empowered in that behalf by the Government, by general or special order, may put a Sevak Off duty;

(a) Where a disciplinary proceedings against him is contemplated or is pending ; or

(b) Where a case against him in respect of any criminal offence is under investigation, enquiry or trial;

Provided that in cases involving fraud or embezzlement, the Sevak holding any post specified in the Schedule to these rules may be put off duty by the Inspector of Post Offices or the Assistant Superintendent of Post Offices of the Sub-Division, as the case may be, under immediate intimation to the Recruiting Authority."

9. In other words, the employee can be placed under put off duty by the Recruiting Authority, that the disciplinary proceedings against the employee is contemplated or pending.

10. The proviso to the rule mandates that in the case of fraud or embezzlement, the employee holding any post specified in the Schedule to the Rules may be put off duty by the Inspector of Post Offices or the Assistant Superintendent of Post Offices from the Sub-Division, as the case may be, under immediate intimation to the Recruiting Authority.

11. Sub-Clause (2) of the Rule mandates that the order passed by the Officers noted herein above being subordinate to the Recruiting Authority shall cease to be effective on the expiry of the fifteen days unless earlier confirmed or cancelled by the Recruiting Authority.

12. Reliance has been placed by the respective counsels for the parties on the Director General instructions, the guidelines governing putting off duty, which mandates that putting an Extra Departmental Agent off duty may cause a lasting damage to his reputation, if he is ultimately exonerated. The competent authority is, therefore, expected to exercise his discretion with proper care and due caution while ordering an Extra Departmental Agent to be put off duty, generally speaking, put off duty cases fall under two categories, namely, cases

relating to frauds or cases relating to minor incidents of indiscipline.

13. The guidelines further mandates that having regard to the allegations of fraud that may take some time, in the pending disciplinary proceedings, as against the cases of the second category involving administrative lapses should not remain pending for long. The relevant portion of the guidelines for the purposes of case is extracted :-

"2. Putting an Extra-Departmental Agent off duty may cause a lasting damage to his reputation if he is ultimately exonerated. The competent authority is, therefore, expected to exercise his discretion with proper care and due caution while ordering an Extra-Departmental Agent to be put off duty. Generally speaking, put off duty cases fall under two categories, vis., -

(i) cases relating to frauds; and

(ii) cases relating to unauthorized absence, leave without sanctioned complaints from the public, etc.

While the inquiry into the first type of cases may take some time, there is no reason why the type of cases in the second category involving administrative lapses should remain pending for long. The following guidelines by way of precaution may, therefore, be strictly followed by the competent authority before putting an Extra-Departmental Agent off duty :-

(a) .....

(b) the offence should be of such a srious nature that removal from service would be probable ultimate punishment and it would therefore be inadvisable that the offender should be allowed to continue to perform his duties pending finalization of the disciplinary case against him.

(c) .....

(d) .....

(e) .....

3. It is also necessary that the disciplinary authority makes every efforts to finalize the disciplinary proceedings and pass final orders so that an EDA does not remain on put off duty for a period exceeding 45 days and not 120 days as ordered previously. The Divisional Superintendent should draw up a time table for ensuring finalization of disciplinary cases within this period. If, due to unavoidable reasons, it is not possible to finalize a case within this period, the matter should be reported immediately to the next superior authority giving full justification why the EDA cannot be taken back to duty pending finalization of the case. The superior authority should on receipt of the repot immediately review the case and consider -

(i) whether there is justification to continue the EDA concerned off duty for a further period; and

(ii) what steps should be taken by the disciplinary authority to eliminate all avoidable delay in finalizing the case.

The superior authority will then make an order accordingly.

14. Having regard to the guidelines, it is categorically provided that the disciplinary authority should in the event that inquiry cannot be concluded within 120 days should report immediately to the next Superior Authority giving full justification why the employee cannot be taken back on duty pending finalization of the case. The Superior Authority should on receipt of the report immediately review the case and consider, inter alia, whether there is justification to continue the employee on put off duty for further period.

15. In view thereof, it is evident that the review of put off duty of an employee in the first instance has to be considered by the Superior Authority, after lapse of the stipulated time upon a report. The revocation of suspension / put off duty of an employee is not automatic after lapse of a stipulated time.

16. On specific query, learned counsel for the respondent is unable to show from either the Rules or the guidelines that after expiry of 120 days there is automatic cessation of put off duty. Rather, the guidelines mandate review of the order on merit by a Superior Authority.

17. In the circumstances, in our opinion, the learned Tribunal committed an error in usurping upon itself the power of a Superior Authority, thereby, setting aside the impugned orders placing the respondent on put off duty. The reasonable course open to the Tribunal was that it should have remitted the matter to the concerned Superior Authority to take a decision having regard to the charge against the respondent / original applicant pertaining to fraud and embezzlement of deposits of the depositors.

18. Learned Tribunal also committed an error in mechanically applying the ratio of the judgement rendered in **Ajay Kumar Chaudhary** (supra). On perusal of the authority, it transpires that the employee therein was placed under suspension and the suspension continued for a prolonged period for several years due to pendency of C.B.I. Inquiry. The facts arising therein are altogether in a different context and are not applicable to the facts of the present case.

19. For the reason stated herein, we are unable to persuade ourselves to accept the opinion rendered by the learned Tribunal. Accordingly, the writ petition succeeds and is **allowed**. The impugned order dated 01 August, 2022 is set aside and quashed.

20. The matter is remitted to the competent Superior Authority to review the put off duty / suspension of the respondent / original applicant in the light of the guidelines. It is expected that an appropriate order shall be passed expeditiously preferably within six weeks from the date of filing certified copy of this order, provided there is no other impediment.

21. It is clarified that we have not expressed any opinion on the rival contentions and merit of the pending disciplinary proceedings against the original applicant.

(2023) 4 ILRA 193
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.04.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 9347 of 2021

S. Sunanda ...Petitioner
Versus
Chairman, Indira Gandhi Rashtriya Uran Akademi, New Delhi & Ors. ...Respondents

Counsel for the Petitioner:
Anupam Verma, Capt. Pramod Kumar Bajaj

Counsel for the Respondents:
Yogesh Chandra Bhatt, Anurag Srivastava

Service Law-Constitution of India, 1950-Article 226-Writ petition challenging disengagement & non extension of contract of the petitioner working on contractual basis-Challenge premised on letter dated 25.05.2016 or 26.12.2016, does not take the case of the petitioner anywhere as these letters neither have created any right nor extinguished any right of the petitioner-Engagement only on contractual basis-There was no termination of the service of the petitioner rather it was a case of not giving any further extension-Even a series of extension given to a contractual employee does not change the status of the said employee-High Courts in exercising power u/Art. 226 would not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. (Para 24, 27, 28, 33)

Writ petition dismissed. (E-15)

List of Cases cited:

1. St. of Karn. & ors. Vs Uma Devi reported in (2006) 4 SCC 1

2. St. of Har. & ors. Vs Piara Singh and Ors. AIR 1992 SC 2130

3. St. of Kar. Vs M.L. Kesari : (2010) 9 SCC 247

4. Narender Kumar Tiwari Vs St. of Jharkhand : (2018) 8 SCC 238

5. St. of West Bengal Vs Minimum wages Inspector : (2010) 2 SCC 425

6. Karnataka Handloom Development Corporation Ltd. Vs Sri Mahadeva Laxman Raval: (2006) 13 SCC 15

7. Mohd. Abdul Kadir Vs DGP : (2009) 6 SCC 611

8. St. of Rajasthan & ors. Vs Daya Lal & ors.: AIR 2011 SC 1193

9. University of Delhi Vs Delhi University Contract Employees Union & ors.: 2021 SCC Online SC 256

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

1. Heard Shri Anupam Verma and Shri Pramod Kumar Bajaj, learned Counsel for the petitioner and Shri Anurag Srivastava and Shri Yogesh Chandra Bhatt, learned Counsel for the respondents.

2. Petitioner is aggrieved by the judgment and order dated 25.02.2020 passed in Original Application No. 485 of 2018 and the order dated 21.07.2020 passed in Review Application No. 4 of 2020 by the Central Administrative Tribunal, Lucknow Bench, Lucknow (hereinafter referred to as the 'Tribunal'), whereby both, Original Application (O.A.) No. 485/2018 as well as the Review Application No. 04/2020 filed by the petitioner, have been dismissed.

A. The case before the Tribunal

3. The petitioner claimed to be appointed as a Telephone Operator with effect from 06.08.2008 on contractual basis with the "Indira Gandhi Rashtriya Uran Akademi" (hereinafter referred to as "**IGRUA**") vide letter dated 05.08.2008. As per the case of the petitioner, the term of the contract was extended from time to time and the last such extension was granted to the petitioner vide letter dated 26.05.2016, which provided the contractual term of employment till 31.12.2016.

4. The petitioner alleged that her services were discontinued in an arbitrary manner on and from 01.01.2017, while another employee similarly circumstanced, namely, Smt. Vidya was retained as a Telephone Operator although she had been earlier engaged to work as an Assistant Librarian. Thus, the petitioner claimed that

since she had been working for more than 10 years as a Telephone Operator with the respondent-IGRUA and as such she was entitled to be regularized and, thus, claimed the following relief in the original Application filed before the Tribunal; to quote :-

"i. To quash letter No. IGRUA:PF: 2016- 17:238 dated 26 May 16 (Annexure no. 1, page 35) vide which the services of the applicant has not been regularized even after continuous service of more than 10 years and meeting all conditions of para 53 of case of Umadevi (supra).

ii. To direct respondents to regularise services of the applicant as per the law laid down by Hon'ble Supreme Court in Uma Devi (supra 2006), M.L. Kesari (supra 2010) and Shiv Narayan Nagar (supra 2017) as applicant meeting all the requirements of Para 53 of Umadevi (supra) with all consequential benefits.

iii. To direct respondents to permit applicant to continue her services and to pay salary and all other allowance etc. as applicable for the period connecting from Jan 2017 (date of discontinuation of service) to date of joining consequent to the order passed by this Hon'ble Court.

iv. To issue any other order or direction which this Hon'ble Court may deem, just and proper in the nature & circumstances of the case as the applicant had to face irreparable personal/professional/social/ financial loss due to acts to respondents through incompetent authority on the dignity of the applicant.

v. To pass any such other order or direction which is just in the present circumstances of the case.

vi. Allow the cost of this application to the applicant."

5. Obviously the aforesaid prayers were contested by the respondents, who also filed their reply stating that the discontinuation of the service was as per the engagement letter issued to the petitioner and they also raised the issue relating to limitation as is applicable under Section 21 of the Administrative Tribunal Act, 1985. The Tribunal after recording the submission of the parties, vide paragraph 9 of the impugned judgment, enumerated the following key issues for consideration; to quote :-

"i. Whether or not the services of the applicant have been discontinued as per terms and conditions of engagement;

ii. That whether the OA is liable to be dismissed on grounds of being at variance with the liberty granted in the OA 33/2018 by this Tribunal vide order dated 18.09.2018;

iii. That whether the OA is liable to be dismissed on grounds of lack of addressing the delay in filing of the OA itself qua the impugned order/letter;

iv. That whether the services of the applicant ought to have been regularised as prayed in the O.A moreso, can any regularization prayer be considered by this Tribunal without submission of any application by the applicant in this regard before the authorities concerned/respondents earlier."

6. The Tribunal examining the material facts of records, returned a finding that the challenge to the disengagement of the petitioner could not stand the legal scrutiny as far as the first issue was concerned. Similarly, as far as the second issue was concerned, the Tribunal found the prayer of the petitioner seeking quashing of the letter dated 26.05.2016 to be at variance with the liberty granted to

her in earlier round of application filed before the Tribunal and held that the OA was barred by limitation.

7. The Tribunal on merits of the case, found that the petitioner was not able to demonstrate any letter/representation sent to the respondents claiming regularization, which was mandatory before making a prayer to the Tribunal as per the rules. As far as the applicability of paragraph-53 of the judgment rendered by the Hon'ble Supreme Court in the case of **State of Karnataka and Others Vs. Uma Devi** reported in (2006) 4 SCC 1, the Tribunal found that the said judgment provided for only one time measure for regularizing the services of those who were on roll in the year 2006 and who had put in 10 years of service as on 10.04.2006, which was not the case of the petitioner. The Tribunal also held that the petitioner was not a regular employee of IGRAU, nor was there any claim of she having been replaced by another fresh contractual employee. Thus, the OA filed by the petitioner was found to be without any merit and as such was dismissed vide the impugned order dated 25.02.2020.

8. The petitioner thereafter preferred a review application seeking review of the impugned order (supra), wherein the Tribunal found that by the time, the OA was filed or the writ petition was filed, the petitioner was not continuing on contractual basis and as such it was held that the judgment of **State of Haryana and others vs Piara Singh and Ors.** reported in AIR 1992 SC 2130 to be not applicable to the facts of the case. The Tribunal also distinguished the judgment of **Uma Devi (supra)** on facts of the present case and dismissed the review application vide an order dated 21.07.2020.

B. Submission of the Petitioner

9. Shri Anupam Verma, learned counsel for the petitioner sought to challenge both the impugned orders passed by the Tribunal on various grounds. Additionally, the learned Counsel also sought to challenge order/letter dated 26.12.2016 before this court, on the ground that the same was issued by a person holding a post, which was never created by IGRAU or approved by the Government. The learned counsel vociferously contended that the judgment passed by the Hon'ble Supreme Court in **Piara Singh (supra)** although referred by him before the Tribunal was not considered and was left out in the final impugned judgment. The learned Counsel sought to justify that there was no delay in filing the OA as apparently this court had relegated the parties before the Tribunal and although this court had granted some interim relief in favour of the petitioner, however, the Tribunal did not consider the same. It was further contended that inspite of direction passed by this court to decide the case on merits, the Tribunal has not decided the same and has considered irrelevant submission of the respondents, while the petitioner claimed for regularization of her service as per the settled proposition of law as laid down in para-53 of the Apex Court judgment in the case of **Uma Devi (supra)** had not been considered and followed by the Tribunal.

10. On facts, the learned counsel highlighted that the petitioner was rendering her service to the respondent since 1998 as "Telephone Operator" on daily wages basis and subsequently on contractual basis since 2008. It was submitted that although the service of the petitioner was unblemished and she had

been continuously working for more than 10 years and the case of the petitioner was a fit case for regularization, however, her services were abruptly brought to an end on 31.12.2016. Blaming the respondent for inordinate delay in filing the counter and thereafter being relegated to the Tribunal, the learned Counsel has sought to rely on a chart incorporated in the writ petition itself to demonstrate that she had been a victim of vexatious proceedings, although she had been diligently pursuing her grievances, since December 2016.

11. The learned counsel, on merits, sought to agitate that reinstatement of another contractual employee in place of the petitioner (contractual employee) was in the teeth of the judgment in the case of **Piara Singh (supra).** Further, since the petitioner had been continuously working for the last 10 years without any order of the Court on a sanctioned post, her service ought to have been regularized as per law laid down in para-53 of the **Uma Devi (supra)** and clarified in **State of Karnatka Vs. M.L. Kesari :** (2010) 9 SCC 247 and **Narender Kumar Tiwari Vs. State of Jharkhand :** (2018) 8 SCC 238. The learned Counsel also relied on the case of **State of West Bengal Vs. Minimum wages Inspector :** (2010) 2 SCC 425 to buttress his submission that the petitioner had worked on sanctioned post having qualification for that post and she carried all the functions and responsibilities of that post continuously for 10 years or more and, therefore, the petitioner was entitled for emoluments of the said post of telephone operator as per law.

12. The fulcrum of the argument of the learned counsel for the petitioner is that the Tribunal has expressed its inability in reviewing the impugned order on the basis of the judgment of **Piara Singh (Supra)** and **Uma Devi (Supra)** and as such this court is being persuaded to exercise its power of judicial review to consider both the said judgments to the facts of the present case and grant reliefs accordingly.

C. Submission of the Respondents

13. On facts, the respondents controverted the arguments made on behalf of the petitioner by submitting that the petitioner was engaged as daily wager as "Telephone Operator" during the period from 15.08.1998 to 30.04.2001. However, in view of the intermittent nature of the work, the petitioner was again engaged after a gap of four years for the period from 01.6.2005 to 05.08.2008 on daily wage basis and on contractual basis with effect from 06.08.2008, which was extended periodically from time to time for a period of six months at a time and ultimately the same came to an end on 31.12.2016. The respondents denied having engaged the petitioner on a regular post and relied on the letter dated 05.08.2008 to refer to the terms & conditions of engagement.

14. Shri Anurag Srivastava, learned counsel elaborating further on facts submitted that vide letter dated 06.08.2005, three persons were engaged on contractual basis on the post of "Telephone Operator", in which the petitioner secured third position and in the said three cases, the respondent had been extending the term of appointment after expiry of six months. He submits that during the process of diversification of activities in the aftermath of the EPABX automation, Mrs. Vidya V, one of the Telephone Operator's amongst the three, was transferred from Telephone Operator's job to work in Library vide

office order dated 13.10.2009. The learned Counsel also referred to a letter dated 25.10.2016 issued by the Chief Engineer of the respondent relating to man power planning, wherein the Chief Engineer had recommended for requirement of one Telephone Operator in place of three Telephone Operators, pursuant to the modernization and upgrading of the EPABX system. It is the case of the respondent that pursuant to complete automation and there being requirement of only one Telephone Operator, the three available contractual Telephone Operators were assessed for their comparative performance, wherein the petitioner was found to be last. The respondent, thus, retained one Mrs. Indu Jain as Telephone Operator on the basis of merit in performance and who, thereafter, had been allocated the clerical work in Dak Dispatch Section with the reduced work of Telephone Operator. It was in this background that the Manager-HR based on the appraisal of the three operators, communicated vide letter dated 26.12.2016 to the petitioner about her forthcoming expiry of contract on 31.12.2016. The respondents have contended that only one manpower was required for the work of Telephone Operator, which was being performed by two till 31.12.2016 and later on, by the end of 2017, no manpower was required as Telephone Operator and even the said Mrs. Indu Jain has been re-designated as Assistant to perform clerical job in 2018 and presently there is no Telephone Operator working in IGRAU.

15. Explaining the journey of the present lis before this Court, the learned counsel has submitted that in the first round of litigation, the petitioner had challenged the letter dated 26.12.2016 before this Court vide Writ Petition No. 2817 of 2017, wherein this Court vide an order dated 08.02.2017 had directed that no fresh recruitment on the post of Telephone Operator shall be made by the respondents, however, later the said writ petition was disposed on 10.10.2018 on the ground of alternate remedy and parties were relegated to the Tribunal. Before the Tribunal, the petitioner, initially filed OA No. 33/2018, however, the same was withdrawn and thereafter another OA No. 485 of 2018 was filed, which initially although was reserved for interim relief, but the same was dismissed finally on the ground of limitation and merits vide an order dated 24.01.2019. On review being filed by the petitioner, the same was allowed by the Tribunal vide an order dated 20.08.2019. The respondents were not happy with the said order of review by the Tribunal and approached this Court by filing Writ Petition No. 25332/2019, which was dismissed by this Court vide an order dated 06.01.2020 with a direction to the Tribunal to decide the pending OA after providing proper opportunity to the parties in an expeditious manner.

16. On merits, the learned counsel has supported the impugned judgment passed by the Tribunal to be perfectly valid and in accordance with law. It has been submitted that the letter dated 26.12.2016, which has been sought to be challenged by the petitioner is not an order, which intends to terminate the service of the petitioner. According to him, the said letter merely is an intimation that the contract period was expiring on 31.12.2016 and the challenge as such to the said letter was wholly improper. It has been contended that frivolous grounds are being adopted by the petitioner, aimed at pushing the administration into accepting her continuation of contractual appointment. It

has also been submitted that the letter dated 26.12.2016 was issued with an advice to obtain clearance from the department at the earliest and submit the same to the finance department, which would enable the respondent to clear the petitioner's dues. It has also been contended that the post of Manager-HR is already approved by the steering committee and ratified by the Government of India.

17. The learned Counsel has emphatically tried to drive home the point that the petitioner had not been replaced by any other contractual employee, hence the judgment of **Piara Singh (Supra)** is not applicable to the facts of the present case and as such the contention of the petitioner was misleading to that extent. In any case, it was a case of non-renewal of term of a contractual employee due to reduced manpower requirement owing to automation of EPABX system and not a case of replacement by another contractual employee. No fresh recruitment on the post of Telephone Operator was made by the respondent ever after due to abolishment of the post of Telephone Operator.

18. The learned Counsel for the respondent has repelled the argument of the petitioner for regularization on the basis of **Uma Devi (Supra)** on the ground that the Tribunal has given a specific finding that the same was not applicable to the facts of the present case. He further submits that even an OM dated 07.10.2020 was issued by the Ministry of Personnel, PG & Pensions, Department of Personnel & Training, wherein it has been clarified that regularization of qualified workers appointed against sanctioned post as per **Uma Devi (Supra)** was only a one time exercise and it was only applicable to those employee who had put 10 years of continuous service as on 10.04.2006, which is not the present case. The respondent has also tried to refute the contention of entitlement of emoluments as a regular employee by the petitioner on the ground that the work of telephone operator was intermittent in nature and her services were engaged only in the exigency of work. The learned Counsel referring to paragraph-44 of the **Uma Devi (Supra),** has submitted that the petitioner had only joined as a contractual employee on 06.08.2008, whereas the cut-off date as per the said judgment was atleast 10 years of contractual service till 10.04.2006 to be applicable.

19. The learned Counsel has also submitted that while the petitioner was engaged by the respondent on contract, there was no order issued by the Ministry of Civil Aviation, the administrative ministry, to regularize the services of employees engaged on contractual basis in IGRAU after having been continuously engaged for a specific period of time. The Ld. Counsel has reiterated that the findings and observation of non-applicability of **Piara Singh (Supra)** and **Uma Devi (Supra)** by the Tribunal was a correct view. Further, he supported the findings of the Tribunal on limitation and submitted assertively that the Tribunal did not overrule any decision of the Apex Court, rather the Tribunal on the basis of material on records returned a finding that the judgments cited by the petitioner before the Tribunal were not relevant to the context and even on merits the petitioner was not entitled for any relief. Thus, he has prayed for dismissal of the present writ petition.

D. Discussion and Findings

20. Having heard the learned counsel for the parties at length and after perusal of material on records, this Court is of the view that the facts of the case lie in a

narrow compass. Undisputedly, the petitioner was appointed as a Telephone Operator with effect from 06.08.2008 on contractual basis with IGRUA vide a letter dated 05.08.2008. The said letter mentions that the contractual appointment would be valid for a period of six months and would automatically lapse on completion of six months. The petitioner had continued to be employed on contractual basis by the respondent and the last extension was granted by the respondent vide letter/order dated 26.05.2016, extending the contractual duration of employment till 31.12.2016.

21. This Court finds that it is the aforesaid extension letter dated 26.05.2016, which had been sought to be challenged by the petitioner before the Tribunal in the OA leading to the instant impugned order. It is rather absurd as to how the petitioner could have challenged the said extension letter, which merely tends to extend the contractual term of the petitioner till 31.12.2016. The petitioner neither before this court nor before the Tribunal could explain as to which part of the said letter is unsustainable or as to how the petitioner is aggrieved by the issuance of the said impugned letter. Further, it seems the petitioner herself is not clear as to what is her grievance or her right under the prevailing law as apparently in the first round of litigation, wherein she was relegated to the Tribunal by this court, the petitioner had filed an OA No. 33/2018 challenging the order dated 26.12.2016 issued by the Manager-HR intimating her about the expiry of her contractual employment on 31.12.2016, although the said letter dated 26.12.2016 was merely relating to obtaining clearances from all department/ section, so as to enable the petitioner for timely clear her dues.

22. As per records, the OA No. 33/2018, filed in the first round of ligation was dismissed as withdrawn by the petitioner, with a liberty to file a fresh OA on the same cause of action. However, the petitioner, while filing fresh OA No. 485/2018, did not impugned/challenge order dated 26.12.2016 and some other letter; being letter dated 26.05.2016 granting extension to the petitioner was sought to be challenged. It was in this background that the Tribunal found the prayer of the petitioner seeking quashing of the letter dated 26.05.2016 to be at variance with the liberty granted to her in earlier round of litigation/application filed before the Tribunal. Thus, the impugning the letter dated 26.05.2016 was not found appropriate by the Tribunal and moreover, the Tribunal also returned a finding that the OA filed by the petitioner was delayed, for the reason of having filed after the limitation period and since there was no condonation of delay application in terms of Section 21(3) of the Administrative Tribunal Act, inspite of an earlier order dated 24.01.2019 passed by the Tribunal dismissing the OA. Thus, the Tribunal in the impugned order also held that the OA was not under limitation.

23. This Court finds the reasoning of the Tribunal was apt in the given facts & circumstances for dismissing the Application on limitation, however, this court could not be held back any further with the said observation on limitation as pertinently the Tribunal had also dealt in detail on the merits of the present case and has even dismissed the OA on merits.

24. The Tribunal on merits of the case, found that the petitioner was not able to demonstrate any letter/representation sent to the respondents claiming

regularization, which was mandatory before making a prayer to the Tribunal as per the rules. This court also finds that the petitioner in the absence of any such representation, had been seeking to challenge various letters, which merely were issued either in the nature of granting extension of contractual engagement or intimating that the contractual engagement was coming to an end on a particular date. In any case, a challenge premised on letter dated 25.05.2016 or 26.12.2016, does not take the case of the petitioner anywhere as these letters neither have created any right nor extinguished any right of the petitioner.

25. However, it is seen that the petitioner, dehors the representation has also claimed regularization by citing various judgments including **State of Karnataka & Ors. Vs Uma Devi (supra), State of Karnatka Vs M.L. Kesari (supra) and Narender Kumar Tiwari Vs State of Jharkhand (supra).**

26. This Court finds it profitable to note that the Tribunal after analysing the contents of the appointment letter as well as the letter of extension, arrived at a decision that the engagement of the petitioner was purely contractual. The Tribunal has returned a categorical finding that vide a letter dated 26.05.2016, it was informed to the petitioner that her extension would be only uptill 31.12.2016 and finally vide letter dated 26.12.2016, she was informed about the forthcoming expiry of the contract period on 31.12.2016 and thus it was concluded that the petitioner was engaged only on contractual basis. The Tribunal also returned a finding that the claim of the petitioner to have been appointed on a regular post was not adequately substantiated. Even before this Court, there has been no argument on the part of the petitioner as to whether the petitioner was at all appointed on a regular sanctioned post.

27. On the contrary, this Court finds that (i) the appointment of the petitioner was on fixed term basis; (ii) each extension was covered under a specific written order, which prescribed a date of coming to end of the said extension; (iii) after completion of period envisaged in the order of appointment, unless there was extension, the engagement would come to an end; and (iv) The term of employment of the petitioner came to end on 31.12.2016. Thus, from the facts it seems that there was no termination of the service of the petitioner rather it was a case of not giving any further extension of the period of engagement to the petitioner. Now, therefore the question would arise as to whether the petitioner was entitled for her extension of engagement in the peculiar facts of this case, wherein it has come on record that the post of "Telephone Operator" came to an end in a phased manner due to advancement of technology. The answer would be in negative. However, it has been pleaded by the petitioner that she had been engaged for the said employment for the last more than ten years. This courts finds that even a series of extension given to a contractual employee does not change the status of the said employee. The Apex Court in the case of **Karnataka Handloom Development Corporation Ltd. v. Sri Mahadeva Laxman Raval: (2006) 13 SCC 15,** although has considered the issue of retrenchment under the Industrial Dispute Act, wherein for availing retrenchment compensation a continuous engagement of 240 days has been prescribed under law, the Hon'ble Apex court recorded its reasoning at paragraph 18 as follows:

"We have perused all the appointment letters dated 14.01.1991, 24.02.1992, 10.02.1993, 03.03.1993 and 30.11.1993 produced by the respondent as annexures which consistently and categorically state that the respondent's appointment with the Corporation was purely contractual for a fixed period. The respondent was engaged only under the Vishwa programme scheme which is not in existence. Now the scheme came to an end during August, 1994 the respondent was also not governed by any service rules of the Corporation. The Corporation put an end to the contract w.e.f. 31.08.1993 which, in our opinion, cannot be termed as dismissal from service. Even assuming that the respondent had worked 240 days continuously he, in our opinion, cannot claim that his services should be continued because the number of 240 days does not apply to the respondent inasmuch as his services were purely contractual. The termination of his contract, in our view, does not amount to retrenchment and, therefore, it does not attract compliance of Section 25F of the I.D. Act at all."

(Emphasis Supplied)

28. This court has already perused the terms and conditions of appointment of the petitioner. Further, in all the orders of engagement specific periods and the amount of honorarium also has been mentioned. Although, the petitioner had been engaged for a considerable period of time, her status of being in contractual engagement does not change. This court cannot be oblivious to the fact that it is settled law that even if a Scheme has been in operation for some decades or that the employee concerned has continued on ad hoc basis for decades, it would not entitle the employee to seek permanency or regularisation. In **Mohd. Abdul Kadir v. DGP :** (2009) 6 SCC 611, the Hon'ble Supreme Court observed as under :-

"15. On completion of the project or discontinuance of the scheme, those who were engaged with reference to or in connection with such project or scheme cannot claim any right to continue in service, nor seek regularisation in some other project or service."

29. However, the point being sought to be agitated by the petitioner is as to whether such contractual appointment made periodically over a period would entitle the petitioner for regularization in view of the judgment passed by the Apex Court in Uma Devi's case (supra). The learned counsel has assertively relied on paragraph-53 of the Judgment. This Court before considering paragraph-53 of the Uma Devi's case (supra) would like to refer to paras-47 and 49 of the judgment along with the said paragraph-53, wherein the Constitutional Bench observed as follows :-

"47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any

promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post."

49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

(Emphasis added)

30. Apparently, it is not the dictum of the Hon'ble Supreme Court to regularise the irregular or illegal appointment. Thus, picking up one sentence from one judgment or picking up some observation from one judgment of the Hon'ble Supreme Court, benefit of regularisation or permanent absorption cannot be granted in violation of the letter, spirit and the intention of the

judgment of the Constitutional Bench of the Hon'ble Supreme Court of India in Uma Devi's case (Supra). Moreover, it goes without saying that, judgment of a Constitution Bench of Apex Court laying down the law within the meaning of Article 141 of the Constitution of India must be read in its entirely for the purpose of finding out the ratio laid down therein. The Constitution Bench, in no uncertain terms, based its decision on the touchstone of the "equality clause' contained in Articles 14 and 16 of the Constitution of India. Emphasis has been laid at more than one places for making appointments only upon giving an opportunity to all concerned and as per the constitutional scheme, appointment through back-door has been held to be constitutionally impermissible.

31. This Court finds that even if the petitioner had been engaged on contractual basis for over ten years, the petitioner would still not have any claim for regularization, in case the contractual appointment was not made as per the constitutional scheme. The case of the petitioner would also not come within the exception as prescribed by Uma Devi's case (supra) in paragraph 53 of the judgment, inasmuch as, the petitioner was not in service for the required period before the said decision. In the present case, the earliest contractual engagement of the petitioner was on 06.08.2008 and the Constitutional Bench judgment of Apex Court in Uma Devi's case (supra) was pronounced on 10.04.2006, by which time, the petitioner would not have completed the ten years services as mandated in the said judgment. Further, Uma Devi's case (supra) was a one-time measure propounded by the Hon'ble Supreme Court. Moreover, on the application of the Uma Devi's Judgment, it will not be out of place to refer to the judgment rendered by the Apex Court in the case of *State of Karnataka and others v. M.L. Kesari and others (supra).* In M.L. Kesari's Case (Supra), the exception as carved out by para-53 of Uma Devi's case (supra) as also to the circumstances under which such persons were to be considered, the position of law was clarified. The Apex Court clarifying Uma Devi's case (supra) held in paragraphs-6, 7 & 8 of the judgment which are relevant to the context :-

"6. This Court in Umadevi further held that a temporary, contractual, casual or a daily-wage employee does not have a legal right to be made permanent unless he had been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution. This Court however made one exception to the above position and the same is extracted below: (SCC p. 42, para 53)

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in State of Mysore v. S.V. Narayanappa, AIR (1967) SC 1071, R.N. Nanjundappa v. T. Thimmiah, (1972) 1 SCC 409 and B.N. Nagarajan v. State of Karnataka, (1979) 4 SCC 507 and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work fourteen years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to

regularise as a one-time measure, the services of such irregularly appointed, who have worked fourteen years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date."

7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi, if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

8. Umadevi casts a duty upon the concerned Government or instrumentality concerned, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. Umadevi directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10-4-2006)."

(Emphasis Supplied)

32. In any case, the Hon'ble Apex Court in ***State of Rajasthan & Ors. v. Daya Lal & Ors.:*** AIR 2011 SC 1193 was considering the scope of regularisation of irregular or part-time appointments in all possible eventualities and laid down well-settled principles relating to regularisation after noting various judgments including Uma Devi (Supra) in the following manner :-

"6. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or

appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by an temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be `litigious employment'. Even temporary, ad hoc or daily- wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date), it is not possible to others who were appointed subsequent to the cut off date, to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

(See : Secretary, State of Karnataka vs. Uma Devi - 2006 (4) SCC 1, M. Raja vs. CEERI Educational Society, Pilani - 2006 (12) SCC 636, S.C. Chandra vs. State of Jharkhand - 2007 (8) SCC 279, Kurukshetra Central Co-operative Bank Ltd vs. Mehar Chand - 2007 (15) SCC 680, and Official Liquidator vs. Dayanand - 2008 (10 SCC 1)"

33. Thus, it can be safely concluded that the law is no more res integra relating to regularization, inasmuch as, it is clear that the High Courts, in exercising power under Article 226 of the Constitution would not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. In the present case, the petitioner has failed to show that she had been appointed pursuant to a regular recruitment process or against a sanctioned post.

34. The other judgments as relied by the learned Counsel for the petitioner are easily distinguishable from the present case, more particularly the judgment of **Narendra Kumar Tiwari and others v. State of Jharkhand and others (supra)** as in the said case, the Apex Court while taking note of the fact that the State of Jharkhand came into existence only on 15.11.2000, held that the Regularization Rules must be given a pragmatic interpretation, and if the candidates had completed 10 years of service on the date of promulgation of the Regularization Rules, they ought to be given the benefit of

service rendered by them. In the opinion of this court, the ratio of the said decision cannot be made applicable in the present case, first & foremost there are no Regularization Rules of the IGRAU and accordingly, there is no question of completion of 10 years of service on promulgation of such rules. The applicant cannot escape the criteria laid down in Uma Devi (Supra), wherein it has been categorically held that a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It was also clarified in the said judgment that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. Further, the Apex Court went on to hold in clear and unequivocal terms that High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.

35. Thus, the case of the petitioner falls short of the exceptions as prescribed by Uma Devi's case (supra) or liable for consideration by the application of the judgment of **M.L. Kesari (supra),** as the petitioner has attained no vested right for the claim of regularization, nor can a direction be sought from this Court for consideration of the same. In any case, there was no order or scheme issued by the Ministry of Civil Aviation, the administrative ministry of the respondent, to regularize the services of employees engaged on contractual basis in IGRAU after having been continuously engaged for a specific period. In any case, the learned Counsel for the respondent is right in placing reliance on the OM dated 07.10.2020, which was issued by the Ministry of Personnel, PG & Pensions, Department of Personnel & Training, wherein it has been clarified that regularization of qualified workers appointed against sanctioned post as per Uma Devi (Supra) judgment was only a one time exercise and it was only applicable to those employee who had put 10 years of continuous service as on 10.04.2006, which is not the present case.

36. Therefore, such regularization, if granted would fall foul of the law laid down by the Hon'ble Supreme Court in the case of **State of Karnataka v. Uma Devi (supra).**

37. The learned Counsel for the petitioner has also relied on the judgment passed by the Apex Court in **State of West Bengal & another v. West Bengal Minimum Wages Inspectors Association & others (supra),** wherein it was held that evaluation of duties and responsibilities of different posts and determination of the pay scales applicable to such posts and determination of parity in duties and responsibilities are complex Executive functions, to be carried out by expert bodies. In that case, it was held that granting parity in pay scale depends upon comparative job evaluation and equation of posts and the burden to prove disparity is on the employee's claiming parity. It was held by the Apex Courts, that court should approach such matters with restraint and interfere only if they are satisfied that the decision of the Government is patently

irrational, unjust and prejudicial to any particular section of employees. Even this judgment does not come to the rescue of the petitioner.

38. Further, it is available on record that the petitioner was not only the one who had been dis-engaged and apparently the non-extension of contractual engagement was for other cogent reasons, including that of non-requirement of three telephone operators in the wake of technological advancement in telecom division and as such the engagement of the petitioner was discontinued on the basis of comparable merits/performance amongst the three operators, wherein the petitioner stood at the third position. This Court is in agreement with the finding of the Tribunal, which has noted the factum of letter dated 25.10.2016 written by Chief Engineer of the respondent relating to the requirement of only one Telephone Operator in place of three due to the modernisation of the telecom division of the respondent. Thus, the petitioner was not replaced by another contractual employee and in any case, there was no need for replacement of the petitioner as the work of Telephone Operator due to the advancement of technology had lost requirement. Automated EPABX and extensive use of own mobile phones by officials/flying cadets was also one of the reasons of loss of need of Telephone Operators as contended by the respondents. Hence, in our considered view, the petitioner had been working on contract basis extendable from time to time which was extended time to time on need basis. As the respondents felt that the work load is decreased by way of development of technology and only one person is sufficient to work as a Telephone Operator, hence, they decided to discontinue the services of the petitioner on comparable basis. Thus, the present case is not a case, wherein any contractual employee has been sought to be replaced by another contractual employee and as such the judgment of the Apex Court in **State of Haryana & Ors Vs Piara Singh & Ors. (supra),** also does not come to any rescue to the petitioner.

39. The petitioner had earlier filed an OA No. 33/2018 challenging the order dated 26.12.2016 issued by the Manager-HR intimating her about the expiry of her contractual employment on 31.12.2016 and obtaining clearances from all department/ section, so as to enable her to clear her dues. The said OA was dismissed as withdrawn by the Tribunal, with a liberty to file a fresh OA on the same cause of action. However, while filing fresh OA No. 485/2018, apparently the aforesaid order dated 26.12.2016 was not challenged by the petitioner. The petitioner sought to challenge the said order dated 26.12.2016 before this Court yet again, which cannot be allowed as a Court for first instance as this Court is exercising its power of judicial review of the order of the Tribunal.

40. As a sequel to the above discussion, this Court holds that impugned orders passed by the Tribunal do not suffer from any infirmity.

E. Conclusion

41. Thus, for all the aforesaid reasons, this Court finds that the instant writ petition is devoid of merit and as such, is, accordingly, **dismissed**.

42. Recently, the Hon'ble Supreme Court was considering the issue of regularizing contractual employees of Delhi University and for that reason a

special examination was to be conducted for these contractual employees only, which was allowed by the Delhi High Court. However, on appeal, the Hon'ble Supreme Court finding fault in the said process in regularising the contractual employee held in paragraph-12 of the judgment passed in **University of Delhi Vs Delhi University Contract Employees Union & Ors.:** 2021 SCC Online SC 256, as follows :-

12. It is true that, as on the day when the judgment in Umadevi was delivered by this Court, the contract employees had put in just about 3 to 4 years of service. But, as of now, most of them have completed more than 10 years of service on contract basis. Though the benefit of regularization cannot be granted, a window of opportunity must be given to them to compete with the available talent through public advertisement. A separate and exclusive test meant only for the contract employees will not be an answer as that would confine the zone of consideration to contract employees themselves. The modality suggested by the University, on the other hand, will give them adequate chance and benefit to appear in the ensuing selection."

(Emphasis Supplied)

43. Thus, before parting with the records, this Court observes that in the event, the said post or any post commensurate to the qualification and skill as currently borne by the petitioner is advertised, the respondents may allow the petitioner to participate in the regular selection process by relaxing her age as one-time measure in the interest of justice.

44. In the facts of the present case, there shall be no order as to cost.

(2023) 4 ILRA 209
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.04.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 14919 of 2021

Anuj Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Rajat Gangwar, Ashmita Singh, Gaurav Mehrotra, Rahul Agarwal

Counsel for the Respondents:
A.S.G., Ajay Kumar Singh, Satish Kumar Rai

Service Law-Constitution of India, 1950-Article 226-Writ petition challenging order imposing punishment of dismissal from service and the appellate order modifying the dismissal of service to compulsory retirement- Inquiry Officer proceeded to hold the charges proved against the petitioner based upon virtually no evidence-Disciplinary authority while has not even dealt with any of the submissions made by the petitioner-Appellate authority completely erred in holding the petitioner guilty by taking recourse to the dictionary meaning of the word 'supervise' and 'to supervise' completely ignoring the office memorandums which specified the nature of duties in respect of charges leveled-None of the witnesses either before the Inquiry Officer or in any of the documents given alongwith the charge-sheet, in any way incarcerate the petitioner with regard to not following any of the duties-Only charge leveled and established was that the petitioner took 14 days in forwarding the report of the unauthorized construction to the Chief Executive Officer which can in the worst case be called as

'negligence' and does not qualify to be a 'misconduct' warranting such extreme punishment as has been imposed - Punishment order set aside with direction to reinSt. the petitioner in the services alongwith all consequential benefits on the post on which he was working at the time of removal. (Para 90, 91, 92, 93, 94)

Petition allowed. (E-15)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Present petition has been filed challenging the Punishment Order No.85 dated 14.08.2019 passed by Respondent No.2, Cantonment Board Resolution No.188 dated 14.08.2019 passed by Respondent No.3 imposing a major punishment of dismissal from service as well as the appellate order dated 01.06.2021 passed by Respondent No.4 modifying the dismissal of service to compulsory retirement (Annexure - 29).

2. The facts, in brief, are that the petitioner was appointed as Assistant Engineer in the Cantonment Board and was promoted to the post of Cantonment Executive Engineer on 17.08.2002. The petitioner claims that during his service tenure, various awards and commendation certificates were received by the petitioner. It is brought on record that on 27.08.2007, the Cantonment Board, Meerut resolved that the building plan showing cinema hall and shops was sanctioned in the year 1957 and thus, any fresh sanction for a similar venture will not amount to change of purpose.

3. The entire dispute started with respect of Bungalow No.167, Chappel Street Meerut Cantt. Meerut. The Ministry of Defense sought a reply in respect of the resolution passed by the Cantonment Board, Meerut on 27.08.2007 as to why the decision of the Board sanctioning the building may not be modified or revoked. The Cantonment Board vide Resolution No.93 dated 02.03.2009, in view of the notices issued by the Ministry of Defense, resolved that the decision of the government setting aside Resolution No.330 dated 04.01.2008 be communicated to the owner of the Bungalow No.167 and further directions were issued that the Chief Executive Officer should ensure that no unauthorised constructions takes place. The said resolution of the Board was challenged before the Delhi High Court in Writ Petition (C) No.1808 of 2011 (Rajesh Agarwal v. Union of India & Ors.). Learned Single Judge vide order dated 26.07.2011 restored the Cantonment Board Resolution No.330 dated 04.01.2008 and passed orders for approving the building sanction plan in respect of the said Bungalow No.167. However, in respect of the same very bungalow, a letter was written by the General Officer Commanding-in-Chief granting approval to the President, Cantonment Board to initiate disciplinary proceedings against the petitioner as well as one Mr. Piyush Gautam; the said sanction in on record as Annexure - 2.

4. In terms of the approval granted, the Board Resolution No.91 was passed initiating disciplinary proceeding against the petitioner on 26.11.2013. The petitioner challenged the said Resolution No.91 dated 226.11.2013 by filing Writ - A No.70147 of 2013 (Anuj Singh v. Union of India & Ors.). The said writ petition was disposed off by the Allahabad High Court vide order dated 20.12.2013 directing that a charge-sheet be issued to the petitioner and disciplinary proceeding be finalised in accordance with law, preferably within a

period of three months from the date of receipt of a certified copy of the order subject to full cooperation by the petitioner.

5. On 20.12.2013, a charge-sheet was served upon the petitioner levelling as many as seven charges against the petitioner; the charge-sheet is on record as Annexure - 4. In the said charge-sheet, apart from the allegations levelled pertaining to Bungalow No.167, six other charges were also levelled against the petitioner. On 27.01.2014, the petitioner filed a reply to the charge-sheet denying the charges levelled against the petitioner. Similar to the petitioner, charge-sheets were also issued to one Piyush Gautam, A.E. and K.A. Gupta, J.E. All the seven charges as levelled against the petitioner are being reproduced herein below:

"STATEMENT OF IMPUTATION OF MISCONDUCT/ARTICLE OF CHARGE FRAMED AGAINST SHRI ANUJ SINGH, EXECUTIVE ENGINEER, CANTT BOARD MEERUT.

Article of Charge I:-

Shri Anuj Singh while working as Executive Engineer and illegally facilitated sanctioning of a building plan for cinema theatre and several shops in respect of B. No. 167, Chappel Street, Meerut Cantt on several numbers of defence land described in the G.L.R. for residential purpose as well as open plots meant for passage, amalgamating land under several separate survey numbers as well as facilitated change of purpose without obtaining sanction of the Govt of India. There was difference in area too as per report dated 30.07.2004 submitted by him in respect of Sy. No. 357/1742 thus by giving misleading report on docket form of building plan to the Cantonment Board, surruptiously allowed of passing of the building plan for cinema building vide Cantt Board Resolution No. 330 dated 04.01.2008. The Govt of India, Ministry of Defence set aside the above decision of the Board holding that the action of the Board is against the interest of the Govt of India being old grant property. The HOR challenged the decision of the Govt before the Hon'ble High Court of Delh where the Govt of India/Cantt Board lost the case. Thus the proprietory interest of the Govt and the policy instructions has been jeopardized due to his incorrect/illegal report.

This action of Shri Anuj Singh was with the intent and motive to cause wrongful gain/benefit to the applicant HOR and causing loss to the Govt of India, as well as defeating the provisions of Cantonments Act & Land Policy of the Govt of India and thus amounts to gross misconduct which is violative of Rules 3 (1) (i) and 3(1)(ii) of CCS (Conduct) Rules, 1964.

Article of Charge II:-

Shri Anuj Singh while working as Executive Engineer facilitated illegal & unauthorized construction of hotel and resort in old grant residential bungalow No. 22-B, Boundary Road, Meerut Cantt comprising survey No. 302 in violation of Old Grant terms under Governor General's order No. 179 dated 12.09.1836 and the Govt's land policy issued by the Ministry of Defence on 24.03.2012 the unauthorized construction were sealed under orders of the CEO u/s 249 of CA, 2006. Inspite of this fact the unauthorized construction of hotel/resort in the said bungalow continued unabated and completed. After lodging FIR on 04.07.2012 and 19.07.2012 with Police

Station Lal Kurti no action for re-seal of the premises and to stop unauthorized construction were taken by him. In fact all the exercise of getting notices issued and sealing was just an eye wash. In August 2013 effective action was taken by the CEO personally in the matter and got stopped the functions in the premises as well as cancellation of application under Sarai Act moved by the offenders.

Thus Shri Anuj Singh failed to perform his dutics as CEE of the Board by not taking any fruitfull & effective action/initiative to stop the unauthorized construction as well as to remove the unauthorized constructions at initial stage. This action of Shri Anuj Singh was with the Intent and motive to cause wrongful gain/benefit to the applicant and loss to the Govt of India as well defeating the provisions of Cantonments Act and Land Policy of the Govt of India and thus amounts to gross misconduct which is violative of Rules 3 (1) (i) and 3 (1) (ii) of CCS (Conduct) Rules, 1964.

Article of Charge III:-

Shri Anuj Singh while working as Executive Engineer and during the period 15.02.1995 to Jan 2012 illegally facilitated illegal construction in building No. 340 A-C, Rangsaz Mohalla, Sadar Bazar, Meerut Cantt comprising survey No. 357/6 in violation of order dated 08.05.2001 passed by the Hon'ble High Court, Allahabad as well as order dated 29.11.2002 passed by the Hon'ble Supreme Court restraining construction over and above the ground floor raised unauthorisedly i.e. no further unauthorized construction on first floor was permitted by the High Court/Supreme Court of India, but inspite of that a report of construction of 14 pillers on first floor only was submitted by him on which order dated 14.12.2001 was passed by the Estate Officer for demolition but on inspection in August 2013 it is found that entire first floor has been completely constructed during past years. But he did not submit any report of unauthorized constructions after submitting report of 14 pillers having an intention of facilitating the builder and in lieu of getting undue benefit and gratification for himself.

This action of Shri Anuj Singh was with the intent and motive to cause wrongful gain/benefit to the applicant and loss to the Govt of India as well defeating the provisions of Cantonments Act and Land Policy of the Govt of India which amounts to gross misconduct which is violative of Rules 3 (1) (i) and 3 (1)(ii) of CCS (Conduct) Rules, 1964.

Article of Charge IV:-

Shri Anuj Singh while working as Executive Engineer and during the period 15.02.1995 to Nov 2013 illegally facilitated the builders to construct huge unauthorized constructions in bungalow No. 198, 199, 202, 209, 210-A, 210-B, 210- C, 213, 220, 222, 223, 227, 233 West End Road, 176, 340, Rangsaz Mohalla, Sadar Bazar, 193 Naya Bazar, 182, 184, 185, 185/A, 187, 188 and 190, Abu Lane, 305 Circular Road, 182/183 Dalmandi Sadar Bazar and other illegal constructions for commercial exploitation as well as committing change of purpose from residential to commercial in several parts of Cantt area. It is notable that such construction do not match with the construction on ground and the construction shown in reports submitted to the office. Even no complete report that unauthorized constructions have been submitted though it had been stated in reports that work was going on at site. Moreover, no effective steps have been

taken to prevent unauthorized constructions as provided under the law i.e. confiscation of building material and sealing of unauthorized construction. Further it is severe negligence in duty that even after dismissal of the appeals in unauthorized constructions by the GOC-in-C as well as the Director, DE he has not initiated appropriate action within the stipulated time pericd for demolition of the unauthorized constructions involved in appeals. It evidently shows involvement in not taking action for demolition of such unauthorized constructions.

This action of Shri Anuj Singh was with the intent and motive to cause wrongful gain/benefit to the builders/offenders and loss to the Govt of India as well defeating the provisions of Cantonments Act and Land Policy of the Govt of India and thus amounts to gross misconduct which is violative of Rules 3(1) (i) and 3 (1) (ii) of CCS (Conduct) Rules, 1964.

Article of Charge V:-

Shri Anuj Singh while working as Executive Engineer illegally facilitated to continue illegally erected mobile tower in bungalow No. 177-177/A Chappel street, Meerut Cantt inspite of removal order passed by the Estate Officer vide order dated 06.03.2012 and dismissal of Writ petition No. 56971 of 2012 by the Hon'ble High Court, Allahabad on 09.11.2012 till when the offender obtained stay order on 12.12.2012 in special appeal before Hon'ble High Court, Allahabad, in breach of instructions issued by the Govt of India, Ministry of Defence as well jeopardizing the security of the Defence/Army installations. As well as illegally facilitated installation of illegal mobile towers in Cantt area in RA' Bazar and Rangsaz Mohalla, Sadar Bazar" Meerut Cantt during the period of temporary absence of CEO from the station between 25.09.2013 and 06.10.2013 in breach of instructions issued by the Govt of India, Ministry of Defence as well jeopardizing the security of the Defence/Army installation: under Meerut Cantt inspite of express instructions issued by the competent authority i.e. CEO and he deliberately mislead the competent authority by giving false report of removal of illegal towers by him and facilitated them to approach the Court by giving sufficient time while not taking prompt action on the instructions given to him by the competent authority.

This action of Shri Anuj Singh was with the intent and motive to cause wrongful, gain/benefit to the applicant and loss to the Govt of India as well defeating the provisions of Cantonments Act and Policy of the Govt of India and thus amounts to gross misconduct which is violative of Rules 3(1)(i) and 3(1)(ii) of CCS (Conduct) Rules, 1964.

Article of Charge VI:-

Shri Anuj Singh while working as Executive Engineer and during the period 15.02.1995 to Nov 2013 illegally facilitated to continue illegal occupation by way of high class fertile cultivation since long back on approximately 15 acres out of 20.997 acres 'C' class land situated at Trenching ground comprising GLR Sy. No. 307/1 belonging to and vested in the Cantonment Board, Meerut. Earlier being the AE and after that promoted/upgraded to CEE the illegal occupation & cultivation was neither reported by him to the CEO/CB nor he tried to get the land vacated from illegal cultivation. He did not give any heed to the direction of the CEO by not erecting boundary pillers for 3-4 months since July

2013 inspite of repeated instructions of the CEO after joint survey and demarcation of boundaries between 05.07.2013 to 10.07.2013 carried out in the presence of CEO's rep and DEO representatives Ultimately, the land has been got vacated by the CEO was informed secretly from reliable sources that the illegal occupant has arranged all legal process to get stay from the court of law. During the period of illegal occupation of approx 20 years illegal gain of more than one crore was awarded to the illegal occupant/occupants.

Thus Shri Anuj Singh failed to perform his duties with undoubtful integrity by not reporting the illegal occupation and cultivation over approx 15 acres of 'C' class land as well as by not making any effort to get the subject land vacated. This action of Shri Anuj Singh was with the intent and motive to cause wrongful gain/benefit to the illegal occupants and loss to the Govt of India/Cantt Board and thus amounts to gross misconduct which is violative of Rules 3 (1) (i) and 3 (1) (ii) of CCS (Conduct) Rules, 1964.

Article of Charge VII:-

Shri Anuj Singh while working as Executive Engineer facilitated issuance of permission for cutting of total 14 green and dry trees in favour of one Shri Rajeev Kumar on his application dated 13.07.2012 and 30.10.2012 in old grant residential bungalow No. 195/1, Delhi Road, Meerut Cantt comprising survey No. 357/1758. Such act on the part of Shri Anuj Singh was totally illegal being in favour of a person. who is not recorded holder of occupancy rights in GLR maintained by the Cantt Board which is in violation of Old Grant terms under Governor General's order No. 179 dated 12.09.1836 and the Govt's land policy issued by the Ministry of Defence. For such illegal act he submitted incorrect report and recommendation in June 2013 for cutting of trees.

Thus Shri Anuj Singh failed to perform his duties as CEE of the Board by not taking any fruitful and effective action/initiative to stop unauthorized construction as well as to remove the unauthorized construction at initial stage. This action of Shri Anuj Singh was with the intent and motive to cause wrongful gain/benefit to the applicant and loss to the Govt of India as well defeating the provisions of Cantonment Act and Land Policy of the Govt of India and thus amounts to gross misconduct which is violative of Rules 3(1) (i) and 3(1)(ii) of CCS (Conduct) Rules, 1964.

LIST OF DOCUMENTS BY WHICH THE ARTICLES OF CHARGE FRAMED AGAINST SHRI ANUJ SINGH, EXECUTIVE ENGINEER, CANTT BOARD, MEERUT IS PROPOSED TO BE SUSTAINED.

Article of Charge No. 1:-

(i) CBR No. 330 dated 04.01.2008.

(ii) Building application dated 07 Dec 2007 of Shri RK Aggarwal

(iii) Cantt Board Meerut letter No. 93/167/L/511 dated 20.03.2006.

(iv) HQ Central Command letter No. 260506/Q3B dated 18.01.2000 enclosing. MoD ID No. 718/20/L/DE/97/1517/DO(V)/D/(L) dated 13.12.1999.

(V) DG DE letter No. 718/20/L/DE/97 dated 17.05.2000.

(vi) Dte DE, CC, Lucknow letter No. 67147/LC2/2 dated 27.12.2006.

(vii) Cantt Board Meerut letter No. 93/167/L/425 dated 12.03.2007.

(viii) Govt of India, Ministry of Defence letter No. 11013/1/87/D(Lands) Vol-I dated 09.02.1995.

(ix) Scrutiny report of Cantt Board Meerut staff as endorsed on the Building Application of Shri RK Aggarwal.

(x) Mutation application dated 14.01.2003.

(xi) Scrutiny report dated 30.07.2004 & 14.12.2004 on the mutation application dated 14.01.2003.

(xii) Ministry of Defence letter No. 10(68)/2008/D(Q&C) dated 21.11.2008.

(xiii) Ministry of Defence letter No. 10 (68)/2008/D(Q&C) dated 20.02.2009.

(xiv) Building plan sanctioned by the Cantt Board vide CBR No. 330 dated 04.01.2008 of B. No. 167, Chappel Street, Meerut and subsequently set aside by Govt of India vide Ministry of Defence Order No. 10 (68)/2008/D(Q&C) dated 20.02.2009.

(xv) CBR No. 227 dated 27.08.2007.

(xvi) GLR Extract of Sy No. 357/1742, 357/1742/1, 357/1742/2, 357/1742/3, 357/1742/4, 357/1742/5, 357/1742/6, 357/1742/7 & 357/1742/8.

(xvii) GLR Plan of Sy No. 357/1742.

(xviii) Cantonment Board, Meerut Bye Laws.

(xix) Cantonments Act, 2006 relevant section 234 & 235.

(xx) Application dated 22.02.2006 and 07.05.2007 of Shri RK Aggarwal.

(xxi) DG DE letter No. 707/1/L/DE/CC/1/2007 dated 01.03.2007.

Article of Charge No. II:-

(i) GLR extract of bungalow No. 22-B, Boundary Road.

(ii) Report dated 14.10.2011 regarding detection of u/a construction.

(iii) Report dated 29.11.2011 regarding detection of u/a construction.

(iv) Report dated 31.01.2012 regarding detection of u/a construction.

(v) Report dated 06.03.2012 regarding detection of u/a construction.

(vi) Report dated 22.05.2013 regarding detection of u/a construction.

(vii) Notice u/s 248 bearing No. Misc/4007/E7A dated 23.11.2011 regarding demolition of u/a construction.

(viii) Notice u/s 248 bearing No. Misc/4190/E7A dated 22.12.2011 regarding demolition of u/a construction.

(ix) Notice u/s 248 bearing No. 93/22-B/524/E7A dated 28.03.2012 regarding demolition of u/a construction.

(x) Notice u/s 248 bearing No. Misc/695/E7A dated 01.05.2012 regarding demolition of u/a construction.

(xi) Notice u/s 248 bearing No. MCB/Bldg/Engg/190 dated 22.06.2013 regarding demolition of u/a construction.

(xii) Copy of letter No. Misc/G/943 dated 25.09.2013.

(xiii) Letter No. 93/22-B/L/348 dated 09.07.2013.

(xiv) Letter No. 93/22/L/569 dated 12.08.2013.

(xv) Letter No. 93/22/L/613 dated 19.08.2013.

(xvi) Order u/s 249 passed by the CEO bearing No. Misc/xxx/E7A dated 23.03.2012.

(xvii) Copy of general CBR dated 18.06.2012.

(xviii) Copy of report dated 04.07.2012 & FIR dated 04.07.2012.

(xix) Copy of report dated 18.07.2012& FIR dated 19.07.2012.

(xx) Criminal writ Petition No. 8346 of 2013, Cantt Board Meerut V/s Pankaj Jolly & others.

Article of Charge No. III:-

(i) 1st report of u/a constructions dated 30.11.2000 in premises No. 340 A-C, Rangsaz Moh.

(ii) II nd report of u/a constructions dated 07.12.2000 in premises No. 340 A-C, Rangsaz Moh.

(iii) Order dated 13.12.2000 regarding sealing passed by the Estate Officer.

(iv) Order dated 28.04.2001 passed by ADJ Meerut.

(v) Order dated 08.05.2001 passed by Hon'ble High Court passed in W.P. No. 17434 of 2001.

(vi) Order dated 14.12.2001 passed by the Estate Officer for demolition.

(vii) Order dated 03.02.2003 passed by Distt Judge Meerut in M.A. No. 314 and 315 of 2001.

(viii) Order dated 28.04.2001 passed by the Hon'ble High Court, Allahabad in Civil Misc Writ Petition No. 17434 of 2001, Rajiv Anand V/s Estate Officer & another.

(ix) Order dated 29.11.2012 passed by the Hon'ble Supreme Court in SLP (C) No. 22499 of 2001.

(x) Detection report dated 04.03.2005 of 1st floor containing 14 pillars.

(xi) Order dated 20.09.2006 passed by the Estate Officer for demolition.

Article of Charge No. IV:-

(i) Detection reports (as per Appendix-A) of unauthorized constructions in respect of bungalow No. 198, 199, 202, 209, 210-A, 210-B, 210-C, 213, 220, 222, 223, 227, 233 West End Road, 176 Rangsaz Mohalla, Sadar Bazar, 193 Naya Bazar, 182, 184, 185, 185/A, 187, 188, 190, Abu Lane, 22-Boundry Road & 305, Circular Road.

(ii) Report of Advocate Commissioner passed by the Hon'ble High Court, Allahabad in Contempt Petition No. 380 of 2001, Executive Officer V/s Pushpa Devi & Others.

(iii) Survey map prepared by the Advocate Commissioner in respect of u/s constructions in bungalow No. 210-B, West End Road.

(iv) Demolition orders (as per Appendix-B & C) passed by the GOC-in-C/Director DE w.e.f 1995 till date.

(v) Application dated 20.07.2013 from Shri S.D. Tripathi for repair of house no.182/183 Sadar Dalmandi.

(vi) Application dated 02.08.2013 from Smt Maya Devi for repair of house no. 182/183 Sadar Dalmandi.

(vii) Detection report dated 24.10.2013 in r/o house no. 182/183 Dalmanci Sadar.

(viii) Copy of GLR extract in r/o house no. 182/183 Dalmandi Sadar.

Article of Charge No. V:-

(i) GLR extract of B. No. 177-177/A, Chappel Street, Meerut Cantt.

(ii) Detection report regarding u/a mobile tower.

(iii) Order dated 06.03.2012 passed by the Estate Officer for removal of tower.

(iv) Order dated 16.10.2012 passed by the District Judge, Meerut.

(v) Order dated 09.11.2012 passed by the Hon'ble High Court, Allahabad.

(vi) Office note/order of CEO dated 07.12.2012.

(vii) Order dated 12.12.2012 passed by the Hon'ble High Court, Allahabad.

(viii) Policy instructions dated 12.09.2008 regarding mobile towers issued by the Min of Defence.

(ix) GLR extract of bungalow No. 292, RA Bazar.

(x) GLR extract of house No. 32, 32/A, Rangsaz Mohalla, Sadar, Meerut Cantt.

(xi) Copy of plaint in suit No. 1234 of 2013, Himanshu Jain V/s Cantonmen: Board, in the Court of Civil Judge (Sr. Div.) Meerut.

(xii) Copy of plaint in suit No. 1233 of 2013, Manjeet Singh V/s Cantonment Board, in the Court of Civil Judge (Sr. Div.) Meerut.

(xiii) Copy of writ petition No.64191 of 2013, Himanshu Jain V/s Cantonment Board and others.

(xiv) Copy of writ petition No.64900 of 2013, Manjeet Singh V/s Cantonment Board and others.

(xv) Copy of detection report dated 09.10.2013 regarding mobile tower in B. No. 292, RA Bazar.

(xvi) Copy of detection report dated 09.10.2013 regarding mobile tower in H No. 32, 32/A, Rangsaz Mohalla, Sadar Bazar, Meerut Cantt.

Article of Charge No. VI:-

(i) GLR extract 'C' class land of trenching ground of Cantt Board.

(ii) Report dated 01.07.2013 by Sanitary Supdt and Sanitary Inspector.

(iii) Report dated 10.07.2013 of Joint survey and demarcation.

(iv) Order of the CEO dated 18.07.2013 for erecting pillars.

(v) Estimate dated 05.04.2005 and sketch of trenching ground.

(vi) Calculation sheet, site plan of trenching ground and comparative statement dated 10.12.2010.

(vii) Comparative statement dated 21.02.2011.

Article of Charge No. VII:-

(i) Copy of GLR of bungalow No. 195, Delhi Road, Meerut Cantt.

(ii) Application dated 13.07.2012 from Rajeev Kumar for cutting trees.

(iii) Another application dated 03.10.2012 from Rajeev Kumar for cutting trees.

(iv) Report 21.06.2013 recommending issue of permission.

(v) ID Note No. 66 dated 22.06.2013 of the CEO.

(vi) ID Note No. 75 dated 11.07.2013 of the CEO.

(vii) Letter No. R/108/Sale of Tree/269 dated 22.07.2013.

(viii) Show Cause letter No. Vividh/G/22 dated 31.08.2013.

(ix) Reply to show cause dated 06.09.2013 received from Shri Anuj Singh."

6. During the pendency of the proceedings, the judgment and order of the Delhi High Court dated 26.07.2011 was challenged by filing L.P.A. No.1051 of 2011. The Division Bench rejected the appeal filed by the Union of India and upheld the order dated 26.07.2011. In the meanwhile, as steps were being taken for demolition of constructions, unfortunately certain labourers died during the process of demolition, as such, an FIR came to be lodged as Case Crime No.309 of 2016 under Section, 147, 302/34 IPC. In the said FIR, six officers/officials including the petitioner were named as accused. In pursuance to the said FIR pertaining to demolition being carried in Bungalow

No.210-B, the petitioner was arrested and sent to District Jail on 10.07.2016. As the petitioner was detained in custody for more than 48 hours, the petitioner was placed under deemed suspension in terms of the provisions of Rule 10A(2) of the Cantonment Fund Servants Rules, 1937 (hereinafter referred to as "the CFS Rules').

7. The petitioner after being released from the custody again submitted his reply to the charges levelled against him on 30.06.2017 and supported the said averments by means of the documents.

8. The petitioner challenged the deemed suspension order by preferring Writ - A No.61673 of 2017 (Anuj Singh v. Cantt. Board and Ors.). This Court vide order dated 22.12.2017 passed an interim order staying the suspension order dated 27.07.2016. In the meanwhile, an order came to be passed on 05.06.2017 and 31.07.2017 exonerating the Assistant Engineer and Junior Engineer by the Board vide Resolution No.586 dated 05.06.2017 and D.O. Part II Order dated 31.07.2017 (Annexure - 7) respectively. In view of the exoneration of the said two persons, a letter was written by the Chief Executive Officer, the Disciplinary Authority to the Principal Director seeking advice in respect of the disciplinary proceeding against the petitioner on 03.01.2018 and 08.01.2018; the Principal Director wrote a letter to the Chief Executive Officer, Meerut advising that the disciplinary proceeding can be continued against the petitioner.

9. On 11.01.2018, a fresh order came to be passed revoking the earlier deemed suspension order and simultaneously a resolution was passed placing the petitioner under suspension once again on account of alleged illegal sanction of building plan in respect of Bungalow No.167, Chappel Street Meerut Cantt. Meerut till the completion of the inquiry. The said suspension order dated 30.01.2018 was challenged by the petitioner in Writ - A No.5445 of 2018 and an interim order dated 12.02.2018 (Annexure - 14) came to be passed staying the suspension order dated 30.01.2018. In the meanwhile, the judgment and order of the Delhi High Court was challenged by the Union of India by preferring an SLP which came to be dismissed on 14.05.2018. Thereafter, the inquiry proceedings continued against the petitioner and the petitioner cross-examined the witnesses adduced against him. After the examination and cross-examination, a written brief was filed on behalf of the petitioner by Defence Assistant on 18.08.2018. After conclusion of the inquiry, the Inquiry Officer submitted its report holding that five charges stood proved against the petitioner and one charge was partly proved (Annexure - 17). The petitioner submitted his reply to the Inquiry Officer on 17.06.2019. On the one hand the inquiry was continuing against the petitioner and on the other hand, a resolution was passed by the Board sanctioning the building plan in respect of Bungalow No.167 Chappel Street Meerut Cantt. Meerut in favour of its owner (Annexure - 19).

10. Ignoring the said fact that in respect of the main charge, the Delhi High Court had adjudicated the issue and the plan was also sanctioned on 18.07.2019, the impugned punishment order came to be passed on 14.08.2019 imposing the punishment of dismissal from service on the petitioner. The petitioner challenged the punishment order by filing Writ - A No.14027 of 2019 which was disposed off on 05.10.2020 directing the petitioner to

avail the alternative remedy of appeal under Rule 14 of the CFS Rules. The petitioner preferred an appeal on 22.10.2020. After hearing, the appellate order came to be passed on 01.06.2021 modifying the punishment order of dismissal to compulsory retirement. The appellate authority held that Charge No.1, which was the main charge in respect of the allegations levelled for sanction of building plan in relation to Bungalow No.167 as not proved. The said orders are now under challenge before this Court.

11. Heard Shri Gaurav Mehrotra, learned counsel for the petitioner who has also submitted his written submission.

12. The first submission of learned counsel for the petitioner is that the orders impugned are unsustainable as the inquiry has not been conducted following the due process of law. He argues that in the charge-sheet as many as seven charges were levelled. He argues that in respect off the first charge, the petitioner's contentions have been accepted by the appellate authority and thus, to that extent, the same loses relevance in the present writ petition.

13. He argues that in respect of Charges No.2 to 5 pertaining to the allegation of unauthorized constructions having come up, on the perusal of the charges levelled, the same can be segregated into two parts; firstly, that the petitioner failed to perform his duties as Executive Engineer of the Board without taking any effective action to stop the unauthorized constructions as well as for removal of the unauthorized constructions at the initial stage and second limb of the charge was that the said action of the petitioner was with the intent and motive to cause wrongful gain/benefit to the applicant and loss to the Government of India as well as defeating the provisions of the Cantonment Act.

14. In respect of Charges No.2 to 5, he further argues that although the Inquiry Officer has recorded the entire charge to be proved, in the entire report there was no material whatsoever to even prima-facie form a view that the negligence of the petitioner was with an intent to cause any wrongful gain/undue benefit to the petitioner or that any loss was caused to the Government. He argues that the Inquiry Officer while holding the said charge to be proved selectively relied upon the documentary evidence to suggest that in the supervisory role, the petitioner was negligent in not stopping the unauthorized constructions. He reiterates that there was no material or even document or any oral evidence to prove the second limb of the charge that any unlawful gain was caused to the petitioner or that any loss was caused to the Government of India.

15. In respect of Charge No.6, he argues that the Inquiry Officer did not consider the documentary and oral evidence, including that of the Chief Executive Officer to the effect that the illegal occupation caused was not within the purview of the duties assigned to the petitioner and was with the Sanitation Department, Junior Engineer and Assistant Engineer. He further argues that even in the appellate order it has been held that the petitioner was merely a supervisory authority and was neither the reporting authority for any unauthorized construction and nor was a part of the final decision making authority. He argues that the duty with regard to reporting of unauthorized construction was assigned through various duty orders issued by the Chief Executive

Officer and contained in Annexure No.20 to the writ petition. In terms of the said orders, it is clear that the files were only to be routed through the petitioner to the Chief Executive Officer, who was the final authority. He further argues that there is no charge, that the petitioner who was assigned the role of routing the files, failed to do so.

16. He draws my attention to the appellate authorities order which reflects that although the petitioner did not perform his supervisory duties, others were also responsible for not reporting the unauthorized constructions and it is on record that no disciplinary proceedings have been initiated either against the persons who were empowered to report the unauthorized constructions or against the Chief Executive Officer, who was the final authority to take the decision.

17. He next argues that on the one hand proceedings have been initiated only against the petitioner and against nobody else, an extreme punishment of compulsory retirement has been passed against the petitioner without there being any iota of evidence to prove the first limb or the second limb of the charges levelled against the petitioner.

18. He argues that it is well settled that the role of the disciplinary inquiry is a quasi-judicial one and should not be done causally. All the charges levelled should be properly proved and the disciplinary authority is to act in an independent manner while exercising the quasi-judicial functions. In support of the said, he places reliance on the judgment of the ***State of U.P. & Ors. v. Saroj Kumar Sinha; (2010) 2 SCC 772, Roop Singh Negi v. Punjab National Bank; (2009) 2 SCC 570, Chamoli District Cooperative Bank Ltd. v. Raghunath Singh Rana; (2016) 12 SCC 204, M.V. Bijlani v. Union of India; (2006) 5 SCC 88*** and ***Radhey Kant Khare v. U.P. Cooperative Sugar Factory Federation Ltd.; 2002 SCC OnLine All 1575.***

19. He next submits that no proceedings have been initiated either against the persons who were responsible for reporting the unauthorized constructions or against the Chief Executive Officer, who was the final authority to pass the order and thus, the action of the respondents against the petitioner is malicious and is also discriminatory. To press on the said point, learned counsel for the petitioner takes me to the duty allocation orders (Annexure - 20) issued from time to time by the Chief Executive Officer wherein it is clear that the responsibility of reporting unauthorized construction was on the Junior Engineer/Assistant Engineer and the sanitation department and the final decision making authority was the Chief Executive Officer.

20. He also argues that in the appellate order itself, finding has been recorded that certain other employees/officials and the technical staff are responsible for reporting any illegality in the cantonment area. He argues that there is no material to demonstrate that why the respondents have not taken any action against any of the said persons who were responsible for reporting and against the Chief Executive Officer. He argues that on the one hand the appellate authority formed an opinion that the petitioner was not the reporting authority, however, the appellate authority failed to take into consideration that the petitioner is being selectively

prosecuted. He argues that it is well settled that parity among co-delinquents must be maintained, especially when the charges are similar and ignoring the same, the action would clearly be discriminatory. He relies on the following judgments:

Rajendra Yadav v. State of Madhya Pradesh and Ors.; (2013) 3 SCC 73

Man Singh v. State of Haryana and Ors.; (2008) 12 SCC 331

State of U.P. and Ors. v. Raj Pal Singh; (2010) 5 SCC 783

21. He then argues that the action against the petitioner is malice in law. He argues that the petitioner is being victimised for oblique purposes by the respondents and thus, on that count, the malice in law is apparent. He places reliance on the following judgments in support of his arguments:

A.P. v. Goverdhanlal Pitti; AIR 2003 SC 1941

RS Garg v. State of U.P. & Ors.; (2006) 6 SCC 430

Punjab State Electricity Board Ltd. v. Zora Singh & Anr.; (2005) 6 SC 776

22. He next argues that the charges levelled against the petitioner pertain to negligence in holding the supervisory role in respect of the constructions for the period 1995 to 2013, which are stale. He draws my attention to the Charges No.3 to 6 which pertain to the year 1995 and the charge-sheet whereof was served on 20.12.2013. He argues that it is well settled that inordinate delay in initiating disciplinary proceedings would render the proceedings vitiated in the absence of any explanation for inordinate delay. In support of the said, he relies upon the judgment in the case of ***P.V. Mahadevan v. M.D. T.N. Housing Board; (2005) 6 SCC 636 and State of Madhya Pradesh v. Bani Singh and Anr.; 1990 (Supp) SCC 738.***

23. He next argues that even if for the sake of argument it is presumed that there was a lack of efficiency on the part of petitioner in performing the supervisory duties, the same cannot constitute to be a "misconduct' inviting the extreme punishment of compulsory retirement, more so, when the second limb of all the charges was neither proved nor was it substantiated by any of the evidences on record. He places reliance on the judgment in the case of ***Union of India v. J. Ahmed; (1979) 2 SCC 286*** and the judgment dated 08.08.2019 passed in ***Writ - A No.10365 of 2019 (Arvind Kumar Sharma v. State of U.P. & Ors.).***

24. He next argues that the disciplinary proceedings have been concluded beyond the time frame fixed for conclusion of the inquiry by the Division Bench of the High Court in judgment and order dated 20.11.2013 passed in Writ - A No.70147 of 2013 wherein certain directions were issued for concluding the proceedings, preferably within a period of three months. In support of the same, he places reliance on the judgment of this Court in the case ***Abhishek Prabhakar Awasthi v. The New India Assurance Company Ltd. & Ors.; 2013 SCC OnLine All 14267.***

25. He lastly argues on the quantum of punishment, which according to the petitioner is grossly disproportionate keeping in view the gravity of the allegations levelled. In support of the said submission, he reiterates that the petitioner

was neither the reporting authority who have been exonerated nor the decision making authority, who have not even been served with the charge-sheet. He argues that disproportionality of the punishment of compulsory retirement granted to the petitioner should be decided, keeping in view the fact, that the second limb of the charge has neither been established nor proved and thus, even if the allegations are presumed, for the sake of arguments, to be established, they would not attract the extreme punishment. He argues that disproportionality of the punishment is in violation of Article 14 of the Constitution of India. For the said, he places reliance on the judgment of the Hon'ble Supreme Court in the case of ***Bhagat Ram v. State of H.P. & Ors.; (1983) 2 SCC 44, S.R. Tewari v. Union of India & Anr.; (2013) 6 SCC 602, Union of India v. Bodupalli Gopalaswami; (2011) 13 CC 553, Charanjit Lamba v. Commanding Officer, Army Southern Command and Ors.; (2010) 11 SCC 314, B.C. Chaturvedi v. Union of India & Ors.; (1995) 6 SCC 749, Ranjit Thakur v. Union of India & Ors.; (1987) 4 SCC 611*** and ***Chairman-cum-Managing Director Coal India Limited and Anr. v. Mukul Kumar Choudhuri and Ors.; (2009) 15 SCC 620.***

26. On the basis of the aforesaid submission, learned counsel for the petitioner argues that the writ petition deserves to be allowed.

27. Shri Ashok Mehta, learned Senior Advocate assisted by Shri S.K. Rai and Shri Ajay Kumar Singh, learned counsel appearing on behalf of the respondents have elaborately denied the arguments raised by the petitioner.

28. In support of the said, he argues that although the petitioner has argued that he alone was not responsible for the infractions, however, the petitioner himself had argued that it was collective responsibility for which he draws my attention to the reply of the petitioner dated 27.01.2014 and the memo of appeal dated 22.10.2020.

29. Learned counsel for the respondents takes me through the counter affidavit filed on behalf of the respondents and draws my attention to Paras - 16 to 24, which are quoted herein below:

"16. That it is established beyond doubt Shri Anuj Singh limited the any discharge of duty mostly to submitting the recommendation instead of taking concrete action. It is exceptionally rare occasion that a demolition is carried out.

17. That as a matter of fact a definite positional and legal action in respect of all unauthorized is found lacking on Shri Anuj Singh part.

18. That the offence of unauthorized construction are grave involving grabbing of defence land and inaction of dealing with the transgressions suitably and legally and in a manner consistent with legal procedure gives credence to involvement in and facilitation of such offences. The offender clearly benefitted financially by facilitation of unauthorized construction in Cantt. area by Shri Anuj Sigh.

19. That Shri Anuj Singh was head of technical section as Assistant Engineer and thereafter upgraded as Executive Engineer, was responsible for taking a whole gamut of actions against unauthorized construction in Cantt. area, and therefore he had an overall

responsibility of the actions being taken or not been taken by his section.

20. That being supervisory head he was also responsible of commissions and omissions of his office subordinates.

21. That there have been established Shri Anuj Singh had neither monitoring nor supervising on the functioning of subordinate staff due to which unauthorized construction went on unabated resulting in unauthorized construction of huge proportion in Cantt. Area, Meerut.

22. That the appellate authority has reaffirmed the finding of the inquiry report and the disciplinary authority to the effect specifically bringing out unauthorized constructions in various bungalows in other parts of Cantt. area with example of categorically the cases of omission and committal of offences with regards to illegal unauthorized constructions.

23. That the appellate authority has specially reaffirmed and held that Shri Anuj Singh appellant has failed to check and stop/ demolish these unauthorized constructions in the bungalows and in the cantt area during his tenure as Cantt. Executive Engineer and further failed to perform to duties as supervisor.

24. That appellate authority re-affirms Shri Anuj Singh the appellant is blameworthy of negligence even in the matter of illegal unauthorized cultivation over a huge area of trenching ground."

30. Learned counsel for the respondents take my through the judgment of this Court dated 29.01.2014 wherein strong observations were made against the Cantonment Board to the following effect:

"Before closing the Court would like to record that the Cantonment Board had utterly failed to protect its property by not taking the steps and appropriate action which it should have taken under the provisions of the Cantonment Act, 1924 for dispossession and demolition of not only the opposite parties but all other vendees and trespassers who had entered into possession over parts of the land in dispute. It also failed to prosecute the contempt application in a manner reasonably expected by an institution of the level of Cantonment Board when it had all the infrastructure and the support of the State/Central Government in carrying out its objective. The Cantonment Board should be more vigilant and should not only act strictly but also timely in accordance to law. Once party is allowed to violate the law and continue violating the same it may result into trespass, illegal constructions, obstructions to public way and violation of the bye- laws governing the Cantonment areas. It indicates the weakness of the Cantonment Board being an extended organ of the Defence Ministry in permitting tress- pass and illegal activities within the Cantonment area. The Central Government must take notice and issue appropriate directions to the Cantonment Boards and whenever it is found that Board has been lacking in timely action and discharging its duties of supervision and maintenance of the Cantonment area in accordance to law, the Central Government/Ministry of Defence must take appropriate action against the erring officials so that further violations of the trespass is checked and controlled. A copy of this order be forwarded to the Secretary, Ministry of Defence, Government of India, New Delhi for necessary action. The records be consigned."

31. In response to the argument of learned counsel for the petitioner in respect of alleged wrongful gain to the petitioner, it

is argued that in second part of each and every charges, it starts with words "this action of the petitioner was with the intent/motive to cause wrongful gain/benefits to the applicant". He argues that the "applicant' used in the second part of each and every charge refers to the holder of occupancy right and not to the petitioner. It is, thus, argued by learned counsel for the respondent that the second part of the charge does not denote wrongful gain to the petitioner.

32. He further argues that an inference can be drawn with regard to the inaction by the petitioner, that it was with an intent and motive to cause a wrongful gain and or benefit to the builder/offenders/illegal occupant and the owners of the properties. He argues that it has to be strongly presumed that the inaction on the part of the petitioner was apparently for illegitimate considerations. In sum and substance, the argument is that the inaction would lead to preponderance of probability and a presumption that the said inaction was for the illegal gain.

33. In respect of the delay in conclusion of the inquiry, a stand has been taken that the delay was not attributable to the respondents. In response to the other arguments, it is argued that merely because there was a collective responsibility, it cannot be a ground to exonerate the petitioner merely because proceedings have not been initiated against the others.

34. It is further argued that the judicial review should not interfere with the administrative decision, including the quantum of punishment as there is no concept of negative equality and the argument of the petitioner on the ground of parity is ill-founded.

35. Respondents draw my attention to the judgments in the cases of ***Cantonment Exec. Officer, Cantonment Board, Meerut and Anr. v. Smt. Puspa Devi & Ors.; Contempt Application (Civil) No.380 of 2021 decided on 29.01.2014, Friends Colony Development Committee v. State of Orissa and Ors.; (2004) 8 SCC 733*** and ***Dipak Kumar Mukherjee v. Kolkata Municipal Corporation; (2013) 5 SCC 353.***

36. No other arguments have been raised at the Bar by either the petitioner or respondents.

37. Before proceeding to analyse the arguments as raised above, it is necessary to note that the services of the petitioner are governed by the CFS Rules. Relevant rules for the purposes of the present case are Rule 10-A, Rule 11, Rule 12 & Rule 12-A to 12-F.

38. Before analzying the arguments as raised across the Bar, it is essential to note that the law with regard to scope of judicial review in disciplinary proceedings matters is fairly well settled and is confined to the decision making process and to see whether the same is perverse, illegal and if it fails to satisfy the test of Article 14 of the Constitution of India.

39. In view of the settled position of law, I proceed to consider the manner in which the Inquiry Officer has proceeded to hold the charges as proved and partly proved against the petitioner, particularly Charge Nos.2 to 6.

40. I am not going into the question of Charge No.1, which has been decided in favour of the petitioner in the appellate order.

ANALYSIS OF REPORT OF INQUIRY OFFICER:

41. To analyze the report of the Inquiry Officer, it is essential that Charge No.2 as levelled against the petitioner in terms of the charge-sheet pertain to illegal constructions in the old grant bungalow No.22-B, Meerut Cantt. comprising survey No.302, allegedly constructed in violation of Old Grant terms.

42. To prove the said charge, the respondents had mentioned as many as 20 written documents needed for substantiating Charge No.2 as levelled against the petitioner. In the report of the Inquiry Officer, which is on record, while dealing with Charge No.2, the Prosecuting Officer in addition to the documents referred to in the charge-sheet proposed to produce the Prosecution Witnesses namely Shri Piyush Gautam, AE; Shri Brijesh Kumar Singhal, SGC; Smt. Sunita Dutta, SGC; and Shri Kamal Singh Yadav, Tracer.

43. It is on record that their deposition was recorded and they were permitted to be cross-examined by the charge-sheeted officer. The Inquiry Officer further records that the charge-sheeted officer also adduced the witnesses namely Shri JS Mahi, Shri Parshotam Lal, Shri Rajesh John and Shri Arun Kanwal. Although the Inquiry Officer records that the Prosecution Witnesses namely Shri Piyush Gautam, Smt. Sunita Dutta, Shri Kamal Singh Yadav and Shri KA Gupta (although not mentioned in the list of Prosecution Witnesses) were permitted to be cross-examined.

44. The Inquiry Officer proceeded to deal with the submissions made on behalf of the Presenting Officer as well as the submissions made by the charge-sheeted officer, however, there is no iota of mention as to what was the deposition by the witnesses examined as Prosecution Witnesses. There is nothing on record to demonstrate as to why these Prosecution Witnesses were permitted in support of the charge-sheet when their names were not even mentioned in the list of witnesses in the charge-sheet. There is no mention as to what was stated by the said Prosecution Witnesses and how they proved the charges levelled in Charge No.2 against the petitioner.

45. The Inquiry Officer although records the submission of the charge-sheeted officer to state that the petitioner was neither responsible for reporting the alleged illegal constructions nor was he authorized to pass orders for demolition, in fact, the Inquiry Officer himself records that there was a delay of about 14 days from the report of the illegal constructions to the recommendation made by the petitioner for taking action against the unauthorized constructions. There is no iota of finding that the petitioner was either empowered to report the constructions or was he empowered to pass orders for removal of the alleged unauthorized constructions. There is nothing on record in the report of the Inquiry Officer to demonstrate as to who substantiated the written documents which were a part of the list of documents mentioned for substantiating Charge No.2. The manner in which the Inquiry Officer proceeded by recording the submission made by the Presenting Officer and on behalf of the charge-sheeted officer alone cannot be termed as a proper inquiry as is contemplated.

46. The Inquiry Officer although records the second part of Charge no.2 to

be proved, gives absolutely no reason or evidence to substantiate the second part of Charge No.2 and only concludes on the basis of CEOs letter dated 09.07.2012 to ADM (City) Meerut to the effect that the offender has caused a loss of Rs.3,03,08,000/- to the Government of India and on the basis of the said letter alone, he concluded the second part of Charge No.2 to be proved against the petitioner.

47. There is nothing on record to demonstrate in the report of the Inquiry Officer as to who proved the CEOs letter dated 09.07.2013. It is relevant to note that the CEO was not a part of the Prosecution Witnesses. Clearly the second part of the charge, as recorded to be proved against the petitioner, was without any evidence whatsoever.

48. Coming to Charge No.3, the allegation levelled was that the petitioner while working as Executive Engineer during the period 15.02.1995 to January, 2012, illegally facilitated illegal construction in Building No.340 Meerut Cantt. in violation of the order dated 08.05.2001 passed by the Hon'ble High Court as well as the order dated 29.11.2002 passed by the Hon'ble Supreme Court which had restrained construction over and above the ground floor.

49. To substantiate the charge as levelled in Charge No.3 in the charge-sheet, as many as 11 documents were proposed to be relied upon. In addition to the documents proposed to be relied upon, the Inquiry Officer allowed four Prosecution Witnesses namely Shri Piyush Gautam, Shri Brijesh Singhal, Smt. Sunita Dutta and Shri Kamal Singh Yadav. He also permitted the charge-sheeted officer to submit 18 documents in his defense and also permitted Prosecution Witnesses to be cross-examined. He thereafter proceeded to record the submission made by the Presenting Officer and the charge-sheeted officer in their written briefs.

50. There is no iota of any deposition of the Prosecution Witnesses nor did the Inquiry Officer recorded as to how the documents proposed to be relied upon in the charge-sheet were substantiated either by Prosecution Witnesses or by anyone. In the finding with regard to Charge No.3, the Inquiry Officer has relied upon the statement of Shri Piyush Gautam who only stated that the unauthorized construction in the form of pillars were apparently casted by the offender prior to January, 2014. There is no iota or whisper of the deposition made by the Prosecution Witnesses against the petitioner as to how he was responsible for the unauthorized constructions contrary to the orders passed by the High Court and the Supreme Court.

51. While recording the finding of the second part of Charge No.3, the Inquiry Officer records that the conversion of constructions from residential premises to commercial purposes resulted in financial benefit to the petitioner, which according to the Inquiry Officer can be presumed by the facts and happenings as recorded while returning the finding of Charge No.3.

52. There is no mention of any witnesses or any documents before the Inquiry Officer which can be said to allege or prove the second part of Charge No.3.

53. Coming to Charge No.4, which allege against the petitioner that for the period 15.02.1995 to November, 2013, the petitioner facilitated constructions in

Bungalow No.198, 199, 202, 209, 210-A, 210-B, 210-C, 213, 220, 222, 223, 227 & 233 of the West End Road; Bungalow No.176, 340, Rangsz Mohalla; Bungalow No.193, Naya Bazar; Bunglow No.182, 184, 185, 185/A, 187, 188 and 190, Abu Lane; Bunglow No.305 Circular Road, including Bungalow No.182/183 Dalmandi Sadar Bazar for commercial exploitation.

54. In support of Charge No.4, as many as 8 documents were proposed to be relied upon in the charge-sheet. The Inquiry Officer permitted five Prosecution Witnesses to sustain the charges namely Shri Piyush Gautam, Shri Brijesh Singhal, Smt. Sunita Dutta and Shri Kamal Singh Yadav. The petitioner permitted cross-examination of the said witnesses as is clear from the Inquiry Report on record. The Inquiry Officer thereafter considered the written briefs of the Presenting Officer as well as the written briefs of the charge-sheeted officer. He has referred to the examination-in-chief of Shri Piyush Gautam who only confirmed that the plotting was done and unauthorized constructions had taken place in Bungalow No.210-B, Westend Road. Shri Brihesh Singhal in his examination-in-chief had only sated that unauthorized construction had taken place in a number of bungalows during the past several years. Shri Kamal Singh Yadav, the Prosecution Witness, only stated that detection reports were submitted and further action was taken according to the provisions of Cantonment Act. None of them made any statement against the petitioner.

55. In the inquiry report, there is no mention of the examination-in-chief of Shri K.A. Gupta and as to what did the said statement of Shri K.A. Gupta establishes to substantiate the charge. The cross-examination of Shri K.A. Gupta referred to in the report of the Inquiry Officer only establishes that CO being head of section had full responsibility.

56. The Inquiry Officer refers to cross-examination of Shri Brijesh Singhal to record that he had stated in his cross-examination that the CO recommended the report of the technical subordinate staff of CEO and was responsible for inspection of the sites. He also recorded that the some properties were sealed due to unauthorized constructions. He also recorded that the report with regard to unauthorized construction and change of purpose was placed before the CEO and the action was taken by the CEO. He also stated that the responsibility of giving the completion report lies with the CO.

57. Similarly, the cross-examination of Shri Kamal Singh Yadav and Shri Piyush Singhal are on record, which even as per the inquiry report do not implicate the petitioner to substantiate the said charge levelled against the petitioner.

58. While proceeding to record the finding on the second part of Charge No.4, the Inquiry Officer records "that there can be no doubt that the CO extended such facilitation to the officers with an intent to extract benefit to them and to gain himself'. There is no whisper of any evidence to substantiate the second part of Charge No.4.

59. Now coming to Charge No.5, in the charge-sheet as many as 16 documents were referred to be the relied upon documents in support of the said charge. In addition to the said documents, four Prosecution Witnesses namely Shri Piyush Gautam, Shri Brijesh Singhal, Shri KA

Gupta and Shri Kamal Singh Yadav were adduced. The Inquiry officer referred to the submissions made by the Presenting Officer as well as the charge-sheeted officer, referred to the examination-in-chief of Shri Brijesh Singhal who only deposed to the effect that the file was put up before the CEO to execute the demolition order but the same was not executed. Similarly, the Prosecution Witnesses Shri Kamal Singh Yadav referred to the displeasure expressed by the CEO with regard to non-removal of illegal mobile towers by the petitioner. The Inquiry Officer does not record anywhere any statement of the Prosecution Witnesses or any statement to substantiate the documents proposed to be relied upon and despite there being evidence to the contrary by the Prosecution Witnesses, concluded the Charge No.5 as proved.

60. Coming to Charge No.6, which pertained to the continuation of illegal occupation of a part or the land situated at Trenching ground in the cantonment board for the period 1995 to 2013 for which the petitioner was charged of not performing his duties in not vacating the illegal occupation or cultivation over the lands in question.

61. In support of the said Charge No.6, as many as seven documents were proposed to be relied upon. In addition to the said documents, the Inquiry officer permitted, three Prosecution Witnesses and also permitted the petitioner to adduce the documents as well as Defense Witnesses in support of his contention.

62. In the entire findings returned for recording that Charge No.6 was partly proved, he referred to the statement of the Prosecution Witnesses namely Shri V.K. Tyagi who did not give any statement against the petitioner. There is no reference to the Prosecution Witnesses Shri K.A. Gupta, although his cross-examination has been referred to. Thus, in the findings of the Inquiry Officer, there was no reference as to how and who substantiated the documents relied upon to substantiate the said charge and as to which part of the statement of Prosecution Witnesses substantiated the charge levelled against the petitioner.

63. The Inquiry Officer does not even consider what was the nature of the duties of the petitioner and whether he was responsible for preventing the illegal encroachment. In the entire findings returned by the Inquiry Officer, there is no whisper of any evidence either documentary or oral to substantiate the second part of Charge No.6 of causing benefit to illegal occupants and causing loss to the Cantonment Board.

64. Charge No.7 levelled against the petitioner was held to be not proved.

65. It is relevant to mention that two of the Prosecution Witnesses namely Shri Piyush Gautam and Shri K.A. Gupta were the persons who were earlier proceeded against but were subsequently exonerated from the charges by the Inquiry Officer vide order dated 05.06.2017 and 31.07.2017.

PROCEEDINGS BEFORE DISCIPLINARY AUTHORITY:

66. After the inquiry report was submitted to the disciplinary authority, the petitioner was given a liberty to file his reply; the petitioner in terms of the said liberty filed his reply denying the

allegations levelled against the petitioner and highlighting the manner in which the inquiry has been conducted. The disciplinary authority passed an order which is contained in Resolution No.188 dated 14.08.2019. The disciplinary authority referred to each of the articles of charge and in respect of each of the charges recorded that the Investigating Officer has gone through the submission of the charge-sheeted officer and has given the conclusion. He further recorded that the charge is of a serious nature and abruptly concluded that the finding of the Investigating Officer are sustained and called for no interference. A similar finding was recorded in respect of each of the seven charges. In respect of the judgments cited by the charge-sheeted officer, the disciplinary authority recorded that the judgments cited by the charge-sheeted officer have been considered and the same are not relevant to the facts of the present case and are of no help to the charged official, and recommended the dismissal of the petitioner with immediate effect. In terms of the said recommendation, an order came to be passed on 14.08.2019 whereby an order of punishment of dismissal was passed against the petitioner with immediate effect.

67. It is clear from the order passed by the disciplinary authority that the conclusion was drawn only on the basis of the submission of the Inquiry Officer and there is no application of mind in respect of the defences taken by the petitioner before the disciplinary authority and the recording of the fact that the judgments cited by the petitioner are of no avail, clearly reflects the lack of application of mind. The same by any stretch of logic cannot be held to be a reasoned order containing reasons and after due application of mind by the disciplinary authority.

PROCEEDINGS BEFORE APPELLATE AUTHORITY:

68. The petitioner preferred an appeal taking all the grounds and highlighting the manner in which the inquiry has been concluded. He gave detailed submissions in respect of each of the charges held to be proved on the basis of which the ultimate punishment order was passed. He also took ground that the order of disciplinary authority was a mechanical order without any application of mind.

69. The appellate authority vide its decision in respect of first charge held that the same does not stand a scrutiny of law as the allegation in respect of Bungalow No.167, Chappel Street Meerut Cantt. Meerut stood concluded by the order of the Delhi High Court dated 26.07.2011 and upheld by the Supreme Court vide its order dated 14.05.2018.

70. Dealing with the arguments raised by the petitioner before the appellate authority, while interpreting the contention of the appellant that he was in a supervisory post, the appellate authority referred to the dictionary meaning of the word "supervisor' and "to supervise' and based upon the said dictionary meaning concluded that the supervisory capacity includes the responsibility of necessary technical check and reporting works in respect of cantonment land.

71. While dealing with second to fifth charge based upon the definition of "supervisor' and "to supervise' as explained in the dictionary, the appellate authority

concluded that any kind of minor deviation from the said duty is to be viewed seriously and the ineffective execution of the duties by the team of the concerned technical staff who are responsible for the first reporting of any illegal activity in the cantonment area does not exculpate the appellant for non-performance of his duties. The appellate authority further recorded that although the appellant is not the only person who is answerable for the illegal constructions, however, failure on the part of the Sanitation Staff alongwith JE and AE to timely report the unauthorized constructions clearly depicts the failure of the appellant to exercise his powers of supervisory capacity. It further recorded that the failure of the appellant to exercise his powers in the supervisory capacity caused loss to the government.

72. While dealing with the fourth charge, the appellate authority recorded that the appellant joined as AE and thereafter as Chief Executive Officer, hence the appellant was not responsible for any illegality committed prior to 1995. The appellate authority further goes to record that the constructions as contained in the list before the IO clearly establish that the appellant did not take timely and effective action to curtail the trend of unauthorized activity going on in the area under the management of the Cantonment Board.

73. As regards the illegal erection of mobile towers contained in fifth charge, it records that the appellant had adequate time of approximately nine months in between the orders given by the Estate Officer for removal of the tower and the stay granted by the High Court, however, the appellant provided undue advantage to the offender and facilitated the time to obtain the stay order from the Hob'ble Court, hence, the appellant failed to implement the orders for removal of illegal erection of mobile tower on the roof of B No.177-177-A, Chappel Street and the said conduct of the appellant classifies as the act of deliberate omission on part of the appellant. He rejected the argument of the appellant that no action has been taken against the other persons responsible.

74. While dealing with the sixth charge, the appellate authority placing reliance on the Defense Witness No.4 concluded that the Investigating Officer has rightly held the charge as partially proven as the allegation of collusion with the occupants was not substantiated. It further records that on the basis of oral testimony as well as the documentary evidence, it was rightly held that the appellant was negligent in monitoring and curbing the illegal cultivation activity on the Trenching Ground.

75. In view of the fact that the first charge was decided in favour of the appellant, the appellate authority held that the second to fifth charge with regard to the negligence on the part of the appellant thereby causing monetary loss to the Government of India are found proven and he is guilty in respect of the said charges.

76. In respect of the sixth charge, the appellate authority held the finding of partially guilty recorded by the Investigating Officer and proceeded to impose major punishment by way of "compulsory retirement' from the date of dismissal in accordance with Rule 11(2)(vi) of the CFS Rules, 1937.

77. A perusal of the order reveals that the appellate authority concluded the findings and substantiated the same on the

basis of the dictionary meaning of the word "supervisor' and "to supervise'. In the entire appellate order, he does not hold that the petitioner was in any way actively involved in either the illegal constructions or illegal cultivation. Based upon the dictionary meaning of the word "to supervise', the appellate authority concluded that the petitioner in terms of the said definition failed to carry out the supervisory duties. The said finding of the appellate authority is clearly erroneous inasmuch as the dictionary meaning of the word "supervise' or "to supervise' can be resorted to only when the supervisory role and the supervisory duties are not specified, whereas, in the present case, the nature of duties in respect of the working was clearly specified and elaborated in the office memorandums as contained in Annexure No.20 to the writ petition wherein no role of reporting the illegal construction is assigned to the petitioner and in fact, the role of reporting was specifically assigned to the JE, Shri. K.A. Gupta and Piyush Gautam and one Shri Vinod Gupta, JE and one Shri Roshan Zamir., Draftsman. Out of the said persons who were assigned the duties of reporting illegal constructions, the proceeding against Shri Piyush Gautam and Shri K.A. Gupta were dropped. The order of the appellate authority based upon the dictionary meaning of the word "supervise' and ignoring the specific office memorandums assigning specific roles to various persons is clearly erroneous and perverse.

78. The argument of Shri Ashok Mehta that the second limb of each charge refers to the benefit of the holder of occupancy rights and not to the petitioner deserves to be rejected as the Inquiry Officer has concluded that the petitioner was a beneficiary as discussed in Para 46, 47, 51 and 58 of this judgment.

79. Coming to the judgments cited by the learned counsel for the petitioner, it would be correct to refer to the judgment of the Supreme Court in the case of ***Saroj Kumar Sinha (supra)*** wherein the role of the Inquiry Officer was clarified in respect of the evidence and the manner of decision making and are contained in Para - 28 which reads as under:

"28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

80. It is relevant to mention that in respect of the manner in which the departmental inquiry is to be held, the Supreme Court in the case of ***Roop Singh Negi (supra)*** had the occasion to consider in Para - 14 & 15 as under:

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled

against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

15. We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the enquiry officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. The appellant being an employee of the Bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the enquiry officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left."

And in Para - 23 while dealing with the necessity of reasoning held as under:

"23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the criminal court on the basis of selfsame evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the enquiry officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the enquiry officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."

81. In yet another case of ***M.V. Bijlani (supra),*** the Supreme Court while dealing with the manner in which the departmental inquiry is to be concluded has held in Para - 25 as under:

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into

consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

In the same very case, the Supreme Court had the occasion to consider the effect of initiation of an inquiry after delay and the Supreme Court recorded his view in Para - 16 & 17 as under:

"16. So far as the second charge is concerned, it has not been shown as to what were the duties of the appellant in terms of the prescribed rules or otherwise. Furthermore, it has not been shown either by the disciplinary authority or the Appellate Authority as to how and in what manner the maintenance of ACE-8 Register by way of sheets which were found attached to the estimate file were not appropriate so as to arrive at the culpability or otherwise of the appellant. The Appellate Authority in its order stated that the appellant was not required to prepare ACE-8 Register twice. The appellant might have prepared another set of register presumably keeping in view the fact that he was asked to account for the same on the basis of the materials placed on records. The Tribunal as also the High Court failed to take into consideration that the disciplinary proceedings were initiated after six years and they continued for a period of seven years and, thus, initiation of the disciplinary proceedings as also continuance thereof after such a long time evidently prejudiced the delinquent officer.

17. In State of M.P. v. Bani Singh [1990 Supp SCC 738 : 1991 SCC (L&S) 638 : (1991) 16 ATC 514] this Court has clearly held: (SCC p. 740, para 4)

"The irregularities which were the subject-matter of the enquiry are said to have taken place between the years 1975-77. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in April 1977 there was doubt about the involvement of the officer in the said irregularities and the investigations were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage."

82. Coming to the parity in terms of the punishment of the co-delinquents, the Supreme Court in the case of ***Rajendra Yadav (supra)*** had the occasion to consider the aspect of parity in co-delinquents and the proportionality of punishment, and held as under:

"9. The doctrine of equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The disciplinary authority cannot impose punishment which is disproportionate i.e. lesser punishment

for serious offences and stringent punishment for lesser offences.

10. The principle stated above is seen applied in a few judgments of this Court. The earliest one is DG of Police v. G. Dasayan [(1998) 2 SCC 407 : 1998 SCC (L&S) 557] wherein one Dasayan, a police constable, along with two other constables and one Head Constable were charged for the same acts of misconduct. The disciplinary authority exonerated two other constables, but imposed the punishment of dismissal from service on Dasayan and that of compulsory retirement on the Head Constable. This Court, in order to meet the ends of justice, substituted the order of compulsory retirement in place of the order of dismissal from service on Dasayan, applying the principle of parity in punishment among co-delinquents. This Court held that it may, otherwise, violate Article 14 of the Constitution of India.

11. In Shaileshkumar Harshadbhai Shah case [(2006) 6 SCC 548 : 2006 SCC (L&S) 1486] the workman was dismissed from service for proved misconduct. However, few other workmen, against whom there were identical allegations, were allowed to avail of the benefit of voluntary retirement scheme. In such circumstances, this Court directed that the workman also be treated on the same footing and be given the benefit of voluntary retirement from service from the month on which the others were given the benefit.

12. We are of the view that the principle laid down in the abovementioned judgments would also apply to the facts of the present case. We have already indicated that the action of the disciplinary authority imposing a comparatively lighter punishment on the co-delinquent Arjun Pathak and at the same time, harsher punishment on the appellant cannot be permitted in law, since they were all involved in the same incident. Consequently, we are inclined to allow the appeal by setting aside the punishment of dismissal from service imposed on the appellant and order that he be reinstated in service forthwith. The appellant is, therefore, to be reinstated from the date on which Arjun Pathak was reinstated and be given all consequential benefits as were given to Arjun Pathak. Ordered accordingly. However, there will be no order as to costs."

83. In the present case, the said judgment applies with all vigour as the two persons who were assigned the role of reporting the unauthorized constructions have been exonerated whereas the petitioner who was not assigned any of the roles except that of forwarding the report of illegal construction to the CEO has been saddled with a major punishment of compulsory retirement.

84. A similar view was taken by the Supreme Court in the case of ***Man Singh (supra)*** where the Supreme Court held as under:

"20. We may reiterate the settled position of law for the benefit of the administrative authorities that any act of the repository of power whether legislative or administrative or quasi-judicial is open to challenge if it is so arbitrary or unreasonable that no fair-minded authority could ever have made it. The concept of equality as enshrined in Article 14 of the Constitution of India embraces the entire realm of State action. It would extend to an individual as well not only when he is discriminated against in the matter of exercise of right, but also in the matter of imposing liability upon him. Equals have to

be treated equally even in the matter of executive or administrative action. As a matter of fact, the doctrine of equality is now turned as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action. The administrative action is to be just on the test of "fair play" and reasonableness."

85. The Supreme Court reiterated the said view in the case of ***State of U.P. and Ors. v. Raj Pal (supra)*** and held in Para - 5 & 6 as under:

5. Though, on principle the ratio in aforesaid cases would ordinarily apply, but in the case in hand, the High Court appears to have considered the nature of charges levelled against the five employees who stood charged on account of the incident that happened on the same day and then the High Court came to the conclusion that since the gravity of charges was the same, it was not open for the disciplinary authority to impose different punishments for different delinquents. The reasoning given by the High Court cannot be faulted with since the State is not able to indicate as to any difference in the delinquency of these employees.

6. It is undoubtedly open for the disciplinary authority to deal with the delinquency and once charges are established to award appropriate punishment. But when the charges are same and identical in relation to one and the same incident, then to deal with the delinquents differently in the award of punishment, would be discriminatory. In this view of the matter, we see no infirmity with the impugned order requiring our interference under Article 136 of the Constitution.

86. It is necessary to note that the Supreme Court in the case of ***Union of India v. J. Ahmed (supra)*** had the occasion to consider the difference between misconduct and negligence in performance of duty and held in Para - 9, 11 & 13 as under:

"9. The five charges listed above at a glance would convey the impression that the respondent was not a very efficient officer. Some negligence is being attributed to him and some lack of qualities expected of an officer of the rank of Deputy Commissioner are listed as charges. To wit, Charge 2 refers to the quality of lack of leadership and Charge 5 enumerates ineptitude, lack of foresight, lack of firmness and indecisiveness. These are qualities undoubtedly expected of a superior officer and they may be very relevant while considering whether a person should be promoted to the higher post or not or having been promoted, whether he should be retained in the higher post or not, or they may be relevant for deciding the competence of the person to hold the post, but they cannot be elevated to the level of acts of omission or commission as contemplated by Rule 4 of the Discipline and Appeal Rules so as to incur penalty under Rule 3. Competence for the post, capability to hold the same, efficiency requisite for a post, ability to discharge function attached to the post, are things different from some act or omission of the holder of the post which may be styled as misconduct so as to incur the penalty under the rules. The words "act or omission" contemplated by Rule 4 of the Discipline and Appeal Rules have to be understood in the context of the All India Services (Conduct) Rules, 1954 ("Conduct Rules" for short). The Government has prescribed by Conduct Rules a code of

conduct for the members of All India Services. Rule 3 is of a general nature which provides that every member of the service shall at all times maintain absolute integrity and devotion to duty. Lack of integrity, if proved, would undoubtedly entail penalty. Failure to come up to the highest expectations of an officer holding responsible post or lack of aptitude or qualities of leadership would not constitute as failure to maintain devotion to duty. The expression "devotion to duty" appears to have been used as something opposed to indifference to duty or easy-going or light-hearted approach to duty. If Rule 3 were the only rule in the Conduct Rules it would have been rather difficult to ascertain what constitutes misconduct in a given situation. But Rules 4 to 18 of the Conduct Rules prescribe code of conduct for members of service and it can be safely stated that an act or omission contrary to or in breach of prescribed rules of conduct would constitute misconduct for disciplinary proceedings. This code of conduct being not exhaustive it would not be prudent to say that only that act or omission would constitute misconduct for the purpose of Discipline and Appeal Rules which is contrary to the various provisions in the Conduct Rules. The inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto so as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the general Rule 3 prescribing devotion to duty. It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute misconduct. If it is so, every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character or personal ability would not constitute misconduct for the purpose of disciplinary proceedings.

11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that conduct which is blameworthy for the government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see Pierce v. Foster [17 QB 536, 542]). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspapers [(1959) 1 WLR 698)]. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur [61 Bom LR 1596], and Satubha K. Vaghela v. Moosa Raza [10 Guj LR 23] . The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under:

"Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct."

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik [AIR 1966 SC 1051 : (1966) 2 SCR 434 : (1966) 1 LLJ 398 : 28 FJR 131] in the absence of standing orders governing the employee's undertaking,

unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In S. Govinda Menon v.Union of India [(1967) 2 SCR 566 : AIR 1967 SC 1274 : (1967) 2 LLJ 249] the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P.H. Kalyani v. Air France, Calcutta [AIR 1963 SC 1756 : (1964) 2 SCR 104 : (1963) 1 LLJ 679 : 24 FJR 464] wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a railway cabinman signals in a train on the same track where there is a stationery train causing head-on collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil (see Navinchandra Shakerchand Shah v. Manager, Ahmedabad Coop. Department Stores Ltd. [(1978) 19 Guj LR 108, 120]). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

13. Having cleared the ground of what would constitute misconduct for the purpose of disciplinary proceeding, a look at the charges framed against the respondent would affirmatively show that the charge inter alia alleged failure to take any effective preventive measures meaning thereby error in judgment in evaluating developing situation. Similarly, failure to visit the scenes of disturbance is another failure to perform the duty in a certain manner. Charges 2 and 5 clearly indicate the shortcomings in the personal capacity or degree of efficiency of the respondent. It is alleged that respondent showed complete lack of leadership when disturbances broke out and he disclosed complete ineptitude, lack of foresight, lack of firmness and capacity to take firm decision. These are personal qualities which a man holding a post of Deputy Commissioner would be expected to possess. They may be relevant considerations on the question of retaining

him in the post or for promotion, but such lack of personal quality cannot constitute misconduct for the purpose of disciplinary proceedings. In fact, Charges 2, 3 and 6 are clear surmises on account of the failure of the respondent to take effective preventive measures to arrest or to nip in the bud the ensuing disturbances. We do not take any notice of Charge 4 because even the Enquiry Officer has noted that there are number of extenuating circumstances which may exonerate the respondent in respect of that charge. What was styled as Charge 6 is the conclusion viz. because of what transpired in the inquiry, the Enquiry Officer was of the view that the respondent was unfit to hold any responsible position. Somehow or other, the Enquiry Officer completely failed to take note of what was alleged in Charges 2, 5 and 6 which was neither misconduct nor even negligence but conclusions about the absence or lack of personal qualities in the respondent. It would thus transpire that the allegations made against the respondent may indicate that he is not fit to hold the post of Deputy Commissioner and that if it was possible he may be reverted or he may be compulsorily retired, not by way of punishment. But when the respondent is sought to be removed as a disciplinary measure and by way of penalty, there should have been clear case of misconduct viz. such acts and omissions which would render him liable for any of the punishments set out in Rule 3 of the Discipline and Appeal Rules, 1955. No such case has been made out."

87. In respect of the inordinate delay in initiation of the inquiry, the Supreme Court had the occasion to consider the same in the case of ***P.V. Mahadevan (supra)*** and recorded in Para - 10 & 11 as under:

"10. Section 118 specifically provides for submission of the abstracts of the accounts at the end of every year and Section 119 relates to annual audit of accounts. These two statutory provisions have not been complied with at all. In the instant case the transaction took place in the year 1990. The expenditure ought to have been considered in the accounts of the succeeding year. In the instant case the audit report was ultimately released in 1994-95. The explanation offered for the delay in finalising the audit account cannot stand scrutiny in view of the above two provisions of the Tamil Nadu Act 17 of 1961. It is now stated that the appellant has retired from service. There is also no acceptable explanation on the side of the respondent explaining the inordinate delay in initiating departmental disciplinary proceedings. Mr R. Venkataramani, learned Senior Counsel is appearing for the respondent. His submission that the period from the date of commission of the irregularities by the appellant to the date on which it came to the knowledge of the Housing Board cannot be reckoned for the purpose of ascertaining whether there was any delay on the part of the Board in initiating disciplinary proceedings against the appellant has no merit and force. The stand now taken by the respondent in this Court in the counter-affidavit is not convincing and is only an afterthought to give some explanation for the delay.

11. Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary

enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer."

88. The Supreme Court also considered the effect of delay in the case of ***State of Madhya Pradesh v. Bani Singh & Anr. (supra)*** and recorded in Para - 4 as under:

"4. The appeal against the order dated December 16, 1987 has been filed on the ground that the Tribunal should not have quashed the proceedings merely on the ground of delay and laches and should have allowed the enquiry to go on to decide the matter on merits. We are unable to agree with this contention of the learned counsel. The irregularities which were the subject matter of the enquiry is said to have taken place between the years 1975-77. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in April 1977 there was doubt about the involvement of the officer in the said irregularities and the investigations were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage. In any case there are no grounds to interfere with the Tribunal's orders and accordingly we dismiss this appeal."

89. In respect of the conclusion of the inquiry within a reasonable time, learned counsel for the petitioner has placed reliance in the case of ***Abhishek Prabhakar Awasthi (supra)*** wherein the Full Bench held in Para - 5 & 6 as under:

"5. In the context of disciplinary proceedings, me High Court in the exercise of its writ jurisdiction under Article. 226 of the Constitution may in appropriate cases fix a stipulation inregard to the conclusion of an enquiry within a stipulated period. Such an order may be passed in several situations, such as when an employee moves a petition challenging an order of suspension and the Court considers it appropriate, in the interests of justice, to direct that the disciplinary proceeding should be expeditiously disposed of Such directions are issued in other appropriate instances to obviate a delay in disposing of disciplinary proceedings. The basis and rationale for these orders is to ensure that an employee is not prejudiced by an undue delay in the conclusion of a disciplinary proceeding. Where the Court stipulates a period of time during which an enquiry must be completed, such a stipulation has to be observed. Clearly, it is not open to the employer to act in disregard of the orders of the Court and it cannot possibly be asserted that notwithstanding the time fixed by the Court, the employer is at liberty to

conclude the enquiry at its own whims and fancy disregarding the stipulation of time.

6. Having said this, it is equally true that there may be a variety of circumstances which may arise in the course of a disciplinary proceeding and despite all reasonable efforts, a disciplinary proceeding is not completed within the time fixed by a court. We do not intend to make an exhaustive enumeration of those circumstances but set out only some by way of illustration. Some times, it may well happen that the complexity of the case may result in prolongation of the enquiry. Besides the nature of the case, the number of witnesses to be examined may be so large that it may not be possible to conclude the enquuiry despite genuine and bona fide efforts within the stipulation so fixed. However, it may well happen that the delay in the conclusion of the enquiry is due to the conduct of one of the two parties. When the employee himself is guilty of a delay which has resulted in a protraction of the enquiry, it would be manifestly contrary to the interests of justice to assert that notwithstanding the conduct of the employee, the jurisdiction to hold an enquiry has come to an end upon the expiry of the period fixed by the Court. On the contrary, it is not open to the employer to use the enquiry as a measure of harassment and to hold a hanging sword on the head of the employee indefinitely. All these aspects assume significance when the issue arises asto whether there were justifiable reasons as to why the enquiry could not be concluded within the period which has been stipulated by the Court. The seriousness of the charge is of vital importance when it falls for determination by a court as to whether there were valid and cogent reasons on the basis of which the enquiry could not be concluded within the time stipulated. But, in either view of the matter, it is necessary that the court, which has fixed the stipulation of time, should be moved for an extension of time which has been so fixed. The Court, which has fixed the time for conclusion of the enquiry, also has the inherent jurisdiction under Article 226 of the Constitution of India ex debito justitiae to exercise the power to extend time in appropriate cases. In this background, it would now be necessary to consider the precedents emanating from this Court on the subject."

90. In the light of the law as summarised above and the facts as recorded above, this Court is of the view that the Inquiry Officer had proceeded to hold the charges proved against the petitioner based upon virtually no evidence to substantiate either the documents in the charge-sheet and further there is no mention of any of the deposition of the oral witnesses to substantiate the charges as are levelled against the petitioner.

91. The disciplinary authority in its order has not given any reasoning and has not even dealt with any of the submissions made by the petitioner before the disciplinary authority while passing the order. The appellate authority has completely erred in holding the petitioner guilty by taking recourse to the dictionary meaning of the word "supervise' and "to supervise' completely ignoring the office memorandums which specified the nature of duties in respect of charges levelled against the petitioner. None of the witnesses either before the Inquiry Officer or in any of the documents given alongwith the charge-sheet, in any way incarcerate the petitioner with regard to not following any of the duties, which were assigned to the petitioner in terms of the office memorandums; the only material on record

against the petitioner is that the petitioner delayed in forwarding of the illegal unauthorized construction with a gap of 14 days in respect of one of the charges. Other than the said, there is no material to substantiate the charges levelled against the petitioner and thus, realizing the limited scope of powers under Article 226 of Constitution of India, this Court is of the firm view that the charges levelled against the petitioner have not been substantiated by any evidence whatsoever and to that extent, the same are perverse.

92. The order of the disciplinary authority is completely non-speaking order and does not satisfy the test of Article 14 of the Constitution of India. The appellate order has gone on a complete tangent proceeding to hold the petitioner guilty placing reliance on the definition of the word "supervisor' or "to supervise' given in the dictionary in complete ignorance of the office memorandums and thus, the same is wholly perverse and arbitrary. There is no finding in respect of the second limb of each of the charges as against the petitioner and I have already held and rejected the argument of the respondents that the charges levelled in the second limb of each of the charge does not relate to the petitioner and relates to the property owner, thus, on all the grounds as referred above, the only charge levelled against the petitioner and established was that the petitioner took a time of 14 days in forwarding the report of the unauthorized construction to the Chief Executive Officer which can in the worst case be called as "negligence' and in any way does not qualify to be a "misconduct' warranting such extreme punishment as has been imposed against the petitioner.

93. Thus, for all the reasons recorded above, the writ petition deserves to be allowed and is accordingly ***allowed***.

94. Order of appeal dated 01.06.2021, punishment order dated 14.08.2019 and the Board resolution dated 14.08.2019 are set aside with direction to reinstate the petitioner in the services alongwith all consequential benefits on the post on which he was working at the time of removal.

(2023) 4 ILRA 241
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.03.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 31507 of 2014

Shailja Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Mrigraj Singh, Sri Santosh Kumar Yadav

A. An Assistant Teacher of the institution had expired while in service-on the approval of BSA an advertisement was issued and the petitioner was selected-Later, referring to G.O. dated 20.01.2003, BSA placed all the appointment/approval in abeyance-Since the procedure for selection is provided under the statutory rules of U.P. Recognized Basic Schools (Junior High School Recruitment and Conditions of Service of Teachers) Rules, 1978-Once the power is exercised by the State for framing statutory rules, it cannot exercise any executive power, therefore, the Government Order dated 20.01.2003 as non-est being contrary to the statutory rules-Thus, once an approval is duly granted by BSA by his communication dated 20/21.02.2004, no power to review

the said order on merits is vested in later BSA, the executive authorities do not have any power to review an order passed by an earlier authority, except for one limited ground of fraud etc. -The matter is decided by BSA after a gap of around 10 years-Such a dispute was required to be settled when earlier approval was granted –Such an irregularity cannot cost an appointment which is approved around 10 years back- Thus, the impugned order is illegal.(Para 1 to 14)

The writ petition is allowed. (E-6)

List of Cases cited:

1. UOI Vs Soma Vishwanath (1988) AIR SC 2255
2. Anurag Mehrotra Vs St. of U.P. & ors. W.P. No. 3425 of 2019

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddharth Khare, learned counsel for the petitioner, Sri Mrigraj Singh, learned counsel for respondent no.2 and the learned Standing Counsel for the State.

2. The petitioner has approached this Court challenging the order dated 12.03.2014 passed by Basic Shiksha Adhikari, Jaunpur whereby the B.S.A., Jaunpur has refused to provide approval to the appointment of the petitioner.

3. The facts of the case are that on 03.12.2003 an Assistant Teacher of the institution had expired while in service. On the approval of Basic Shiksha Adhikari, an advertisement was issued on 29.01.2004 inviting applications from eligible persons. The Basic Shiksha Adhikari has passed an order on 15.02.2004 authorizing the Assistant Basic Shiksha Adhikari, Maharajganj/Badlapur to participate as a member of Selection Committee in the selection process held on 18.02.2004. After selection of the petitioner, all papers were submitted to the B.S.A. for approval, who accorded approval on 20/21.02.2004, making it effective from date of joining. On 22.02.2004 appointment letter was issued to petitioner who joined on 25.02.2004. However, salary bills submitted by the management with regard to petitioner remained pending.

4. On 11.06.2004, Basic Shiksha Adhikari, referring to Government Order dated 20.01.2003, sent letter to all the Managemnt/Head of all recognized and aided Junior High Schools, whereby he placed all the appointments/approval in abeyance. It also refers to circular letter dated 21.05.2004 of Regional Assistant Director of Education prohibiting payment of salary to appointments made without sanctioned post and further required every institution to submit all papers pertaining to selection/appointment made subsequent to Government Order dated 20.01.2003 for inquiry. The Government Order dated 20.01.2003 required prior permission of the State Government for making appointment for vacancies caused by the retirement. After giving an opportunity of hearing an order was ultimately passed by the B.S.A. on 12.03.2014 revoking the approval of B.S.A. dated 20/21.01.2004. It further held that petitioner was not entitled to receive any salary from the government grants. The said order, though, was passed on 12.03.2014 but was dispensed by registered post on 18.08.2014 and is now under challenge in the present writ petition.

5. Learned counsel for the petitioner challenges the order on facts as well as on short legal submission. The legal submission of learned Senior Advocate is

that since the procedure for selection is provided under the statutory rules of U.P. Recognized Basic Schools (Junior High School Recruitment and Conditions of Service of Teachers) Rules, 1978. Therefore, once the power is exercised by the State for framing statutory rules, it cannot exercise any executive power with regard to the same subject by issuing executive order. Therefore, the Government Order dated 20.01.2003 as non-est being contrary to the statutory rules.

6. On merits, learned Senior Advocate for the petitioner submits that once an approval is duly granted by B.S.A. by his communication dated 20/21.02.2004, no power to review the said order on merits is vested in later B.S.A. The executive authorities do not have any power to review an order passed by an earlier authority, except for on limited ground of fraud etc. Next submission of learned Senior Advocate is that the impugned order even on merits is illegal as the defects pointed out in the same are presumptive.

7. On the other hand, learned counsels for the respondents support the impugned order and state that the impugned order rightly refuses to grant approval to the appointment of the petitioner.

8. So far as the Government Order dated 20.01.2003 is concerned, the law is well settled that once the State has exercised its legislative power with regard to any subject by framing statutory rules, it cannot exercise its executive power. Suffice is to refer to judgment passed in case of ***'Union of India Vs. S.S. Soma Vishwanath'*** reported in ***AIR 1988 SC 2255*** in which the Supreme Court held:-

"It is well settled that the norms regarding recruitment and promotion of the officer belong to the Civil Service can be laid down either by a law made by the appropriate Legislature or by the rules made under the proviso to Article 309 of the Constitution of India or by means of executive instructions issued in Article 73 of the Constitution of India in the case of Civil Services in the Government of India and under Article 162 of the Constitution of India in the case of Civil Services in the State Governments ***, if there is a conflict between the executive Instructions and the rules made under the proviso to Article 309 of the Constitution of India the rule made under the proviso to Article 309 of the Constitution of India prevail and if there is a conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the appropriate Legislature, the latter prevails." (emphasis added)***

9. The aforesaid judgment is later also followed by this Court in case of ***'Anurag Mehrotra Vs. State of U.P. and Others'; Writ Petition No.3425 (S/S) of 2019.*** In view of the aforesaid, the Government Order dated 20.01.2003 is directly in teeth of statutory rules. The State cannot usurp the power already vested in the authority by statutory rules. Therefore, there was no occasion to revisit the approval of the B.S.A. dated 20/21.02.2004 which granted appointment to the petitioner.

10. Now, coming to the merits of the case, the impugned order states that the vacancy is said to have arisen on account of death of late Sabhajeet Pathak, Assistant Teacher while in service on 31.12.2003. In judgment of the High Court dated 07.08.2013 passed in Writ Petition No. 41896 of 2005, it is noted that with the

approval of the District Basic Education Officer the post was advertised on 11.07.2002 and it found that the appointment was illegal. The said fact appears to be wrongly noted in the earlier judgment of this Court as the newspaper 'Tarun Mitra' dated 01.02.2004 is filed along with present writ petition and the same was also submitted before the B.S.A. Ignoring the actual document, the B.S.A. was not supposed to refer to a date in the order. Further in the impugned order it is claimed that the management/head master was asked to provide notarized affidavit along with all the documents. There is no reason for initiating a different procedure in the present case which is not followed in other matters. All the documents were in the office of B.S.A. since the initial stage when the earlier B.S.A. had granted approval by order dated 20/21.02.2004. Even otherwise, it is not in dispute that all the documents were present before the B.S.A. while considering the present matter. Hence, there was no occasion to ask for an affidavit and to refuse to believe the document only on the said ground. Next ground taken in the impugned order for rejecting the case of petitioner is that in furtherance of order dated 22.07.2013 passed in Writ Petition No.46110 of 2005 one Sevantak Pathak was granted appointment under Dying in Harness Rules, 1974. Thus, there are no further vacancy available to accommodate the petitioner.

11. It goes without saying that right of petitioner on the basis of her initial appointment since 20/21.02.2004 when earlier B.S.A. granted approval to the petitioner and in furtherance of which petitioner joined on 25.02.2004. Her rights cannot be disturbed by any appointment or order passed with regard to any other person. Even otherwise, an appointment under Dying in Harness Rules, 1974 can also be accommodated on a supernumerary post. The same cannot impact rights of petitioner. The last ground is that the publication was made only in one newspaper. Along with the record only one newspaper was submitted. The matter is decided by B.S.A. after a gap of around 10 years. Such a dispute was required to be settled when earlier approval was granted on 20/21.02.2004. Such an irregularity cannot cost an appointment which is approved around 10 years back.

12. Thus, the impugned order dated 12.03.2004 cannot stand and is set aside.

13. Respondents are directed to pay salary of the petitioner from the date of his initial joining 25.02.2004 along with interest of 6% within a period of three months from the date a certified copy of this order is placed before it. They are also directed to ensure regular salary to petitioner in future.

14. With the aforesaid, the writ petition stands **allowed**.

(2023) 4 ILRA 244
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.04.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-A No. 31682 of 2018

Vishal Kumar Balmiki ...Petitioner
Versus
Punjab National Bank & Ors. ...Respondents

Counsel for the Petitioner:
Sangam Lal Pandey

Counsel for the Respondents:
Prashant Kumar, Gopal Kr. Srivastava

A. Civil Law - Compassionate appointment-petitioner's father died in harness –petitioner submitted an application for compassionate appointment which was rejected by respondent/Bank-the petitioner is a graduate and the respondents are excluding the candidature of the petitioner for being considered on a Class IV post in sub staff cadre solely on the ground that the recruitment rules carry the legend of graduate candidate not being eligible-the said condition in the recruitment rules would only be applicable with respect to where the respondents are making direct recruitment and not on compassionate grounds-directions issued for fresh consideration as the petitioner would not be rejected only on the ground of he being a graduate otherwise the object of the scheme for compassionate appointment would fail as it helps the deceased's family to tide over the sudden financial crisis.(Para 1 to 20)

The writ petition is disposed of. (E-6)

List of Cases cited:

1. Endra Narayan Rajpoot & ors. Vs St. of U.P. & ors., W.P. No. 1709 of 2017

2. Kartikey Vs St. of U.P. & ors. , Spl. Appeal No. 229 of 2016

3. Alok Kumar Misra Vs St. of U.P. W.P. No. 6655 of 2016

4. Punj. & ors. Vs Anita & ors. (2015) 2 SCC 170

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and Sri Gopal Kumar Srivastava, learned counsel appearing for the respondent- Bank.

2. Instant writ petition has been filed praying for the following main reliefs:-

"(i) a writ, order or direction in the nature of certiorari quashing the order dated 02.05.2018 passed by the opposite party no. 1 as communicated by the opposite party no. 2, contained in Annexure No. 1 to the writ petition with consequential benefits;

(ii) a writ, order or direction in the nature of mandamus commanding the opposite parties and directing them particularly the opposite party no. 1 to consider the claim of the petitioner for appointment on compassionate ground on the post of Clerical Cadre, as submitted vide application dated 14.08.2017, contained in Annexure No. 4 to the writ petition and issue necessary orders in this regard."

3. At the very outset, learned counsel for the petitioner states that he is confining his claim for compassionate appointment to a Class IV post. The aforesaid statement is recorded.

4. The case set forth by the petitioner is that his father who was employed as a Sweeper in the respondent- Bank died in harness on 03.07.2017. The petitioner claims to have submitted an application for grant of compassionate appointment in August, 2017 which was processed but subsequently the same has been rejected vide order dated 02.05.2018, a copy of which is annexure 1 to the writ petition. The ground which emerges from the order of rejection dated 02.05.2018 is that the petitioner had been called for the brief interface for the job in clerical cadre as SWO (Single Window Operator-A) but he was not found suitable for the said post. The detailed grounds as to why the

petitioner has not been found suitable have been indicated in the counter affidavit filed by the Bank by annexing an order dated 27.04.2018, a copy of which is annexure C3 to the counter affidavit from which it emerges that upon conduct of the brief interface in order to assess the suitability of the petitioner for the proposed job it was found that the candidate/ petitioner is not having any knowledge of computer and thus it was opined that the petitioner was not suitable for the job in clerical cadre and hence his claim has been rejected vide order impugned dated 02.05.2018.

5. The contention of learned counsel for the petitioner is that when he applied for compassionate appointment under the respondents, his claim should have been considered sympathetically by the respondents and his candidature should not have been rejected in a pedantic manner on the ground that he was not found suitable in an interface having no knowledge of computer. The other argument of learned counsel for the petitioner is that when the petitioner is seeking compassionate appointment as such, even though the respondents have rejected his claim for a Class III post but his candidature could also be considered on a Class IV post on which he may be found suitable and eligible.

6. On the other hand, Sri Gopal Kumar Srivastava, learned counsel appearing for the respondent Bank argues that a circular dated 25.09.2014, a copy of which is annexure C1 to the counter affidavit, is a scheme for compassionate appointment for a dependent family member of deceased employee. It is argued that the case of the petitioner was considered for a Class III post but he was not found suitable and hence his claim was rejected vide the order dated 2.5.2018. It is further contended that as per clause 7 of the scheme, the posts to which the appointment can be made are both clerical and sub staff cadre. As per Sri Srivastava, Sub Staff cadre are the posts in the category of Class IV which include peon/sweeper etc. Placing reliance on Clause 8 of the said policy, it is contended that Clause 8.2 categorically provides that an applicant for compassionate appointment should be eligible and suitable for the post in all respect under the provisions of the relevant recruitment rules.

7. Reliance has also been placed on the relevant recruitment rules, a copy of which has been passed to the Court and has been kept on record, the High Court being a Court of record, to contend that for peons in subordinate cadre, the qualification prescribed is class tenth and twelfth standard and the graduate candidates are not eligible to be selected and the petitioner being a graduate is not eligible for a Class IV post/peon/sub staff.

8. The argument of Sri Srivastava is that admittedly the petitioner is a graduate and thus keeping in view the recruitment rules, a graduate is not eligible for a Class IV post as such, there is no infirmity in the respondent-Bank in not having considered the petitioner against the Class IV post and the petitioner not having been found suitable for a Class III post, his candidature has consequently been rejected.

9. In this regard, Sri Srivastava has placed reliance on the judgments of this Court in the cases of **Endra Naryan Rajpoot and 11 Ors Vs. State of U.P and ors passed in Writ Petition No. 1709 (SS) of 2017, Kartikey Vs. State of U.P and Ors passed in Special Appeal No. 229 of 2016, Alok Kumar Misra Vs. State of**

U.P passed in Writ Petition No. 6655 (SS) of 2016 as well as the judgment of the Apex Court in the case of **State of Punjab and ors VS. Anita and Ors reported in (2015) 2 SCC 170.**

10. Heard the learned counsel appearing for the contesting parties and perused the records.

11. From a perusal of records it emerges that the petitioner's father was working as a Sweeper in the respondent-Bank who died in harness on 03.07.2017. The petitioner staked his claim for compassionate appointment under the relevant rules and policy of the bank. The petitioner being a graduate was called for an interface by the bank but the bank did not find the petitioner suitable for being appointed in the clerical cadre and thus his claim for compassionate appointment has been rejected, vide order dated 2.5.2018.

12. After perusal of records and the reasons as have been assigned by the respondents in the impugned order dated 02.05.2018 read with the order dated 27.04.2018 it emerges that in the brief interface in order to assess the suitability of the petitioner, it was found that the petitioner is not having any knowledge of computer and thus his claim was rejected. The Court does not find any reason to interfere with the order by which the claim of the petitioner has been rejected in the clerical cadre more particularly when the prospective employer i.e Bank has itself not found the petitioner suitable for appointment.

13. Whether the petitioner can also be considered for appointment in the sub staff cadre which pertains to Class IV post is next the question to be decided by the Court.

14. The respondent- Bank has issued a policy for compassionate appointment dated 25.09.2014. The relevant provisions of the policy are reproduced below :

*"**1. NAME OF SCHEME:***

The Scheme is to be called the "Scheme for compassionate appointment to a dependent family member of a deceased employee/ employee retired on medical grounds due to incapacitation before reaching the age of 55 years.

2. OBJECT OF THE SCHEME:

To enable family of a deceased employee/employee retired on medical grounds due to incapacitation before reaching the age of 55 years, tide over the sudden financial crisis.

4. COVERAGE

4.1 To a dependent family member of a permanent employee of the Bank who-

(a) dies while in service (including death by suicide)

(b) is retired on medical grounds due to incapacitation before reaching the age of 55 years. (Incapacitation is to be certified by a duly appointed Medical Board in a Government Medical College/ Government District Head Quarter Hospitals/ Panel of Doctors nominated by the Bank for the purpose).

(4.2) For the purpose of the Scheme "employee" would mean and include only a confirmed regular employee who was serving full time or part-time on scale wages, at the time of death/retirement on medical grounds, before reaching age of 55 years and does not include any one engaged on contract/temporary/casual or any person who is paid on commission basis.

7. <u>POSTS TO WHICH APPOINTMENTS CAN BE MADE</u>

7.1 The appointment shall be made in the clerical and sub-staff cadre only.

8. <u>ELIGIBILITY</u>

8.1 The family is indigent and deserves immediate assistance for relief from financial destitution; and

8.2 Applicant for compassionate appointment should be eligible and suitable for the post in all respects under the provisions of the relevant Recruitment Rules."

15. Perusal of the said policy which is called Scheme for compassionate appointment would indicate that the scheme is titled as " Scheme for compassionate appointment to a dependent family member of a deceased employee/employee retired on medical grounds". Clause 2 of the object of the scheme is to enable family of a deceased employee/employee retired on medical grounds due to incapacitation before reaching the age of 55 years, tide over the sudden financial crisis. The coverage of the policy, as per Clause 4, includes dependent family member of a permanent employee of the Bank who dies while in service. Clause 7 of the Policy indicates the posts in which appointment can be made which is both clerical and sub staff cadre. The eligibility as per Clause 8. 2 is that the applicant for compassionate appointment should be eligible and suitable for the post in all respects under the provisions of the relevant recruitment rules.

16. Once the object of the scheme itself is to enable the family of the deceased employee to tide over the sudden financial crisis on account of the death, consequently, Clause 8 of the scheme would have to be understood in the context of the scheme for compassionate appointment itself i.e to tide over the sudden financial crisis. Once the petitioner is admittedly a graduate obviously he would be Class X and Class XII pass and consequently, he would be eligible for appointment as a peon in the subordinate cadre or the sub staff cadre.

17. The argument of Sri Srivastava while not considering the claim of the petitioner for a sub staff cadre is that as per Clause 8.2, the petitioner should be eligible and suitable for the post in all respect under the provisions of the relevant recruitment rules and the relevant recruitment rules specifically provide that the graduate candidates are not eligible. As already indicated above, the scheme contemplates appointment on compassionate grounds in order to tide over the sudden financial crisis. Obviously, the recruitment rules are to be followed whereby a higher qualification is not be taken into account while making direct recruitment. Here, the case is not one of direct recruitment but is of compassionate appointment. The petitioner is a graduate and the respondents, as per their argument, are excluding the candidature of the petitioner for being considered on a Class IV post/peon in subordinate cadre/sub staff cadre solely on the ground that the recruitment rules carry the legend of graduate candidate not being eligible. In the view of the Court the said condition in the recruitment rules would only be applicable with respect to where the respondents are making direct recruitment and not on compassionate grounds. This would be apparent from the fact that Clause 8.2 of the policy provides that the person should be eligible and suitable for the post and when seen in the context of the scheme being applicable for

the purpose of compassionate appointment, the same would obviously entail the petitioner to be eligible as per the recruitment rules for a Class IV post meaning thereby that he would have to have the qualification of Class Xth or Class XIIth or equivalent and by no stretch of imagination can the respondents be allowed exclude a graduate candidate for the purpose of compassionate appointment on sub-staff cadre as the same would run against the policy of providing compassionate appointment to tide over sudden financial crisis.

18. So far as the judgments over which Sri Gopal Kumar Srivastava, learned counsel appearing for the respondent- Bank has placed reliance, suffice it to say that the judgments of **Endraa Narayan Rajpoot (supra) & Alok Kumar Mishra (supra)** pertain to cases where the persons were staking their claim on the basis of an advertisement issued by the Commission i.e for the purpose of direct recruitment and the said cases did not pertain to compassionate appointment. So far as the Division Bench judgment in the case of **Kartikey (supra)** is concerned, the same also does not pertain to compassionate appointment and thus in the view of the Court none of the three judgments would have any applicability or would be attracted to the facts of the present facts case. So far as the judgment of the Apex Court in the case of **Anita (supra)** is concerned the same again pertains to a case of direct recruitment and not to compassionate appointment. Accordingly, none of the aforesaid judgment have any applicability in the facts of the instant case.

19. Keeping in view the aforesaid discussion, the writ petition is disposed of with the direction to the respondent no. 3 i.e Zonal Manager, Punjab National Bank, HRD Section, Zonal Office, Gomti Nagar, Lucknow who is said to be competent authority or any other competent authority to consider the case of the petitioner for compassionate appointment in the sub staff cadre or against any Class IV post. The case of the petitioner would not be rejected only on the ground of he being a graduate.

20. Let such a consideration be done within a period of six weeks from the date of receipt of a certified copy of this order.

(2023) 4 ILRA 249
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.03.2023

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Writ-A No. 37062 of 2014

Suneel Kumar & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ashish Jaiswal

Counsel for the Respondents:
C.S.C.

A. Civil Law - Chandra Mohan Jha University, Meghalaya, Act, 2009-Section 48-Education-degree-validity-Bachelor degree obtained by from CMJ University are valid in view of judgment of Meghalaya High Court passed in Writ(C) No. 177 of 2014 and Amendment in Section 48 of Amendment Act 2019-the verification of both the students are completed according to the records of the University and the degree of both the aforesaid students are valid.

The petition is allowed. (E-6)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Ashish Jaiswal, learned counsel for the petitioners and Ms. Shivi Mishra, learned Standing counsel for the respondent.

2. The present writ petition has been filed by two persons namely Sunil Kumar and Desh Deepak both sons of Sri Rameshwar Dayal with the prayer for direction to the respondent no.2 Principal, District Institute of Education Training, Bhogoan, Mainpuri to permit the petitioners to appear in the IInd and IIIrd Semester Examinations of B.T.C. Training Course-2012 and to continue their studies for the said course.

3. The record reflects that the petitioners passed their High School and Intermediate Examinations in Ist Division from the U.P. Board and subsequently obtained their Bachelor of Arts (B.A.) Degree in Ist Division from Chandra Mohan Jha University, Meghalya (for short 'CMJ University Meghalaya') which was duly recognized as per Section 2(f) of University Grants Commission Act, 1956.

4. On the strength of the aforesaid qualification, the petitioners have applied online for B.T.C. Training, 2012 from District Institute of Education Training, Mainpuri (for short ' DIET') in which, both of them are selected and sent for training. The petitioners have passed their Ist semester examination and the examination of IInd semester was going to commence from 22.1.2014, in the meantime, the respondent No. 2 Principal DIET, Mainpuri passed an order dated 13.1.2014 whereby the training of the petitioner has been discontinued as per the judgment of this Court dated 19.11.2013 passed in Writ-A No. 36180 of 2013 (Satyesh Kumar & Ors. Vs. State of U.P. & Ors), which follows that the degree obtained from the CMJ University, Meghalaya from the Academic Year 2009-2013 are invalid. The said letter of the Principal, DIET, Mainpuri has been appended at page no. 27 to 28 of the writ petition. Subsequently, the petitioners challenged the order dated 13.1.2014 passed by the Principal DIET, Mainpuri by way of Writ-A No. 3775 of 2014, which was dismissed vide judgment dated 21.1.2014 and the said order was affirmed by the Division Bench of this Court in Special Appeal No. 154 of 2014 vide order dated 11.2.2014 with the liberty to the petitioners to file appropriate representation in view of the direction issued by the Hon'ble Apex Court in Special Leave Petition [petition (s) for Special Leave to Appeal (Civil) No(s). 19617 of 2013 CMJ Foundation & Ors. Vs. State of Meghalaya & Ors].

5. It further reflects from the record that the CMJ Foundation, Meghalaya filed **Special Leave to Appeal (Civil) No(s). 19617 of 2013** against the judgment and order dated 31.5.2013 passed in Writ- A No. 16 of 2013 by the High Court of Meghalaya at Shilong, the said Special Leave to Appeal is disposed of vide order dated 13.9.2013 with the direction to the State Government, Mehghalaya to take appropriate action under Section 48 of CMJ University Act, 2009 after giving notice and reasonable opportunity of hearing to the Institution. The order dated 13.9.2013 passed in Special Leave to Appeal (Civil) No(s). 19617 of 2013 is quoted as under:-

"The petitioners in the connected petition are permitted to file the special leave petition. These petitions are directed against judgment dated 31.5.2013 of the

Division Bench of the Meghalaya High Court whereby the appeal filed against the order of the learned Single Judge refusing to quash order dated 30.4.2013 passed by Principal Secretary to the Governor of Meghalaya under Section 13(3)(b) of the CMJ University Act,2009 (for short, 'the 2009 Act') was dismissed.

During the pendency of the special leave petitions, the Visitor-cum-Governor, Meghalaya made comprehensive recommendations on 12.6.2013 for dissolution of the University on the grounds of mismanagement, maladministration, indiscipline and failure in the enforcement of the objectives of the University, apart from criminal liability. The note containing the decision of the Visitor including the recommendations made by him reads as under:

"1. I have perused the letter dated 10th June, 2013 from Shri S.P Sharma, Advocate for CMJ Foundation with reference to the Directives issued by this office vide letter no. GSMG/CMJU/82/2009/311 dated 24th May, 2013. It is observed that the CMJ Foundation/University has moved the Court of Chief Judicial Magistrate seeking copies of documents for the purpose of compliance of the Directives, after much delay, on 10th June, 2013 the last date fixed for compliance of the Directives. It thus appears that the CMJ Foundation is not sincere about compliance with the Directives. Moreover, all the Directives that were issued vide this office letter No. GSMG/CMJU/82/2009/143 dated 30th April, 2013 could have been complied by the CMJ Foundation without recourse to the documents seized by the State Police. The Directives issued on 30th April, 2013 are stated below:

i) The CMJ University shall recall/withdraw all the degrees awarded so far and publish this fact in national and local newspapers at their own cost.

ii) The CMJ Foundation shall submit a fresh proposal for appointment of the Chancellor along with the correct bio-data of the candidate recommended and supporting documents.

iii) The CMJ University shall frame rules and procedures for admission into the M.Phil and Ph.D degree programmes, allocation of supervisor, course work/ evaluation, assessment and further related methods in accordance with the UGC (Minimum Standards and Procedure for Awards of M.Phil/Ph.D degree) Regulation, 2009.

v) No fresh admission of students shall be undertaken by the CMJ University till compliance of the above instructions and till the appointment of the Chancellor in accordance with Section 14 (1) of the CMJ University Act, 2009.

2. It is unfortunate that the Chairman of CMJ Foundation has remained incommunicado all these days and chosen to communicate only through his counsel. According to media reports his counsel says he is in Bihar attending on his sick parent. Even if it is true it cannot be the reason for not addressing the issues for so long.

3. It is worth mentioning that immediately after the first directives were issued the University alleged that the students had vandalized the office and equipment in the University which subsequently was found to be false by police. According to police it was engineered by the university staff at the instance of one of the Directors. It was a deliberate attempt to destroy evidence and the case is under police investigation.

4. All these cast a shadow on the sincerity of the University to adhere to the requirement of law, initiate corrective

actions and uphold the standards of higher education.

5. The commissions and omissions of University are in two parts; i) It started functioning without the Chancellor whose appointment has not been approved by the Visitor, and ii) it functioned in gross violation of the standards and norms set by the University Grants Commission and other regulatory bodies, CMJU Act 2009, and Meghalaya Private Universities (Regulations of Establishment and Maintenance of Standards) Act 2012. This is even more serious an offence; it constitutes a breach of trust in addition. Even with the legally appointed Chancellor no university can be allowed to function with such fraudulent intent and vitiate the academic environment, disgrace the institution of higher learning and bring disrepute to the state where it is established.

6. On the basis of facts and circumstances available it is concluded that the university committed the following grave irregularities:

i) The University functioned from 17/10/2010 with the self- appointed Chancellor without the approval of the Visitor in terms of Section 14(1) of the CMJ University Act, 2009 on the presumption of "deemed approval" of the Visitor. This is not legally valid and the position has been affirmed by the order dated 16th May, 2013 of the Hon'ble High Court of Meghalaya which has further been upheld by the Division Bench of the Hon'ble High Court of Meghalaya in their order dated 31st May, 2013.

(ii) It awarded B.Ed degree through Distance Mode without the requisite approval of the regulatory bodies and without affiliation. The B.Ed degrees awarded by the CMJ University were held to be invalid in the eye of Law by the order dated 24th May, 2013 of the Hon'ble High Court of Gauhati.

(iii) The Shillong Engineering and Management College was de-affiliated by NEHU from academic session 2011-2012. This College, which was in existence prior to the sanction for establishment of the CMJ University, cannot be affiliated with the CMJ University. While the fate of the students of this College was already uncertain in view of the said deaffiliation, the College continued to make admissions by misleading the students that the degrees will be issued by the CMJ University.

iv) The University had reported that during 2012-2013 it had awarded PhD degrees to 434 students and enrolled another 490 students. These figures though extraordinarily high do not reflect the correct position. Information is available with us that another 29 students have also received PhD degree from the University and more information is coming on a daily basis. So it is obvious that the actual number of award of and enrolment for, PhD and other programs will be much higher than was reported. The University awarded PhD even in subjects like the Bodo and Punjabi languages where the guides/faculty are not easily available. These constitute gross abuse of the university's power and violation of the UGC (Minimum Standards and Procedure for Awards of M.Phil/ Ph.D Degree) Regulation, 2009.

v) The University furnished a list of 10 faculty members with PhD which is inaccurate. One of the faculty members is only a research scholar at NEHU. The list includes the Vice- Chancellor, Registrar and other functionaries of the University as faculty which is quite misleading. In fact the University does not have adequate teachers to introduce courses which it had been doing.

vi) The University is running several off campus centres outside Meghalaya which is not permissible under the UGC (Establishment of and Maintenance of Standards of Private University) Regulations, 2003 and the decision of the Hon'ble Supreme Court (2005) in the case of Prof. Yashpal & Anr. Versus State of Chhattisgarh & Ors.

vii) It is offering distance education programme outside the boundaries of Meghalaya and outside India. These actions are in gross violation of UGC Regulations and guidelines.

viii) Total students enrolled by CMJ University as per information submitted by the University in 2010-11:176, 2011-12: 469, 2012-13: 2734. All these admissions are illegal as all its actions are db initio void in absence of a legally appointed Chancellor.

x) The University has violated Section 45(3) and Section 46(4) of the CMJ University Act, 2009 by not submitting the Annual Report and the Annual Accounts / Balance Sheet and the Audit Report to Visitor.

xi) Even after the initiation of actions by the Visitor the University continued to mislead the students and public by press statements. It issued a news paper advertisement in the Shillong Times on 22nd April, 2013 claiming it has not yet awarded any PhD degree to any of the students enrolled from the State of Assam which is false. Again it issued advertisement in newspaper on 2nd May and 16th May, 2013 in matters of holding Convocation and Award of PhD Degree knowing full well that there can be no Convocation without the legally appointed Chancellor and that the admissions of the courses and award of the degrees were illegal.

x) The University has violated Section 41(1) of the CMJ University Act relating to establishment of Endowment Fund and indulged in cheating by withdrawing the deposit of Rs.210 lakhs within days of making the deposit.

xi) The University repeatedly acted in contravention of Section 52 of the CMJ University Act 2009 in respect of maintenance of standards and other related matters applicable to private universities.

7. All these established facts clearly indicate mismanagement, mal-administration, indiscipline and failure in the accomplishment of the objectives of the University, apart from criminal liability. In the interest of maintaining proper standards of higher education it would be desirable that the CMJ University be wound up. The state government is accordingly being addressed to consider Dissolution of the CMJ University in terms of Section 48 of the CMJ University Act, 2009."

(emphasis supplied)

In terms of the recommendations made by the Visitor-cum- Governor, the State Government is required to take action under Section 48of the 2009 Act.

Shri Ranjan Mukherjee, learned counsel appearing for the Government of Meghalaya says that he is not in a position to make a statement whether the State Government has taken action in furtherance of the recommendations made by the Visitor-cum- Governor.

In view of the above, we feel that ends of justice will be served by directing the State Government to take an appropriate action under Section 48 of the 2009 Act after giving notice and reasonable opportunity of hearing to the petitioners.

The special leave petitions are accordingly disposed of with a direction that within three months from today the State Government shall, after giving an opportunity to the petitioners to show cause

against the action proposed to be taken, pass a speaking order under Section 48 of the 2009 Act.

The students whose admissions and degrees were declared illegal may also make representation to the State Government and seek an opportunity of hearing from it. The request made by them shall be sympathetically considered by the State Government."

6. Pursuant to the direction issued by the Hon'ble Apex Court, as well as direction made in Special Appeal No. 154 of 2014, petitioners filed their representations on 18.3.2014 in the office of Director Higher and Technical Education, Meghalaya at Shilong whereupon, the petitioners were directed to appear in person on 23.3.2014, in compliance of the said direction, the petitioners were appeared before the authority concerned but no decision was communicated to the petitioners by the Director Higher and Technical Education, Meghalaya at Shilong.

7. In the meantime, **Writ(c) No. 177 of 2014** was filed by the CMJ Foundation along with the CMJ University in High Court of Meghalaya on the ground that Mehgalaya Legislative Assembly enacted the CMJ University Act, 2009 (Act No.4 of 2009) to establish and incorporate an University in the State, with emphasis on providing high quality and industry-relevant education in the areas of Physical Sciences, Life Sciences, Technology, Medical Science and Paramedical, Management, Finance & Accounting, Commerce, Humanities, Languages & Communication, applied and Performing Arts, Education, Law Social Science and related areas sponsored by CMJ Foundation and to provide for matters connected therewith or incidental thereto.

8. As the questions call for the decision in the said writ petition are to be decided taking into consideration of the provisions of CMJ University Act, 2009 (for short 'Act' 2009') which was decided finally by the High Court of Meghayala vide order dated 16.7.2015 with the direction to the State Government, Meghalaya to take steps in strict compliance with the provisions of the Act, 2009, Meghalaya Private Universities, Regulation of Establishment and Maintenance of Standards) Act, 2012 (Act No. 8 of 2012), principles of natural justice and the concept of obligation of the administrative authorities to act fairly in interest of justice from the stage of Hon'ble Apex Court.

The relevant paragraph nos. 29 to 31 are quoted as under:-

"29.For the foregoing discussions, this Court is of the considered view that there was non-compliance with or breach of the fundamental procedural requirements as provided under Section 48 of the said Act of 2009 as well as principles of natural justice and the concept of the obligation of the administrative authorities to act fairly in issuing the show cause notices dated 12.11.2013 and 24.01.2014 and passing the impugned order dated 31.03.2014 which would lead to many facets injustice. Thus, the impugned order dated 31.03.2014 and the show cause notices dated 11.12.2013 and 24.01.2014 are hereby quashed and set aside.

30. In the result, the State Govt. may take steps in strict compliance with the provisions of the CMJ University Act, 2009 (Act 4 of 2009), the Meghalaya Private Universities (Regulation of Establishment and Maintenance of Standards) Act, 2012 (Act No.8 of 2012), principles of natural justice and the concept of the obligation of

the administrative authorities to act fairly in interest of justice from the stage where the Apex Court passed the said judgment and order dated 13.09.2013.

31. Writ petition is allowed to the extent indicated above."

9. Subsequently, vide notification 16th October of 2019, the CMJ University Amendment Act, 2019 (Act No. 14 of 2019) was passed by the Meghalaya Legislative Assembly which received the assent of the Governor on 9th October, 2019 published in Gazette of Meghalaya Extraordinary Issue dated 16th October, 2019 whereby, the amendment of Section 48 was made by inserting the following provisions. The Amendment of Section 48 is quoted as under:-

"Provided if the University is dissolved at the instance of the Sponsor as provided in sub-section (1), making arrangement for the affected students of the University, until the last batch of regular courses of studies of University are completed, shall be the responsibility of the University in consultation with the UGC, AICTE and other Regulatory Bodies"

10. After the judmgnet of Meghayala High Court dated 16.7.2015 passed in Writ(c) No. 177 of 2014 as well as amendment in Section 48 of Amendment Act 2019, the CMJ University informed the petitioners, the petitioner no. 2 under the RTI Act, 2005 to the effect that the students named Desh Deepak Registration No. 10111010119125 and Sunil Kumar, Registration No. 10111010119126 of Bachelor of Arts Degree has completed their verification and therefore, the verification of both the students are complete according to the records of the University and the Degree of both the aforesaid students are valid.

11. The information supplied in this regard vide letter dated 2.5.2022 is quoted as under:-

"Date- 02.05.2022

Subject: Information under RTI Act 2005.

with reference to the letter cited above, we would like to inform you that, the university was closed by an impugned office order of Government of Meghalaya dated 31.03.2014 Subsequently. The Meghalay High Court vide WPC No. 177/2014 has quashed and set aside, the office order dated aside, the office order dated 31.03.2014 After the University reopened in November 2015, Student verification process started with orginal documents due to the official documents seized by the Govt. of Meghalaya. As per the record, the Student named Desh Deepak Registration No. 10111010119125 and Suneel Kumar Registration No. 10111010119126 of Bechelor of Arts Degree , has completed their verification, therefore, the verification of both the above student is compete according to the records of the university and the degree of both the above students is valid."

12. In view of the aforesaid, the B.A. Degrees obtained by the petitioners from the CMJ University, Meghalaya are valid in view of the judgment of **Meghalaya High Court passed in Writ (c) No. 177 of 2014** and **Amendment in Section 48 vide Amendment dated 16th October, 2019.**

13. In the facts and circumstances, the Degrees obtained by the petitioners from the CMJ University, Meghalaya in the year -2012 are treated to be valid one.

14. Accordingly, the writ petition is allowed with the direction to the State

Government of U.P. to continue the petitioners with the B.T.C. Training Course- 2012, if the same is surviving.

(2023) 4 ILRA 256
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2023

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Writ-A No. 38165 of 2011

Sushil Kumar Bajpai ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Pandey, Sri Rajeev Trivedi, Sri Shashi Kant Shukla

Counsel for the Respondents:
A.S.G.I., C.S.C. (2011/33987), Sri Praveen Shukla, Sri Saumitra Singh

A. Civil Law - Public Accountant Default Act, 1850-Sections 2 & 4-Central Civil Services (Conduct) Rules, 1964-Rules 3(I)(ii)-Central Civil Services (Classification, Control and Appeal) Rules, 1965-Rules 14 & 16-Recovery of amount-the petitioner had given a cash advance of Rs. 8,01,000 even without taking any initial of Assistant Post Master-At relevant time petitioner was working as Postal Assistant-He is not a public accountant as defined in section 2 of the Act of 1850-Proceeding of recovery cannot be initiated against petitioner unless and until a liability to that effect of the loss of Government amount is fixed upon him-Act of 1850 also has been repealed by Central Government on 02.09.2019-Impugned order quashed.(Para 1 to 27)

The petition is allowed. (E-6)

List of Cases cited:

1. Smt. Madhubala Bharti Vs St. of U.P. & ors., W.P. No. 40574 of 2001

2. Girija Dayal Srivastava Vs St. of U.P. (1987) UPLBEC 1121

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Shri Shashi Kant Shukla, learned Counsel for the petitioner and Shri Saumitra Singh, Senior Panel Counsel for Union of India/respondents.

2. The instant writ petition under Article 226 of the Constitution of India has been filed against the impugned order dated 06.05.2011 passed by the respondent no.4, Chief Post Master, Kanpur, District Kanpur Nagar whereby a sum of Rs.7,57,500/- has been directed to be recovered from the petitioner as an arrears of land revenue in exercise of power under Public Accountant Default Act, 1850.

3. It reflects from the record that the petitioner joined on the post of Postal Assistant at Head Post Office, Banda on 24.09.1983. Subsequently, he was transferred to Kanpur on the same post. On 17.03.2003 while he was performing his duties as Postal Assistant in the office of Treasurer, a loss of Rs.8,00,000/- occurred in the department due to the irresponsibility committed by one Shailendra Kumar Dixit, who was working at that time as Postal Assistant N.S.C., Discharge Counter, Head Post Office, Kanpur Nagar.

4. A first information report was lodged against unknown persons on 17.03.2003, thereafter, the departmental proceeding was initiated against the petitioner and he was served with a charge-sheet on 18.07.2003 issued by the respondent no.4 with the allegation that the petitioner has given a cash advance of

Rs.8,01,000/- to Shailendra Kumar Dixit, Postal Assistant N.S.C. Discharge Counter, Kanpur Nagar without taking any initial of the Assistant Post Master namely Sri S.S. Trivedi and as such he acted in contravention of Rule 3 (I) (ii) of CCS (Conduct) Rules, 1964.

5. The petitioner submitted his reply on 13.08.2003 denying the charges levelled against him and further stated that the amount in dispute was given to Shailendra Kumar Dixit with the consent of Assistant Post Master, Shri S.S. Trivedi, who made his initial on the cash register certifying therein that the amount has been received by Shailenra Kumar Dixit and as such two charges made against the petitioner are frivolous and are liable to be dropped.

6. Subsequently, the statement of Shri S.S. Trivedi, Assistant Post Master was recorded by the inquiry officer and the disciplinary authority, respondent no.4 passed the order dated 15.11.2003 whereby imposed recovery of Rs.88,032/- against the petitioner with immediate effect in 42 equal installments @ Rs.2,096/- per month from his salary.

7. Being aggrieved by order dated 15.11.2003, the petitioner filed an appeal before the respondent no.3, Director Postal Services, Kanpur Region, Kanpur on 29.11.2003, which was not decided by the appellate authority despite several reminders given by the petitioner. Ultimately, the petitioner filed an Original Application being Original Application No.92 of 2004 (S.K. Bajpai Vs. Union of India and others) against the order dated 15.11.2003 before the Central Administrative Tribunal, and the Central Administrative Tribunal vide order dated 09.02.2004 stayed the operation of the said order till disposal of the appeal.

8. The respondent no.3 during pendency of the Original Application before the Central Administrative Tribunal had allowed the appeal filed by the petitioner vide order dated 18/29.06.2004 by setting aside the recovery of Rs.88,032/- with the direction that a fresh charge-sheet be issued by the disciplinary authority against the petitioner.

9. The disciplinary authority neither issued any charge-sheet nor initiated disciplinary proceeding as per Rule 16 of C.C.S.(C.A.A.) Rules, 1965 (hereinafter referred as "Rules of 1965") in pursuance of the direction of appellate authority dated 18/29.06.2004.

10. Subsequently, the respondent no.4 issued the order dated 09.04.2005 directing recovery of Rs.8,00,000/- from the petitioner as arrears of land revenue. The respondent no.4 has also passed two separate orders dated 08.04.2005 and 8/9.04.2005 against Shailendra Kumar Dixit and Shri S.S. Trivedi for recovery of Rs.8,00,000/- each meaning thereby the respondent no.4 had issued recovery of Rs.24,00,000 against the petitioner and two other persons working in the Post Office.

11. The petitioner was again compelled to file the Original Application being Original Application No.511 of 2005 challenging the order dated 09.04.2005 before the Central Administrative Tribunal and the Central Administrative Tribunal while entertaining the Original Application

vide order dated 04.05.2005 stayed the recovery proceeding against the petitioner. Thereafter, a fresh charge-sheet was issued by the disciplinary authority against the petitioner under Rule 14 of Rules of 1965 with regard to the earlier charges on 07.05.2005, which was replied by the petitioner on the same day i.e 07.05.2005 denying the entire charges.

12. The inquiry officer was appointed, who submitted his report on 26.05.2008 with the finding that the charges levelled against the petitioner were not proved. The disciplinary authority i.e. respondent no.4 did not agree with the conclusion of inquiry officer, issued a letter dated 09.06.2008 regarding disagreement with the inquiry report and invited representation from the petitioner.

13. In reply thereto, the petitioner filed his representation dated 12.07.2008, the respondent no.4 without considering the representation as well as finding recorded by the inquiry officer passed the order dated 19.07.2008 imposing the recovery of Rs.2,50,000/- from the salary of the petitioner in 100 equal monthly installments.

14. The petitioner aggrieved by the order dated 19.07.2008, filed an appeal under Rule 23 of Rules of 1965 before the respondent no.3, which was rejected vide order dated 20.11.2008 affirming the punishment order dated 19.07.2008.

15. Being aggrieved by the order dated 20.11.2008 the petitioner filed Original Application No.1314 of 2008 (Sushil Kumar Bajpai Vs. Union of India and others) before the Central Administrative Tribunal for quashing the order dated 19.07.2008 and 20.11.2008 passed by the respondent nos.4 & 3 respectively, which was disposed of finally vide order dated 23.12.2008 setting aside the order dated 20.11.2008 passed by the respondent no.3 and the petitioner was directed to file complete copy of the Original Application with all annexures and additional appeal, the respondent no.3 was also directed to decide the the appeal by a reasoned and speaking order in accordance with land and relevant rules on the subject and stayed the recovery proceeding against the petitioner till disposal of the appeal.

16. Thereafter, the appellate authority vide order dated 23.03.2009 modified the punishment of recovery of Rs.2,50,000/- as imposed vide order dated 19.07.2008 to Rs.1,50,000/-. The petitioner again challenged the said order dated 23.03.2009 passed by the appellate authority vide Original Application No.474 of 2009 before the Central Administrative Tribunal, which was finally disposed of vide order dated 15.05.2009 setting aside the order dated 23.03.2009 passed by the appellate authority and remitted the matter back to reconsider the entire case in accordance with law and pass a reasoned and speaking order within a period of three months and further stayed the recovery against the petitioner during the pendency of the appeal.

17. The appellate authority, thereafter, rejected the appeal vide order dated 14.07.2009 and affirmed the order dated 19.07.2008 directing recovery of Rs.1, 50,000/- as the petitioner was held responsible for the loss to the extent of Rs.1,50,000/- and the said amount is being recovered from the salary of the petitioner.

18. The petitioner again filed Original Application No.881 of 2009 before the

Central Administrative Tribunal challenging the order dated 19.07.2008 as well as the order dated 14.07.2009 passed by the appellate/disciplinary authority, which is pending before the Tribunal.

19. From the record, it is apparent that the amount, which was directed to be recovered from the salary of the petitioner to the extent of Rs.1,50,000/- has been recovered and the Original Application No.511 of 2005 was dismissed as withdrawn vide order dated 22.12.2010 and during pendency of the Original Application No.881 of 2009 the impugned order dated 06.05.2011 has been passed while exercising the power under the provisions of Section 2 & 4 of Public Accountant Default Act, 1850 (Act No.12 of 1850) whereby an amount of Rs.7,57,500/- has been directed to be recovered from the petitioner as an arrears of land revenue after deducting the amount of Rs.1,50,000/- which has already been recovered from the total loss to the extent of Rs.8,00,000/-. The order dated 06.05.2011 passed by the respondent no.4 is impugned in the writ petition.

20. Learned Counsel for the petitioner submits that the disciplinary proceeding against the petitioner was initiated and departmental inquiry was held in which the charges against the petitioner has not been substantiated, thereafter, the fresh inquiry has not been initiated by the department in pursuance of the order of Central Administrative Tribunal and an amount of Rs.7,57,500/- is sought to be recovered from the petitioner by the impugned order.

21. Learned Counsel for the petitioner further submits that the amount in question, which is directed to be recovered is not an amount and kind of security as per Section 2 of the Public Accountant Default Act, 1850 and the petitioner is neither a Official Assignee or Trustee, or as Sarbarakar, is entrusted with the receipt, custody or control of any moneys or securities for money. The impugned recovery under the Public Accountant Default Act, 1850 is absolutely illegal and the said amount cannot be recovered from the petitioner as an arrears of land revenue.

22. Learned Counsel for the petitioner again submits that before passing of the impugned order no opportunity of any hearing has been afforded to the petitioner.

23. In support of his argument learned Counsel for the petitioner placed reliance upon the division Bench judgement of this Court in the case of **Smt. Madhubala Bharti Vs. State of U.P. and others** passed in **Writ Petition No.40574 of 2001** and **Girija Dayal Srivastava Vs. State of U.P.** reported in **1987 UPLBEC 1121**. The relevant portion of the judgement in the case of **Smt. Madhubala Bharti (supra)** is quoted as under:-

"The another factor which is to be considered by this Court that whether the recovery of loss caused by a public servant to the government can be recovered as arrears of land revenue. In case of Girja Dayal Srivastava (Supra) the Division Bench of this Court has clearly held that process of recovery arrears of land revenue is an exception to the oral process. The right of recovery as arrears of land revenue must be shown to be permitted by statutory provision including the statutory rules in respect of government servant. In respect of the government servant, loss caused to the government may be recovered from the salary under section 40 of the Civil Services Classification (Appeal) Rules,

1930 as applicable in U.P. But under Public Account Default Act, 1850 it cannot be recovered as arrears of land revenue. In case of Titoo Singh Vs. District Magistrate,(Supra) the provision of Sections 173 A and 21 was being considered and the Division Bench of this Court has held that it cannot be recovered as arrears of land revenue. It can adopt other modes of recovery.

In view of the aforesaid fact, we are satisfied that the recovery cannot be made against the petitioner unless and until a liability to that effect of the loss of government amount is fixed upon the petitioner. "

24. Learned Counsel for the Union of India on the other hand states that the impugned order has rightly been passed but he failed to substantiate the fact as to why fresh disciplinary proceeding has not been initiated as per direction of the Central Administrative Tribunal.

25. After considering the rival submissions made by both side as well as perusing the record of the case, it is apparent that no fresh disciplinary proceeding was initiated as per direction of Central Administrative Tribunal and the petitioner is not a Public Accountant as defined in Section 2 of the Public Accountant Default Act, 1850 and as per Division Bench judgment of this Court in the case of Smt. Madhubala Bharti (supra) the proceeding of recovery cannot be initiated against the petitioner unless and until a liability to that effect of the loss of government amount is fixed upon him and even the Public Accountant Default Act, 1850 (Act No.12 of 1850) has been repealed by the Central Government on 02.09.2019 through a bill called as Repealing and Amending Bill, 2019 as the said Act has become obsolete.

26. In view of the aforesaid, this Court is of the opinion that the recovery cannot be made against the petitioner unless and until a liability to that effect of the loss of government amount is fixed upon the petitioner. Therefore, the impugned order dated 06.05.2011 passed by the respondent no.4, Chief Post Master, Kanpur, District Kanpur Nagar is quashed.

27. The Writ Petition is allowed. No order as to cost.

(2023) 4 ILRA 260
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.03.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 47099 of 2012

Union of India & Ors. ...Petitioners
Versus
Smt. Kamla Pandey & Anr. ...Respondents

Counsel for the Petitioners:
Sri M.K. Sharma, Sri Rajnish Kumar Rai, S.C., Sri Rajesh Tripathi

Counsel for the Respondents:
Sri J.P. Pandey, Sri Pramod Kumar (Saxena), Sri Pramod Kumar Saxena, S.C., Sri Vijay Kumar Singh, Sri Ramesh Narain Pandey

A. Service Law - Railway Service (Pension) Rules, 1993-Section 18 Sub-Rule (3)-pension to casual labour-deceased was a casual labour-his wife approached the Tribunal by filing OA seeking family

pension for herself and for her minor son under the pension rules applicable to the employees of the railways-For entitlement of pension minimum 10 years of employment is mandated under the Rules-However the deceased rendered services for less than 10 years-More so, he was not appointed as a temporary railway servant, nor was he regularized on a regular Group D post, accordingly, as per Pension Rules a casual labour is not entitled to pension-The reasoning assigned by the Tribunal is based on wrong assumption that the deceased employee was a 'temporary railway servant', whereas, under the Pension Rules 'casual labour with temporary status', is ineligible and excluded from the definition of 'temporary railway servant'.(Para 1 to 34)

The writ petition is allowed. (E-6)

List of Cases cited:

Inder Pal Yadav & ors. Vs U.O.I. & ors.

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

1. Heard Sri Rajesh Tripathi, learned counsel appearing for the petitioner-Union of India-Railways and Sri Pramod Kumar (Saxena) assisted by Sri Ramesh Narain Pandey, learned counsel for the respondent.

2. The writ petition is directed against the order dated 22 May 2012, passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad (for short "Tribunal"), in Original Application No. 1144 of 2006 (for short "OA"), whereby, allowing the family pension to the first respondent/original applicant.

3. During pendency of the writ petition, the original applicant died, the legal heirs have been substituted.

4. The original applicant, a widow, of R.R. Pandey, who was employed as casual labour with the Railways from 8 August 1977. He was given temporary status w.e.f. 1 January 1985, vide order dated 25 November 1985. The employee died on 12 July 1988. On the death, the widow/original applicant came to be engaged as fresh casual labour, vide order dated 22 August 1988. In 2012, she approached the Tribunal by filing OA seeking family pension for herself and for her minor son under the pension Rules applicable to the employees of the Railways. The OA was contested by the petitioners/respondents, inter alia, contending that for entitlement of pension minimum 10 years of employment is mandated under the Rules. The husband of the respondent was engaged as a casual labour from 29 August 1979 to 1 September 1980, and thereafter with breaks until his death, according to the petitioner the total length of service rendered by the deceased employee was 8 years 9 months and 9 days. In other words, having rendered less than 10 years of service, family pension was not admissible to the respondent, since the deceased employee was a casual labour.

5. The learned Tribunal relying on Rule 18 of the Railway Service (Pension) Rules, 1993 (for short "Pension Rules') in particular sub-Rule (3) of Rule 18, allowed the OA. The petitioner/respondents were directed to grant family pension to the respondent/original applicant from the date of eligibility and also to pay arrears.

6. Learned counsel appearing for the petitioner submits that the Pension Rules, in particular Rule 18, would not apply in the case of casual labour, therefore, the respondent/original applicant was not entitled to family pension. It is further submitted that at no point of time the

husband of the respondent-original applicant came to be appointed as a temporary railway servant, nor, was he regularized on a regular Group D post, accordingly, as per Pension Rules a casual labour is not entitled to pension.

7. Per contra, the learned counsel appearing for the respondent/original applicant submits that the employee, admittedly, came to be engaged as a casual labour but subsequently, was given temporary status w.e.f. 1 January 1985, after granting age relaxation of 1 year 3 months and 16 days. Accordingly, it is urged that the employee was conferred temporary status/regularized against a Group D post. It is further submitted that it is noted in the impugned judgment of the learned Tribunal that the respondent/original applicant came to be given compassionate appointment on the death of the employee, meaning thereby, that had the employee not been a temporary railway servant or a regular employee, compassionate appointment would not have been given to the respondent.

8. Further, it is submitted that the case of the respondent/original applicant would be governed as per Section (a) non-gazetted staff (1) Temporary Railway Servants Rule 2301 under Chapter XXIII of the Railway Establishment Manual, which was applicable on the date of death of employee i.e. 1988. He further submits that the Rule defining "temporary railway servant' subsequently, came to be amended/modified, as reflected in Chapter XV Volume (1) (revised addition 1989) and in the terms and conditions applicable to railway servants and substitutes in temporary servants non-gazetted staff Rule (1501). It is sought to be urged that the expression "casual labour with temporary status', was subsequently incorporated in the defination in 1989, which was not excluded in the earlier Rule. It is, therefore, submitted that earlier "casual labour' was excluded from the definition of "temporary railway servant', and since the employee was conferred "casual labour with temporary status', prior to 1989, his spouse/widow would be entitled to family pension. In other words, it is sought to be urged that the Rule excluding "casual labour with temporary status', which came to be incorporated in 1989 cannot be given effect retrospectively so as to non-suit the respondent and deprive her family pension.

9. It is urged that the learned Tribunal has not committed any illegality or perversity in granting family pension, the writ petition being devoid of merit is liable to be dismissed.

10. Rival submissions fall for consideration.

11. The sole question that arises for consideration is, as to whether, the respondent/original applicant was eligible and entitled to family pension under the Pension Rules, or in the alternative is "casual labour with temporary status' entitled to pension.

12. Rule 18(1) of Pension Rules provides for pension, inter alia, to temporary railway servant. The Rule reads thus:

Rule-18: Pensionary, terminal or death benefits to temporary railway servant. -

(1) A temporary railway servant who retires on superannuation or on being declared permanently incapacitated for further railway service by the appropriate

medical authority after having rendered temporary service not less than ten years shall be eligible for grant of superannuation, invalid pension, retirement gratuity and family pension at the same scale as admissible to permanent railway servant under these rules.

13. On plain reading of rule it provides that a temporary railway servant, who retires on superannuation or being declared permanently incapacitated for further railway service after having rendered temporary service not less than 10 years, shall be eligible for grant of superannuation, retirement gratuity and family pension, as admissible to permanent railway servant. In other words, the rule mandates two conditions for earning family pension: (i) the employee must have been a "temporary railway servant'; (ii) must have rendered service for not less than 10 years.

14. Sub-rule (3) of Rule 18 provides for family pension in the event of death in harness of a temporary railway servant. Sub-rule (3) of Rule 18 is extracted:

In the event of death in harness of a temporary railway servant his family shall be eligible to family pension and death gratuity on the same scale as admissible to families to permanent railway servants under these rules

15. In other words, the rule mandates that in the event of death of a "temporary railway servant', his family shall be eligible for the family pension as admissible to families of permanent railway servant under the Rules. It does not mandate 10 years of service, which is required to be satisfied in respect of temporary railway servant, who retires on attaining the age of superannuation or being declared permanently incapacitated. The Rule does not employ the expression, "casual labour with temporary status'.

16. The entitlement to family pension to the respondent/original applicant is dependent upon the fact that whether the employee was conferred/appointed "temporary railway servant'. It is not being disputed that the employee came to be appointed as a casual labour and on having put in the requisite number of days/ years, mandated in terms of Railway Board Circular dated 1 June 1985, temporary status would be conferred upon the casual labour. The employee was conferred the status of "casual labour with temporary status', w.e.f. 1 January 1985 vide order dated 25 November 1985. The order reads *''..... under noted project casual labour working on this sub-division, having more than 3 years but less than 5 years (1551 days) service including 360 days continuous working days as on 1.1.84 on being declared medically fit in classes as shown against each are are being given temporary status w.e.f. 1.1.84 in grade and scale indicated against each: .....'* It appears that the employee was granted age relaxation while conferring upon him status of "casual labour with temporary status'. The employee thereafter died in 1988. Admittedly, on the death of the employee he was not working/engaged as "temporary railway servant'. Rule 18 of Pension Rules was, therefore, not applicable upon him.

17. Under Railway Establishment Manual Rule 2301, a casual labour has been excluded from the definition of temporary railway servant. The rule reads thus:

"Temporary Railway Servant' means a railway servant without a lien on a

permanent post on a Railway or any other administration or office under the Railway Board. **The term does not include ''casual labour', a ''contract' or ''part time' employee or an ''apprentice'.**

18. The question that arises is as to whether "casual labour with temporary status' is entitled to pension/family pension.

19. Subsequently, it appears that the Rule came to be amended/modified being Rule 1501 in the Railway Establishment Manual (revised addition 1989) which is extracted:

"Temporary railway servant' means a railway servant without a lien on a permanent post on a Railway or any other administration or office under the Railway Board. **The term does not include ''casual labour', including ''casual labour with temporary status' a ''contract' or ''part-time' employee or an ''apprentice'.**

20. The Rule is pari materia with the earlier Rule, except the expression "casual labour with temporary status" was added excluding such category/class of casual labour from the definition of "temporary railway servant'. The modification was incorporated by Railways after the decision rendered by the Supreme Court in **Inder Pal Yadav and others vs. Union of India and others.** It is thereafter category of "casual labour with temporary status' was created from amongst the casual labour. It would be relevant at this stage to notice the definition of "casual labour'. Rule 2501 is extracted:

Casual labour refers to labour whose employment is seasonal, intermittent, sporadic or extends over short period. Labour of this kind is normally recruited form the nearest available source. It is not liable to transfer, and the conditions applicable to permanent and temporary staff do not apply to such labour.

21. The submission of the learned counsel appearing for the respondent/original applicant is that since the expression "casual labour with temporary status', was not part and parcel of the earlier definition of "temporary railway servant', therefore, the same would not be applicable in the case of respondent as the employee had died in 1988 prior to the amendment. The temporary status was conferred upon the employee prior to the amendment which cannot be read retrospectively to have been excluded in the earlier definition of "temporary railway servant', therefore, it is urged that the respondent/original applicant is entitled to family pension being admissible to her under the Rules on the death of the employee.

22. In our opinion the submission of the learned counsel for the respondent/original applicant is misconceived and based upon misreading of the Rule.

23. The definition of "temporary railway servant' excludes, casual labour, Railways in compliance of the decision of the Supreme Court in **Inder Pal Yadav** (supra) upgraded the status of casual labour, who had put in a requisite number of days/years of service with the Railways. The category being "casual labour with temporary status', were conferred higher wages in the pay-scale and was also entitled to gratuity. But the ordinary "casual labour', as well as, "casual labour with temporary status', i.e. a class within a class of casual labour continued to be excluded

from the definition of "temporary railway servant'. By no stretch of imagination, it can be said that the definition of "temporary railway servant' as defined earlier did not exclude "casual labour with temporary status', therefore, a casual labour with temporary status is entitled to pension. The occasion to exclude "casual labour with temporary status' from the definition of "temporary railway servant' arose after such a class came to be created after the decision in **Inder Pal Yadav** (supra). Accordingly, Railways, in their wisdom, clarified by amending the definition of "temporary railway servant' to exclude the "casual labour with temporary status'.

24. On reading of the definitions of "temporary railway servant', as it stood earlier and prior to amendment, casual labour, be it ordinary casual labour or with temporary status, are excluded from the definition of "temporary railway servant'. The submission of the learned counsel for the respondent/original applicant that since the authorities had granted age relaxation while conferring the "temporary status' upon the casual employee, it would be deemed that the employee came to be regularized on the establishment of the Railways. Further, on the death of the employee the Railways had given respondent/original applicant compassionate appointment which could not have been given in the case had the deceased employee been of a casual labour. The argument is misconceived and not borne from the material placed on record. Age relaxation while conferring temporary status on a casual labour would not tantamount to regularization as the order nowhere states that the deceased employee came to be conferred status of a "temporary railway servant'.

25. The order dated 25 November 1985, clearly notes that the casual labour working in the sub division and having completed the requisite number of years/days of service or continuous work, as on 1 January 1984, are being given temporary status. The order dated 22 August 1988, relied upon by the respondent while conferring compassionate appointment to the respondent/original applicant reads as follows:

"GM has accorded his approval for the engagement of Smt. Kamla Pandey widow of Late Ram Raj Pandey, Ex. Casual Record Sorter as a fresh Casual Labour under F.A. & C.A.O./CORE/Allahabad."

26. From bare perusal of the order, it is evident that the respondent/original applicant came to be engaged as a casual labour. It is not a compassionate appointment on the regular establishment of the Railways against any post. The status of the respondent/original applicant and her husband was that of a casual labour or casual labour with temporary status.

27. Such casual labour who acquire temporary status, will not, however, be brought on the permanent or regular establishment or treated in regular employment of Railways until and unless they are selected through regular Selection Board for Group D Posts in the manner laid down from time to time.

28. On specific query, it is informed that the respondent/original applicant subsequently came to be regularized on a Group-D Post in 2005 by the Railways. Until then, she worked as a "casual labour with temporary status'.

29. In the backdrop of the facts noted herein above, it is categorically evident that at no stage the deceased employee was engaged or appointed as ''temporary railway servant', nor, was he regularized against the post on the regular establishment by the Railways. In the circumstances, having regard to Rule 18 of Pension Rules, the deceased employee was not entitled to pension being ineligible under the Rules. Accordingly, the respondent/original applicant was not entitled to pension on the death of her husband being ineligible.

30. The learned Tribunal misdirected itself without adverting to the categorical stand taken by the petitioners before the Tribunal that the deceased employee was neither eligible nor entitled to pension. The learned Tribunal committed an error in relying on Section 18 of the Pension Rules to direct grant of family pension merely for the reason that the employee had put in 10 years of temporary service since 1977, further, in the opinion of the Tribunal, as per sub-Rule (3) of Rule 18, in the case of death in harness the mandate of 10 years is not provided under the Rules. The opinion so formed is on misreading of Rule 18 as a whole.

31. Casual labour as per circular shall be eligible to count only half the period of service rendered by them after attaining temporary status on completion of prescribed days of continuous employment and before regular absorption, as qualifying service for the purpose of pensionary benefits. This benefit will be admissible only after their absorption in regular employment.

32. In our opinion, the reasoning assigned by the learned Tribunal is on a wrong premise based on an assumption that the deceased employee was a ''temporary railway servant', whereas, under the Pension Rules ''casual labour with temporary status', is ineligible and excluded from the definition of ''temporary railway servant'.

33. The Supreme Court in **General Manager, North West Railway and others vs. Chanda Devi,** held that the Railway Rules made a distinction between casual labour having temporary status and temporary railway servant. The Pension Rules under which Railway employees are granted pension do not apply to casual employees conferred with temporary status which merely protects a casual employee's service. In the given facts, the employee, therein, came to expire on 29 December 1988, prior to his death the employee was conferred substitute temporary status, the claim of the widow of the employee for family pension came to be rejected as it was not admissible to substitute employees. Para-32 is extracted:

"What was protected by conferring temporary status upon a casual employee was his service and by reason thereof the pension rules were not made applicable. A workman had not been and could not have been given a status to which he was not entitled to."

34. In the circumstances, the writ petition is **allowed**. The impugned order dated 22 May 2012, passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad, is hereby set aside and quashed.

(2023) 4 ILRA 267
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 53237 of 2014

Sahajanand Rai ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Rai, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
A.S.G.I. Sri C.S. Chaturvedi, S.C. Sri Sanjeev Singh, Ms. Vatsala

A. Civil Law - Bank Clerk-cum-Cashier - Pension - Memorandum of Settlement dated 10.04.2002 - Clause 6(b) of Settlement, 2002 provided that an employee found guilty of gross misconduct may be removed from service with superannuation benefits, i.e., Pension and/or Provident Fund and Gratuity, and without disqualification from future employment - On 27.04.2010, another Memorandum of Settlement, 2010 was arrived at with regard to introducing the Pension Scheme - Under the Settlement, 2010, an option was made available for opting for the Pension Scheme - Later, a circular letter dated 24.08.2010 was issued by the Bank, which provided that employees who have ceased to be in the service of the Bank on account of penalty proceedings are not eligible to opt for joining the pension scheme - Held: once a settlement has been arrived at between the parties on 27.04.2010, which provides pensionary benefits to all categories of employees whose services were ceased, they cannot be deprived by a circular that creates a clause between the employees whose services are ceased for different reasons - any provision contrary to the Settlement, 2010, cannot be inserted by way of a circular, which is against the employees (Para 12).

B. Petitioner was removed from service in terms of Clause 6(b) of the Settlement, 2002, which provides removal from service with superannuation benefits, i.e., Pension and/or Provident Fund and Gratuity - Petitioner submitted his option for the Pension Scheme in terms of the Settlement, 2010, which was denied - Held - In light of Clause 6(b) of the Settlement, 2002, as well as the judgment of the Apex Court in the case of Bank of Baroda, the petitioner is fully entitled to retiral benefits, and the same cannot be taken away by way of a circular, which is in violation of the Settlement, 2010 (Para 14).

Allowed. (E-5)

List of Cases cited:

Bank of Baroda Vs S.K. Kool (Dead) through Legal Representatives & anr.; (2014) 2 SCC 715
2. S.B.I. Vs Golam Jilani M.A.T. -1053 of 2018

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Sanjay Kumar Rai, learned counsel for petitioner and Ms. Vatsala, learned counsel for respondent Nos. 2 to 5 (respondent-Bank).

2. By way of present petition, petitioner is challenging the orders dated 13.10.2010 and 11.08.2014 passed by Deputy Regional Manager, Bank of India, Regional Office, Varanasi, by which, petitioner has been denied the pension and leave encashment as well as para 3 of circular dated 24.08.2010.

3. Learned Senior Counsel submitted that petitioner was appointed on 13.08.1988

as Clerk-cum-Cashier under the respondent-Bank of India (hereinafter referred to as "Bank') at district Bhadohi, which is a nationalized bank and comes within the purview of Article 12 of Constitution of India. Petitioner was posted at different places and lastly, he was posted at district Jaunpur in October, 2001 where disciplinary proceedings were initiated against him. He was issued departmental charge sheet dated 05.01.2002, upon which, Inquiry Officer has submitted inquiry report dated 11.02.2002. The inquiry report was supplied to the petitioner alongwith show cause notice dated 14.06.2002. Petitioner has submitted reply to the show cause notice and ultimately, vide order dated 19.09.2002 passed by the Chief Manager/Disciplinary Authority, petitioner was punished imposing penalty of removal from service in terms of clause 6(b) of Memorandum of Settlement dated 10.04.2002 (hereinafter referred to as "Settlement, 2002'). Against that order, petitioner has filed an appeal before the Zonal Manager, Varanasi Zone, Varanasi. The appeal so filed by the petitioner was rejected vide order dated 28.03.2003. Aggrieved by the orders dated 19.09.2002 and 28.03.2003, petitioner has filed Writ Petition No. 17841 of 2003 (Sahajanand Rai vs. Bank of India & others) before this Court, which was also dismissed vide order dated 24.01.2007. Against that order, petitioner has filed Special Appeal No. 251 of 2007 (Sahajanand Rai vs. Bank of India & others), which was also dismissed vide order dated 09.12.2009. Lastly, petitioner has filed Special Leave to Appeal (Civil) No. 9596 of 2010, which was dismissed as withdrawn vide order dated 09.04.2010 with liberty to the appellant to approach the High Court by way of a review petition. Subsequent thereto, petitioner has filed review petition seeking review of the Division Bench judgment dated 09.12.2009 passed in Special Appeal No. 251 of 2007. The review petition has been dismissed by a Division Bench of this Court vide order dated 30.07.2010. Against the aforesaid judgment, petitioner has again preferred Special Leave to Appeal (Civil) No. 30627 of 2010, which has also been dismissed vide order dated 15.11.2010. He next submitted that as a consequence of aforesaid litigations, the penalty imposed upon the petitioner by order dated 19.09.2002 has attained finality.

4. He next submitted that vide impugned order, petitioner was removed from service in terms of Clause 6(b) Settlement, 2002, which provides removal from service with superannuation benefits i.e. Pension and/or Provident Fund and Gratuity etc. As petitioner was not paid pension, therefore, he has moved application under Right To Information Act, 2005, which was replied to the petitioner vide communication dated 26.12.2010 that the total amount due to the petitioner under the head of Provident Fund and Gratuity had been adjusted towards loans advanced to the petitioner from the said bank as also from Bank of India Employees Cooperative Credit Society Ltd. He further submitted that on 27.04.2010, a Memorandum of Settlement (hereinafter referred to as "Settlement, 2010') has been arrived between the Indian Banks Association and the Workmen Association with regard to introducing Pension Scheme in the banking industry as a second retiral benefit in lieu of Contributory Provident Fund. Under the Settlement, 2010, an option was made available for opting for the Pension Scheme and it was also available to employees who had ceased to be in service in the concerned bank. Petitioner has submitted his option for

opting Pension Scheme in terms of the aforesaid Settlement, which was denied vide impugned order having reference of circular letter dated 24.08.2010 (hereinafter referred to as "Circular') issued by the Bank, which provides that option for Pension Scheme shall not be available to the employees whose services stood ceased as a consequence of the disciplinary proceedings. Impugned order dated 11.08.2014 has also been passed rejecting the application of the petitioner for sanction of pension.

5. He firmly submitted that the Settlement, 2010 made available an option to all members of the Contributory Provident Fund irrespective of their current status of being an employee of the Bank or having ceased to be an employee of the bank. There exists no such clause in the Settlement, 2010, which may preclude the petitioner from exercising his option for pension. Further, Clause 3 of the Circular, which has been relied upon by the respondents in rejecting the application of the petitioner is a clause contrary to the Settlement, 2010, which is having no such provisions. Binding terms of the Settlement, 2010 cannot be subject to any alteration by means of a circular letter issued by the respondent-bank. He next submitted that entitlement for pension/leave encashment under respondent-bank is based upon a qualifying service of 10 years towards credit and petitioner is fulfilling such requirements as he was continuous in service from 13.08.1988 to September, 2002. Petitioner is having no objection for adjustment of amount of Contributory Provident Fund towards loans of the petitioner, as mentioned in the communication of Deputy Regional Manager dated 26.12.2010, but after deduction of same, amount of pension/leave encashment should have been paid to the petitioner. It is next submitted that similar issue was before the Apex Court in the matter of ***Bank of Baroda vs. S.K. Kool (Dead) through Legal Representatives and another; (2014) 2 SCC 715 (Civil Appeal No. 10956 of 2013)*** decided on 11.12.2013, in which Apex Court with detail finding has held that in case of penalty of removal from service with superannuation benefits, employee shall be entitled for those benefits arising out of bipartite Settlement. He firmly submitted that no inclusion can be made in bipartite Settlement by a circular and definition of retirement is very well considered in the matter of ***Bank of Baroda (Supra)*** which provides that even the employees, who have been terminated along with superannuation benefits in terms of Clause 6(b) of Settlement, 2002, are entitled for pensionary benefits, which includes such employees also who have been awarded penalty.

6. Per contra, Ms. Vatsala has vehemently opposed the submissions of counsel for petitioner, but could not dispute the facts so argued by learned Senior Counsel. She only submitted that similar issue was before Calcutta High Court in the matter of ***State Bank of India v. Golam Jilani (M.A.T. -1053 of 2018)*** decided on 18.02.2019. In the said case, after termination under Clause 6(b) of Settlement, 2002, pension was denied and the Court has finally held that after punishment, he has rightly been denied for the pension.

7. I have considered the submissions of counsel for parties and perused the records as well as judgments cited above.

8. It is undisputed that petitioner was awarded punishment of removal from

service in terms of Clause 6(b) of Settlement, 2002, against which, petitioner has contested up to the Apex Court, but could not succeed.

Clause 6(b) of **Settlement, 2002** is quoted below:-

"6. An employee found guilty of gross misconduct may;

(a).....

(b) be removed from service with superannuation benefits i.e. Pension and /or Provident Fund and Gratuity as would be due otherwise under the Rules or Regulations prevailing at the relevant time and without disqualification from future employment, or"

9. From the perusal of clause 6(b) of the Settlement, 2002, there is no dispute that petitioner was removed from service, but not precluded from superannuation benefits i.e. pension and/or provident fund and gratuity as would be due otherwise under the Rules or Regulations prevailing at the relevant time. Petitioner was also not disqualified for future employment.

10. Later on, another Settlement, 2010 arrived between the Indian Banks' Association and the Banks' workmen's Union regarding introducing pension scheme in the banking industries as second retiral benefits in lieu of contributory funds. The Settlement, 2010 provides for an option for opting the pension scheme and it was available to the employees who had ceased to be in service in employment of the concerned-bank. Relevant paragraph of the **Settlement, 2010** is quoted below:-

"4. Employees who ceased to be in service on or after 29th September 1995 in case of Nationalized Banks/26th March 1996 in case of Associate Banks of State Bank of India on account of voluntary retirement under special scheme after rendering service service for a minimum period of 15 years, shall be eligible to exercise an option to join the Pension Scheme subject to the terms and conditions mentioned for retiring employees opting for joining the Scheme."

11. From the perusal of same, it is apparently clear that every employee, for any reason, ceased to be in service on or after 29th September 1995 in case of Nationalized Banks/26th March 1996 in case of Associate Banks of State Bank of India, shall be eligible to opt the scheme. Later on, Circular has been issued depriving such employees to take pensionary benefits on account of resignation/voluntarily retirement under Officers Service Regulation 19/incapacitation/on medical grounds/any other type of cessation on account of penalty proceedings are not eligible to opt for joining the pension scheme. Relevant paragraph of **Circular** is quoted below:-

"3. It also may be noted that the employees who have ceased to be in the service of Bank account of Resignation/Voluntarily retired under Officers Service Regulation 19/incapacitation/on medical grounds/any other type of cessation on account of penalty proceedings are not eligible to opt for joining the pension scheme. Also existing Pension optees cannot revoke their option from pension to CPF."

12. The contention of counsel for petitioner is correct for the reasons that once a settlement has arrived between the parties on 27.04.2010 which provides pensionary benefits to all category of employees whose services were ceased,

they cannot be deprived by a circular which creates a clause between the employees whose services are ceased for different reasons. In fact, once Settlement, 2010 arrived between the parties, any provision contrary to that cannot be inserted by the way of Circular which is against the employees. The very same issue was subject matter of Apex Court in the matter of ***Bank of Baroda (Supra)*** in which, Apex Court has taken specific view that employees, who have been removed from service in terms of Clause 6(b) of Settlement, 2002, shall be entitled for superannuation benefits. Relevant paragraph Nos. 14, 15 & 16 of the judgment are quoted below:-

"14. The Regulation does not entitle every employee to pensionary benefits. Its application and eligibility is provided under Chapter II of the Regulation whereas Chapter IV deals with qualifying service. An employee who has rendered a minimum of ten years of service and fulfils other conditions only can qualify for pension in terms of Article 14 of the Regulation. Therefore, the expression "as would be due otherwise" would mean only such employees who are eligible and have put in minimum number of years of service to qualify for pension. However, such of the employees who are not eligible and have not put in required number of years of qualifying service shall not be entitled to the superannuation benefit though removed from service in terms of clause 6(b) of the Bipartite Settlement. Clause 6(b) came to be inserted as one of the punishments on account of the Bipartite Settlement. It provides for payment of superannuation benefits as would be due otherwise.

15. The Bipartite Settlement tends to provide a punishment which gives superannuation benefits otherwise due. The construction canvassed by the employer shall give nothing to the employees in any event. Will it not be a fraud Bipartite Settlement? Obviously it would be. From the conspectus of what we have observed we have no doubt that such of the employees who are otherwise eligible for superannuation benefit are removed from service in terms of clause 6(b) of the Bipartite Settlement shall be entitled to superannuation benefits. This is the only construction which would harmonise the two provisions. It is well settled rule of construction that in case of apparent conflict between the two provisions, they should be so interpreted that the effect is given to both. Hence, we are of the opinion that such of the employees who are otherwise entitled to superannuation benefits under the Regulation if visited with the penalty of removal from service with superannuation benefits shall be entitled for those benefits and such of the employees though visited with the same penalty but are not eligible for superannuation benefits under the Regulation shall not be entitled to that.

16. Accordingly, we hold that the employee's heirs are entitled to superannuation benefits. The entire amount that the respondent is found entitled to along with interest at the rate of 6% per annum should be disbursed within 6 weeks from the date of receipt/communication of this Order."

13. Learned counsel for respondents have also placed reliance upon the judgment of Calcutta High Court in the matter of State ***Bank of India (Supra).*** The said case was about interpretation of Rule 14 of State Bank of India Employees Pension Fund Rules, 1955. In that case, petitioner was not entitled under the provisions of Rule 14 of Rules, 1955 to get

pensionary benefits as he was not fulfilling the requirement of Rule, 14. Further, in that case, minimum requirement for grant of pension was 20 years of qualifying service whereas in the present case, minimum requirement of qualifying service for pension as well as leave encashment is 10 years. It is the case of petitioner that he is having qualifying service of 10 years, which was not denied in the counter affidavit. Learned counsel for respondent-Bank has also not produced any Rules which prohibits for payment of pension and other retiral benefits as in the case of ***State Bank of India (Supra).***

14. In the light of Clause 6(b) of Settlement, 2002 as well as judgment of Apex Court passed in ***Bank of Baroda (Supra),*** petitioner is fully entitled for retiral benefits and the same cannot be taken away by the way of Circular, which is in violation of Settlement, 2010.

15. Therefore, under such facts of the case as well as law laid down by the Apex Court, let a writ of certiorari is issued quashing paragraph-3 of Circular dated 24.08.2010 as well as impugned orders dated 13.10.2010 & 11.08.2014.

16. Accordingly, writ petition is **allowed**.

17. No order as to costs.

18. Respondents-authorities are directed to pay all retiral benefits including pension/leave encashment provided petitioner fulfils all other requirements required under the Rules of Bank.

19. Liberty is given to the Bank to adjust the amount of loan advanced to the petitioner from the Bank and also from Bank of India Employees Cooperative Credit Society Ltd., if already not adjusted.

(2023) 4 ILRA 272
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2023

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ-B No. 14278 of 1986

Smt. Dhanraji & Ors. ...Petitioners
Versus
Dy. Director of Consolidation, Varanasi & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shashi Kumar Dwivedi, Sri Hanuman Kinkar, Sri V.K.S. Chaudhary, Sri R.S. Maurya, Sri Manoj Kumar Singh

Counsel for the Respondents:
Sri Triveni Shanker, Sri Awadhesh Kumar, Sri R.K. Pandey, Sri S. Rai, Sri A.R. Dubey, Sri L.P. Singh, Sri Manish Pandey

Civil Law-Constitution of India, 1950-Article 226-Uttar Pradesh Consolidation of Holdings Act, 1953-Sections 5(c) (ii) & 12- Writ petition against the orders rejecting the petitioners' claim for mutation- Absolutely no requirement of a previous written permission from the Settlement Officer of Consolidation in transferring the entire holding by a bhumidhar during time that a consolidation scheme is in force- Authorities below have committed a manifest error of law in holding the sale deed to be void for violation of Section 5(c)(ii)- It is not this Court's province to re appreciate evidence but to ensure that the Authorities of fact below do not omit relevant evidence by basing their findings on stray St.ments here and there.(Para 46, 47, 50)

Evidence Act, 1872-Sections 107 & 108-Section 107 raises a presumption that a

person is alive if it is shown that he/ she was alive within thirty years, and the burden of proving that he/ she is dead is on the person who asserts the fact- Section 108 is in the nature of a proviso to Section 107, though an independent Section, it opens with words 'Provided that when". Harmoniously construed, Sections 107 and 108 form an integral scheme on the question, who in the normal course of events is to be presumed alive and who can be presumed dead- A presumption of civil death under Section 108 cannot be drawn merely because some persons of acquaintance have not heard of the missing person in the span of seven years last Impugned orders quashed-Matter remitted to The Consolidation Officer. (Para 55, 57, 74)

Petition Allowed. (E-15)

List of Cases cited:

1. E. Mahboob Saheb Vs N. Sabbarayan Chowdhary & ors., (1982) 1 SCC 180

2. Narayanan Rajendran & anr. Vs Lekshmy Sarojini & ors., (2009) 5 SCC 264

3. Kondiba Dagadu Kadam Vs Savitribai Sopan Gujar & ors., (1999) 3 SCC 722

4. Smt. Ram Rati & ors. Vs Gram Samaj, Jehwa and Ors., AIR 1974 All 106

5. Foran Singh & ors. Vs Deputy Director of Consolidation & ors., 1993 (1) AWC 192

6. East Punjab Province Vs Bachan Singh & ors., AIR 1957 Punj 316

7. LIC of India Vs Anuradha (2004) 10 SCC 131

8. Fani Bhusan Banerjee Vs Surja Kant Roy Chowdhury & anr., 1907 SCC OnLine Cal 20 : (1906- 07) 11 CWN 883

9. Jeshankar Revashankar Vs Bai Divali, AIR 1920 Bom 85 (2)

10. Muhammad Sharif & anr. Vs Bande Ali & ors., (1911) 8 ALJ 1052

11. Narayana Pillai Vs Velayuthan Pillai, AIR 1963 Mad 385

12. Saroop Singh Vs Banto & ors., (2005) 8 SCC 330

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioners, who are eight in number, impugn the validity of the orders dated 05.06.1986, 05.09.1985 and 02.11.1979 passed by the Deputy Director of Consolidation, Varanasi, Camp Gyanpur, the Assistant Settlement Officer of Consolidation, Varanasi (West) and the Consolidation Officer, Gyanpur, District Varanasi (now Bhadohi), respectively, rejecting the petitioners' claim for mutation of their rights over land, which shall be hereinafter morefully described.

2. The facts giving rise to this petition are required to be noticed about their salient features, which are these:

One Balraji, widow of Chandra Shekhar, was the recorded tenure holder of the following plot numbers, which are shown below in tabular form indicating the old numbers and the new:

Old Number	New Number	Chak Number
292, 293/1, 293/2, 345, 346, 347, 348/1, 349, 363, 364, 521, 1161/347, 1162/346	366	68
196, 197, 198, 199, 200, 201, 202, 203	331	
457, 475, 476, 479, 480 (mi.), 481	306अ	
482/1, 482/2, 483, 484, 485, 488/1, 569, 570, 571, 572, 573/2, 474, 475,	306ब	

481 (mi.)		

3. Apart from the land, above mentioned, that was agricultural and, therefore, consolidated into a *chak* in Smt. Balraji's name, bearing *Chak* No.68, Smt. Balraji also owned certain plot numbers that did not qualify as land under the Act of 1953 and were, therefore, excluded from the consolidation scheme. Plots of land, that were not included as part of *Chak* No.68, belonging to Balraji, are shown below, also in tabular form:

Land excluded fron consolidation operations	
Old Number	New Number
102	799
167ङ	899
150ङ	847
156ग	879
212क	53(min.)
218ई.	66(min.)
378ख	382

4. The dispute is with regard to land recorded in the basic year in the name of Smt. Balraji, comprising *Chak* No.68. It is the petitioners' case that the land in dispute was sold in favour of petitioner Nos.1 to 7 by petitioner No.8, Smt. Balraji vide registered sale deed dated 29.05.1974. Later on, a deed of rectification dated 12.07.1974 was excuted by Smt. Balraji, inasmuch as in the sale deed dated 29.05.1974, one of the plots transferred in favour of petitioner Nos.1 to 7 was mentioned as Plot No.161/347, admeasuring 2 *biswa* 17 *dhoor* by an inadvertent clerical error, whereas the correct number of the plot sold was 1161/347 for the same area.

5. It is the petitioners' further case that by time the sale deed dated 29.05.1974 came to be executed, the *chak* carved out had been confirmed and the tenure holders delivered possession over their respective *chak*. Through the sale deed dated 29.05.1974, therefore, the entire area of *Chak* No.68 was transferred by Balraji to petitioner Nos.1 to 7. In addition, the sale deed also transferred certain other plots of land, that were outside the consolidation scheme. The old plot numbers no longer remained in existence and *Chak* No.68 had become identifiable in terms of the four new numbers as renumbered during the consolidation operations. Therefore, it is the petitioners' case that a typographical error in the mention of one of the plots, comprising the *chak* with reference to its old number would not affect the identity of the property transferred through the sale deed dated 29.05.1974 (for short, 'the sale deed').

6. It is also the petitioners' case that though in the basic year Smt. Balraji was recorded over a large tract of land, one Smt. Devraji, a half sister of Balraji's deceased husband, Chandra Shekhar and another Ram Jag, an uncle of the late Chandra Shekhar, filed objections during the consolidation operations much before the sale deed was executed, claiming a share in Chandra Shekhar's land, that had come to be recorded in Balraji's name. The said objections were compromised and Smt. Devraji given a share in the holding inherited by Smt. Balraji from Chandra Shekhar. It is the petitioners' case that nobody else filed objections under Section 9-A of the Act of 1953.

7. At the end of the consolidation, *Chak* No.68 was carved out in the name of Smt. Balraji out of land comprising plots,

which were already recorded in Balraji's name. The petitioners' *Chak* No.68 largely comprised of land that was held as *bhumidhari* and some of it comprised *sirdari* holding also. The sale deed under reference, apart from transferring all that comprised *Chak* No.68, also conveyed Balraji's land, that was excluded from consolidation operation, and shown as excluded plots, detailed in the sale deed. The dispute in this petition is with regard to land comprising *Chak* No.68, which shall hereinafter be referred to as 'the land in dispute'.

8. It is also the petitioners' case that petitioner Nos.1 to 6 are members of one family, whereas petitioner No.7, Rudra Prasad son of Khilodhar Pandey is Balraji's brother. All of them having acquired interest in the land in dispute through the sale deed executed by Smt. Balraji, filed an application under Section 12 of the Act of 1953, seeking mutation of their name on the basis of the sale deed. The application for mutation was filed before the Consolidation Authorities under Section 12 of the Act last mentioned, because at the relevant time, consolidation operations in the Village had still not been denotified. The petitioners' application under Section 12 was registered as Case No.611.

9. It is the petitioners' case that proclamation was issued, but no objections filed. At the hearing of the application, Smt. Balraji, petitioner No.8, gave testimony before the Assistant Consolidation Officer supporting transfer of title in favour of petitioner Nos.1 to 7 through the sale deed that she had executed. The Assistant Consolidation Officer allowed the application by his order dated 16.07.1974. The order of mutation was carried out in the consolidation records on 07.08.1974.

10. It appears that one Kamla Shankar, who was the Village Pradhan, filed an appeal on 12.09.1974 against the order dated 16.07.1974 passed by the Assistant Consolidation Officer, granting the mutation application made by petitioner Nos.1 to 7. No appeal was carried by any other person aggrieved. The Assistant Settlement Officer of Consolidation allowed the appeal *vide* his order dated 12.09.1974 and remanded the case to the Consolidation Officer for decision afresh. The petitioners appeared before the Consolidation Officer, but they say that the case was adjourned at the instance of Kamla Shankar, the Village Pradhan, who was inimically disposed towards them.

11. On 24.11.1975 another set of objections were filed by Asharam under Section 12 of the Act of 1953 claiming *bhumidhari* rights on the basis of some kind of an agreement to sell between him and Smt. Balraji. In the alternate, Asharam claimed *sirdari* rights to the land in dispute on the basis of possession. It must be remarked here that in the objections filed by Asharam, a copy of which is annexed as Annexure No.4 to the writ petition, there is no case of an heirship pleaded by him, entitling him to inherit the land in dispute from Balraji upon the latter's demise intestate. Though, Asharam has said that Balraji was issueless and an aunt of his, it is not indicated by any precise description of relationship through bloodline or marriage, how Asharam was an heir of Balraji's, entitling him to inherit the land in dispute. There is no pedigree also propounded by Asharam in his objections/ application under Section 12 filed before

the Consolidation Officer, connecting him to Balraji as an heir. All that Asharam says in his objection is that about 7 or 8 years ago, Smt. Balraji expressed her wish to go on a pilgrimage. Asharam thereupon paid her a sum of Rs.5000/- in order to enable her to perform the pilgrimage. Smt. Balraji in lieu of aforesaid money that she received, put Asharam in ownership possession of the land in dispute and said that once back from pilgrimage, she would execute a sale deed in Asharam's favour, after receiving a further consideration of Rs.10,000/-. The objections proceed that Smt. Balraji never returned from her pilgrimage to Village Duhia.

12. It is also pleaded in the application/ objections filed by Asharam that he had come to know that some persons had set up an imposter for Balraji and got a forged sale deed executed on her behalf relating to the land in dispute (in order to cause wrongful loss to Asharam). The further objection is that Asharam is in possession of the land in dispute and no one else has any right, title or interest therein.

13. In substance, as already remarked, the application for mutation or objection to the petitioners' claim for mutation on behalf of Asharam, is based on a right arising from an oral agreement of sorts between Balraji and Asharam, and in the alternate, upon possession of the land in dispute being given to the latter, entitling him to *sirdari* rights under the U.P. Z.A. & L.R. Act.

14. Apart from the objections/ application moved by Asharam, objections were also filed on behalf of the *Gaon Sabha* by the Pradhan, Kamla Shankar, saying that Balraji went to pilgrimage 10 years ago and has not returned till date nor has she been heard of. It was also the *Gaon Sabha's* case that she has no heir entitled to inherit, and, therefore, her land would vest in the *Gaon Sabha*. The *Gaon Sabha*, therefore, prayed that after expunging Smt. Balraji's name from the revenue records, the said land be recorded in the *Gaon Sabha's* Khata.

15. On the pleaded case of parties, the Consolidation Officer framed the following issues (translated into English from Hindi):

"1. Whether Dhan Raji and others, on the basis of the sale deed executed by Mst. Balraji, are bhumidhars in possession of the land in dispute?

2. Whether Smt. Balraji went to pilgrimage and until the present time has not returned; and, she has not executed the sale deed? If yes, its effect?

3. Whether the sale deed in favour of Dhan Raji and others is valid?

4. Whether Mst. Balraji has died issueless and the land is vested in the Gram Sabha?

5. Whether the objections filed by the Gram Sabha are valid?

6. Whether Asharam is bhumidhar in possession over the land in dispute in accordance with his objections?"

16. The Consolidation Officer has dealt with Issues Nos.1, 2 and 3 together. The Consolidation Officer has remarked that the sale deed has been executed in favour of seven persons by Smt. Balraji or the woman claimed to be her, and all these persons are residents of different districts, to wit, Varanasi, Mirzapur and Jaunpur. In her testimony, Balraji, who has appeared, has said that she does not know the vendees and that she has not executed any sale deed in their favour. It has also been remarked

that none of the vendees has been produced as a witness. It is then observed by the Consolidation Officer that the sale deed shows payment of a sale consideration of Rs.35,808/-, out of which Rs.17,200/- are shown to be paid to some creditor on a pronote, but no pronote or receipt has been produced. Rs.3700/- are said to have been paid earlier, but no witness about this transaction has been produced. It is then remarked that witness, Surendra Nath has identified his signatures on the sale deed, but has not identified Smt. Balraji's thumb mark.

17. It is then noticed by the Consolidation Officer that Smt. Balraji, who has been produced, has been called an imposter by Asharam and not the real Balraji. Smt. Balraji, who has testified, has said that her eyesight is weak, and has further said that two years ago when she executed the sale deed, her eyesight was weak at the time. Balraji has been noted to have said in her testimony that no permission for execution of the sale deed had been secured by her. She has said that she came once to the Registrar's office. Coming once to the Registrar's office has been frowned upon by the Consolidation Officer, because there is also a deed of rectification said to be executed by Smt. Balraji.

18. The Consolidation Officer has picked up disjunct pieces of evidence from the testimony of Balraji's father, Khilodhar to say that Khilodhar has stated that Balraji's brother did not attend the Registrar's office on the date the sale deed was executed, whereas Balraji says that all the seven vendees were present in the Registrar's office when the deed was executed and registered. It has also been noticed that Balraji says that she had received Rs.35,000-36,000/- before the Registrar and had affixed her thumb mark twice.

19. It is also noticed that Balraji has testified that she had spoken to the vendees about the proposed sale, but has said at the same time that she had not executed the sale deed in favour of Visheshwar Barhai's son or in favour of Kaluram Barhai. She has also said that she does not know Jai Shankar or Vinod Kumar (petitioner Nos.4 and 5) and had not executed any sale deed in their favour. From these facts, the Consolidation Officer has opined that the sale deed is not one executed by Balraji.

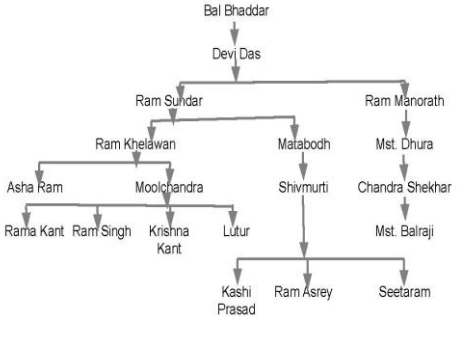
20. About a certain witness, Rama Shankar, the Consolidation Officer has observed that though this witness is one, who has identified Smt. Balraji, but Smt. Balraji has testified that she does not know him, nor has the said witness witnessed the sale deed. It is then observed that Khilodhar in his testimony has testified that he is Balraji's father and further said that he did not know that Balraji, who had executed a sale deed in favour of Dhan Raji and others, was the same person, who had executed a sale deed in his son Rudra Prasad's favour. He has also said that on the date of execution of the sale deed, he was accompanying Balraji. It is then remarked by the Consolidation Officer that there is no reason why he has not identified Balraji. It is observed that this gives rise to suspicion about the petitioners' case.

21. There is a reference to the testimony of the petitioners' witness, Doodhnath, who has said that on the date of the sale deed, the petitioners were in possession. The witness has further been noticed to have said that none of the vendees was present, whereas Balraji has

said that on the date of execution of the sale deed, all the vendees were present in the Registrar's office. It is remarked by the Consolidation Officer that there is no sale deed executed in favour of Doodhnath and, therefore, there is no question of possession being delivered to him. His testimony has been discarded as untrustworthy. It is remarked that no evidence has been led on behalf of Smt. Dhan Raji and others (the petitioners), which may prove that they are in possession of the land in dispute. It is also observed that some of the plots comprising the land in dispute were held as *sirdari* by Smt. Balraji, about which it is said that she paid 20 times the land revenue on the date she executed the sale deed, but no *bhumidhari sanad* has been placed on record. On the basis of the aforesaid findings, it is concluded that the sale deed executed by Smt. Balraji is not valid.

22. The Consolidation Officer then proceeded to observe that on behalf of Asharam, Jagdamba, Sabhajeet, Girdhari Yadav and Mahendra Nath, the Panchayat Secretary, Village Duhia have testified. They have produced the Family Register relating to the Village and in the said register, Balraji's name is not entered. The Consolidation Officer has drawn an inference that the absence of Balraji's name in the Family Register of the Village shows for the 10 years past, she did not live in Village Duhia. It is then noticed that Jagdamba Prasad, Vijay Nath and Sabhajeet in their testimony have said that Smt. Balraji had proceeded on pilgrimage, but never returned. It is held by the Consolidation Officer that there is no reason to disbelieve the testimony of these witnesses. There is then an abrupt remark by the Consolidation Officer that from these facts, it is proved that Smt. Balraji is missing (*laapata*) for more than seven years and her civil death has to be presumed. On 29.07.1974, the presence of Balraji is not established. The said fact has also been acknowledged by Kamla Shankar, Pradhan that Smt. Balraji had proceeded on a pilgrimage and her whereabouts are not known since. The conclusion reached by the Consolidation Officer from these facts is that Smt. Balraji was not alive on 29.05.1974, and, therefore, could not have executed the sale deed in favour of Dhan Raji. Smt. Dhan Raji does not, therefore, derive any title under the sale deed. It is in this manner that Issues Nos.1, 2 and 3 were answered by the Consolidation Officer.

23. Issues Nos.4 and 6 were dealt with together by the Consolidation Officer with the opening remark that the two issues being inter-related, were being answered at once. It is noticed by the Consolidation Officer that Kamla Shankar, the Village Pradhan, Village Duhia has said that Smt. Balraji had proceeded on a pilgrimage 10 years ago and her whereabouts are not known since. As such, her civil death has to be presumed. It is further noticed that the Village Pradhan has said that Smt. Balraji has left no heir. Therefore, according to the Pradhan, the land in dispute would vest in the *Gaon Sabha*. The Consolidation Officer has noticed on the other hand, that Asharam, respondent No.4 here, has claimed himself to be Balraji's lawful heir, entitled to inherit the land in dispute. In his objections, he has propounded a pedigree, that has been set out by the Consolidation Officer in his findings on Issues Nos.4 and 6. The said pedigree is to the following effect:



24. It has then been observed that Asharam saying that Chandra Shekhar pre-deceased his father, Ram Manorath and further that at the time of Ram Manorath's demise, his brother, Ram Sundar was alive, the pedigree propounded being proved by Jagdamba Prasad, a native of Village Duhia as well as by Kamla Shankar, the Pradhan, there is no reason to disbelieve the pedigree. It is also observed that Sabhajeet and Girdhari Yadav, witnesses for respondent No.4, Asharam, have said that Asharam is in possession of the land in dispute and further that Smt. Balraji is Asharam's aunt (*Chachi*). This assertion has also been read in aid of believing the pedigree. It is then held on the basis of the pedigree that by virtue of Section 171 of the U.P. Z.A. & L.R. Act, Asharam would be Smt. Balraji's heir, entitled to inherit. The *Gaon Sabha's* claim based on escheat and that of the petitioners founded on the sale deed, has been discarded by the Consolidation Officer. At the same time, the claim of Asharam, respondent No.4, based on heirship founded on the pedigree, entitling him to inherit the land in dispute, presuming a civil death for Balraji, has been accepted by the Consolidation Officer. He has, therefore, ordered that name of Balraji be expunged from the land in dispute and that of Asharam, respondent No.4, be recorded in her stead as her heir. The objections of the *Gaon Sabha* and those of petitioners Nos.1 to 7 were ordered to be rejected.

25. The order passed by the Consolidation Officer was questioned by petitioner Nos.1 to 6 by means of Appeal No.319, under Section 11(1) of the Act of 1953. Another appeal was preferred by *Gaon Sabha* from the same order, which was numbered as Appeal No.329.

26. The petitioners filed an application for additional evidence at the stage of appeal, seeking to bring on record the following documents:

(i) A copy of the Patwari's report in connection with deaths and mutations relating to Village Duhia for the year 1288 Fasli;

(ii) A copy of the *Dakhal Dehani* in Case No.12 of Village Duhia, decided on 12.06.1901; and,

(iii) A certificate dated 05.08.1985 issued by the Union Bank of India, Branch Koirauna, certifying that there was a deposit of Rs.15,000/- in the name of Smt. Balraji, the certificate being one dated 28.01.1981.

27. The first of the two documents were produced in additional evidence to show that the name of Ram Sundar's father was not Devi Das, but Jai Mangal, a fact incorrectly testified to on behalf of the respondents; also, incorrectly introduced through a pedigree, that was mentioned in the testimony on behalf of Asharam. The certificate from the Bank was produced to show that the money held in deposit in Smt. Balraji's account by the Bank were proceeds of the sale that she had received after paying off her creditor. These documents if considered could prove many other things regarding the petitioners' case. The Assistant Settlement Officer of Consolidation, who heard the two appeals, treating Appeal No.319 by the petitioners as the leading case, proceeded to dismiss both by his order dated 05.09.1985, affirming the Consolidation Officer. Amongst many others, the petitioners make a grievance that the documents that were produced and admitted in additional evidence by the Assistant Settlement Officer of Consolidation were not at all considered by him while rendering judgment in the appeal.

28. The petitioners and the *Gaon Sabha*, both preferred revisions from the orders of the Consolidation Officer and the Assistant Settlement Officer of Consolidation under Section 48(1) of the Act of 1953. The petitioners' revision was numbered as Revision No.795/874, whereas that of the *Gaon Sabha* as Revision No.892. Here, again the petitioners' revision was heard by the Deputy Director of Consolidation as the leading case and decided by means of a common judgment and order dated 05.06.1986. The Deputy Director of Consolidation dismissed both the revisions, affirming the Authorities below.

29. Aggrieved, this writ petition has been preferred.

30. Pending the writ petition, the first petitioner, Smt. Dhan Raji has passed away and was represented on record by her sons, Chandu Lal and Dudhnath, petitioner Nos.1/1 and 1/2, respectively. Further on, during the long pendency of the writ petition, Dudhnath also passed away and is represented on record by his seven sons, Anoop, Raj Kumar, Prem Kumar Chaurasiya, Vijay Chaurasiya, Ashish Kumar, Ravi Shankar Chaurasiya and Nand Kumar Chaurasiya, petitioner Nos.1/2/1, 1/2/2, 1/2/3, 1/2/4, 1/2/5, 1/2/6 and 1/2/7, respectively. The fourth respondent, Asharam also passed away pending the writ petition and his heirs too were brought on record, to wit, Karta Ram Shukla and Ram Abhilash Shukla, both sons of Asharam. Ram Abhilash Shukla also passed away meanwhile and, therefore, Ram Abhilash's interest and ultimately that of Asharam was represented by the latter's sons, Jai Prakash Shukla, Sada Nand Shukla, Shailesh Shukla, Rajesh Kumar Shukla and Pawan Kumar Shukla. Karta Ram Shukla has been substituted as respondent Nos.4/1, whereas the late Ram Abhilash Shukla is shown in the array as deceased respondent Nos.4/2, represented by his five heirs and LRs, numbered as respondent Nos.4/2/1 to 4/2/5.

31. Heard Mr. Shashi Kumar Dwivedi, learned Counsel appearing for petitioner Nos. 1/1, 1/2/1, 1/2/2, 1/2/3, 1/2/4, 1/2/5, 1/2/6, 1/2/7, 2, 3 and 5, Mr. Hanuman Kinkar, learned Counsel appearing on behalf of petitioner No.4 and Mr. Triveni Shanker, Advocate along with Mr. Awadesh Kumar and Mr. R.K. Pandey, learned Counsel appearing on behalf of respondent nos. 4/1, 4/2/1, 4/2/2, 4/2/3, 4/2/4 and 4/2/5.

32. It is argued by Mr. Shashi Kumar Dwivedi and Mr. Hanuman Kinkar, learned Counsel appearing for the petitioners that Asharam in his objections under Section 12 never came up with a case of inheritance as an heir of Balraji's. It was after the petitioners' evidence had closed in support of their case based on the sale deed that Asharam in his evidence in support of a case that was never about heirship, propounded a pedigree for the first time and laid claim on its basis. It is urged that the Consolidation Officer committed a manifest error in holding Asharam to be Balraji's heir while Smt. Balraji was alive and testified before the Consolidation Officer. It is also argued that the finding of the Consolidation Officer that Balraji was an imposter is perverse, because there is overwhelming testimony on record by Balraji's father, whose identity has not been doubted, identifying Balraji as his daughter, testifying in Court.

33. It is urged on behalf of the petitioners that the sale deed has not been cancelled till date by a Court of competent

jurisdiction and no one has challenged the deed of rectification. It is, particularly, argued that the Consolidation Authorities have concurrently erred in holding it to be a case of transfer of a part of the holding by Smt. Balraji, attracting the consequences under Section 5(c)(ii) of the Act of 1953 as the transfer embodied in the sale deed was one made without permission from the Settlement Officer of Consolidation. It is argued that the deed of rectification is not about a plot that was left out in the sale deed, but about the incorrect mention of a plot number, going by the old numbering. The sale deed conveyed the whole of *Chak* No.68, which would include every part and all plots therein, including the one that was rectified from one mentioned as Plot Nos.161/347 to 1161/347, both of which bear reference to the same plot with an identical area of 2 *biswa* 17 dhur. According to the learned Counsel, there is, thus, no case of part transfer of the holding so as to render the sale deed executed by Smt. Balraji, admittedly without permission from the Settlement Officer, void under Section 5(c)(ii) of the Act of 1953.

34. It is also argued that the Authorities below have perversely concluded that Smt. Balraji, who appeared before the Consolidation Officer was an imposter, inasmuch as she was identified, amongst other witnesses by Khilodhar, her father and Rudra Prasad, her brother, both of whom testified in support of the petitioners' case. Their identity was not doubted.

35. It is also submitted that the Deputy Director of Consolidation has incorrectly remarked that Balraji had not affixed her thumb impression on all pages of the sale deed, which runs into a number of seven. It is submitted that Balraji's testimony has been perversely read by the Authorities below to conclude that she affixed her thumb impression on two pages alone, whereas what Balraji said in her evidence was that she twice thumb marked the sale deed. The only inference from Balraji's testimony is that she once thumb marked the document at the time of execution, and a second time, before the Sub-Registrar, when it was registered. It is urged that every page of the sale deed is thumb marked.

36. It is also argued that Surendra Nath Srivastava, who is the Scribe of the sale deed as well as the deed of rectification, was examined on behalf of the petitioners as PW-1. The witness has said that he knew the parties well before hand and testified to the fact that the deed was executed by Balraji. It is also argued that the presumption about Balraji's death has been wrongly drawn, because she was admitted to be alive within 30 years and no one had seen her die. There is absolutely no evidence of her reputed or acknowledged death, and the presumption about the death of a person, who has not been heard of for seven years would only arise, if it is proved that he/ she has not been heard of for the period of seven years by those who would have naturally heard of him/ her, if alive. It is argued that Balraji's father and brother, who have testified, are persons, who would have naturally heard of her and they have said that Balraji, who was before the Court, was the same person. There is evidence of witnesses that Balraji was staying with her father at Gopalpur. Asharam or his witnesses in Village Duhia are not men, who would naturally hear of Balraji, if she was staying with her father at Gopalpur. The submission of the learned Counsel for the petitioners is that no presumption about Balraji's death under the circumstances can

arise. Rather, there is a presumption of her being alive in view of Section 107 of the Evidence Act. It is argued that all the Authorities below have committed a manifest error in raising a presumption about Balraji's death and then accepting it. The findings on the state of evidence, according to the learned Counsel for the petitioners, is perverse.

37. The learned Counsel for respondent No.4, Mr. Triveni Shanker has argued that the Consolidation Officer has recorded findings to the effect that the sale deed was not in respect of the entire holding owned by Balraji and, therefore, void under Section 5(c)(ii) of the Act of 1953. It is pointed out that the sale deed is void, because admittedly no permission was secured from the Settlement Officer of Consolidation to transfer a part of the holding. It is further argued that the Consolidation Officer has held that the woman, who appeared before the Consolidation Officer, was not Balraji, but an imposter. It was observed by the Consolidation Officer that the woman, who appeared for Balraji, stated that she had not executed the sale deed in the petitioners' favour nor were the petitioners known to her. The further finding, according to the learned Counsel for respondent No.4 recorded by the Consolidation Officer, is that payment of sale consideration was not proved. Also, Surendra Nath could not prove Smt. Balraji's thumb impression, supporting the inference that the Balraji produced to prove the sale deed, was indeed an imposter. The most crucial finding that has been emphasized by the learned Counsel for respondent No.4 is that the Consolidation Officer, the Assistant Settlement Officer of Consolidation and the Deputy Director of Consolidation have unanimously held the sale deed relied upon by the petitioners to be one not executed by Balraji.

38. It is also pointed out that the Consolidation Officer has observed that Ram Chandra, who was the sole attesting witness of the sale deed and the one who had identified Smt. Balraji at the time of execution of the said deed, was not identified by Balraji before the Consolidation Officer. Balraji, who was produced before the Consolidation Officer, stated that she did not know Ram Chandra. There is much contradiction, according to the Consolidation Officer, between the statements of witnesses, who appeared for the petitioners regarding the execution of the sale deed. It is also a finding recorded by the Consolidation Officer that no reliable evidence was produced by Smt. Dhan Raji and others, to wit, the petitioners to prove that they were in possession of the land in dispute. No *bhumidhari* certificate was obtained for the plots that were *sirdari*. As such, the sale deed was void. Much emphasis has been laid on the fact that Balraji was unheard of for more than seven years, and, therefore, her civil death has to be presumed.

39. The Consolidation Officer has recorded the fact that in the Family Register of the *Gaon Sabha* Duhia since Balraji's name was not there, it has to be inferred that Smt. Balraji was not present on 29.05.1974 in the village. It is most importantly emphasized by the learned Counsel for respondent No.4 that the Consolidation Officer has recorded a finding that the person, who appeared in the witness-box impostering as Balraji, stated that she did not know any of the purchasers nor had she executed any sale deed in their favour. None of the purchasers were examined in support of the

sale deed. The sale deed does not mention the manner of payment of consideration, where it is not said that a part of the sale consideration was paid to the creditor to discharge Balraji's liability on the alleged pronote. No receipt about payment to the creditor has been filed. It is emphasized that the Consolidation Officer has observed that Surendra Nath, one of the witnesses for the petitioners, identified his signatures on the sale deed, but did not identify Smt. Balraji's thumb impression.

40. About Asharam's claims, it is pointed out by the learned Counsel that the Consolidation Officer has held that he had proved his pedigree. The pedigree propounded by Asharam was also proved by the testimony of his witnesses, Jagdamba as also that of Kamla Shankar, the Pradhan of the Village, who testified to the fact that Asharam belongs to Balraji's family. It was also held, according to the learned Counsel, by the Consolidation Officer that Asharam was proved by the testimony of Sabhajeet and Girdhari to be in possession of the land in dispute. It has also been held by the Consolidation Officer that Asharam was Balraji's heir under Section 171 of the U.P. Z.A. & L.R. Act and the *Gaon Sabha* had no right therein.

41. Most of these findings have been affirmed by the Settlement Officer of Consolidation and the Deputy Director of Consolidation. Learned Counsel for the respondent, Mr. Triveni Shanker, submits that these findings recorded by the three Authorities below consistently are pure findings of fact, which cannot be disturbed by this Court in exercise of our jurisdiction under Article 226 of the Constitution. In support of his contention, learned Counsel for respondent No.4 has relied upon the decisions in **E. Mahboob Saheb v. N. Sabbarayan Chowdhary and others, (1982) 1 SCC 180, Narayanan Rajendran and another v. Lekshmy Sarojini and others, (2009) 5 SCC 264** and also on the decision of the Supreme Court in **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and others, (1999) 3 SCC 722.**

42. It is also urged with much emphasis that execution of the sale deed on 29.05.1974 and a later deed of rectification dated 12.07.1974 make both a case of transfer of a part of Balraji's holding, which being done admittedly without a permission by the Settlement Officer of Consolidation, brings the transfer within the mischief of Section Section 5(c)(ii) of the Act of 1953. In support of this contention of his, Mr. Triveni Shanker has placed reliance upon the Full Bench Decision of this Court in **Smt. Ram Rati and Ors. v. Gram Samaj, Jehwa and Ors., AIR 1974 All 106.** Reliance has also been placed upon the decision of this Court in **Foran Singh and others vs. Deputy Director of Consolidation and others, 1993 (1) AWC 192.**

43. I have carefully considered very detailed submissions advanced by the learned Counsel on both sides and perused the record.

44. The foremost point that was mooted was that Balraji having transferred a part of her holding by means of the sale deed, and later on, transferred another part of it, albeit a single plot, in the garb of the deed of rectification, all the Authorities below have construed in manifest error the sale deed and the deed of rectification to constitute two different transactions, each transferring a part of Balraji's holding and, therefore, void under Section Section 5(c)(ii) of the Act of 1953. The

consequence of the transfer being void has been inferred in view of the admitted fact of the absence of previous permission obtained by Balraji from the Settlement Officer of Consolidation. In this case, there is no quarrel about the fact that on the date the sale deed was executed, the provisions of the Act of 1953, as they stood, were those as amended by U.P. Act No.38 of 1958, where it was provided by Section 5 as under:

"4. Amendment of Section 5 of the U. P. Act V of 1954.-For Section 5 of the Principal Act, the following shall be substituted:

"5. Effect of Declarations.-Upon the publication of the notification under Section 4 in the official *Gazette*, the consequences, as hereinafter set forth; shall, subject to the provisions of this Act, from the date specified thereunder till the publication of notification under Section 52 or Sub-section (1) of Section 6 as the case may be. ensure in the area to which the declaration relates; namely-

(a) the district or part thereof, as the case may be/ shall be deemed to be under consolidation operations and the duty of maintaining the record-of-rights and preparing the village map, the field book and the annual register of each village shall be performed by the District Deputy Director of Consolidation, who shall maintain or prepare them, as the case may be, in the manner prescribed;

(b) (i) all proceedings for correction of the records, and all suits for declaration of rights and interests over land, or for possession of land, or for partition, pending before any authority or court, whether of first instance, appeal, or reference or revision, shall stand stayed, but without prejudice to the right of the persons affected to agitate the right or interests in dispute in the said proceedings or suits before the consolidation authorities under and in accordance with the provisions of this Act and the Rules made interest :

(ii) the findings of consolidation authorities in proceedings under this Act in respect of such right or interest in the land, shall be acceptable to the authority or court before whom the proceeding or suit was pending which may, on communication thereof by the parties concerned, proceed with the proceeding or suit, as the case may be;

(c) notwithstanding anything contained in the U.P. Zamindari Abolition and Land Reforms Act, 1950 (U. P. Act I of 1951), no tenure-holder, except with the permission in writing of the Settlement Officer, Consolidation, previously obtained shall-

(i) use his holding or any part thereof for purposes not connected with agriculture, horticulture or animal husbandry including pisciculture and poultry farming: or

(ii) transfer by way of sale, gift or exchange any part of his holding in the consolidation area :

Provided that a tenure-holder may continue to use his holding or any part thereof, for any purpose for which it was in use prior to the date specified in the notification issued under Section 4."

(emphasis by Court)

45. There is little quarrel about the law obtaining at the point of time when the sale deed was executed. The law as then stood forbade any transfer of a part of the bhumidhar's holding without the previous permission in writing of the Settlement Officer of Consolidation in a consolidation area, that is to say, an area where a notification under Section 4 of the Act of 1953 was in force. There is also no issue

about the fact that the land at the relevant time fell in a consolidation area. The issue is whether Smt. Balraji by the sale deed transferred a part of her holding; and another part of it by the deed of rectification. A perusal of the sale deed shows that Balraji transferred the whole of her *Chak* No.68 by the sale deed and also transferred some land that was placed outside the consolidation scheme. The deed of rectification was executed to correct an apparent clerical error in the sale deed, where for the old Plot No.1161/347, Plot No.161/347 was mentioned. It is equally true that at the time when the sale deed was executed, the old plot numbers had been renumbered and their old numbers obliterated. The old numbers were mentioned in the sale deed *ex abundati cautela*. The mention in the sale deed of old Plot No.1161/347 as 161/347 was, therefore, a matter of no consequence.

46. There were already new numbers assigned and the sale deed was explicit about the vendor's intent that by her conveyance, she intended to transfer the whole of *Chak* No.68 in favour of the petitioners; not any part of it. The deed of rectification was nothing more than a correction of a clerical error in the sale deed, which would relate back to the sale deed. The deed of rectification can by no means be regarded as an independent conveyance in itself or a transfer of a different plot of land, not mentioned in the sale deed. The deed of rectification did not transfer anything that was not part of the sale deed. It only removed through rectification a clerical error about the quondam number of one of the plots transferred by the sale deed. There is absolutely no requirement of a previous written permission from the Settlement Officer of Consolidation in transferring the entire holding by a *bhumidhar* during time that a consolidation scheme is in force. That is the clear purport of Section 5(c)(ii) of the Act of 1953. This has been eloquently held in the Full Bench decision in **Smt. Ram Rati** (*supra*), where it has been observed:

"11. This being the position we are clearly of the opinion that in the present case it is the English text which shall prevail over the Hindi version and according to the English text the expression "any holding" occurring in clause (ii) of Section 5(1)(c) of the Act does not include the "Whole holding" so that it is not necessary to obtain the permission of the Settlement Officer (Consolidation) for the transfer of the holding as a whole."

47. In the opinion of this Court, the Authorities below have, therefore, committed a manifest error of law in holding the sale deed to be void for violation of Section 5(c)(ii) of the Act of 1953.

48. The Authorities below have prima facie wrongly held that Smt. Balraji who was produced before the Consolidation Officer in support of the sale deed was an imposter, or the person who executed the sale deed was an imposter. The witnesses who appeared along with Balraji in support of the petitioners' case was Khilodhar, PW-6, Balraji's father and her brother, Rudra Prasad, besides Pradhan of Village Gopalpur, Sharda Prasad. He is also an attesting witness of the sale deed executed in favour of the petitioners. These witnesses have stated that the person who executed the sale was Smt. Balraji. Smt. Balraji in her testimony also stated that she sold her property. At this stage, it would be important to notice Balraji's examination-

in-chief recorded on 14.07.1976 before the Consolidation Officer, where she testified as PW-2. It reads:

"वहलफ बयान किया कि मैं डुहिया में चन्द्रशेखर की वेवा हूँ मेरा नाम वलिराजी है। हमारी जमीन जो डुहिया में थी सब हमारे नाम चक कटा है। चक कटने के पहले मैं अपनी सम्पूर्ण जमीन कास्त करती थी। चक कटने के बाद भी सम्पूर्ण जमीन पर हमारा कब्जा है। चकबंदी में मैंने अपनी जमीन के बारे में मुकदमा लड़ाया। सब मुकदमा जीतने के बाद हमारे नाम चक कटा। चकबंदी में हमारी ननद को खड़ा करके आशाराम ने हमारे खिलाफ लड़ाया था। आशाराम शुक्ल डुहिया के है। ननद हार गयी थी। ननद का नाम देवराजी था। हमारी उस ननद देवरानी के लड़के के साथ आशाराम ने अपने लड़की की शादी किया है। चक कटने के बाद हमने अपने भाई और चन्दू, दूधनाथ के औरत व लड़के के हक में बैनामा लिखा दिया। बैनामा रजिस्ट्री में आकर मैंने लिखवाया था। बैनामा लिखाने के बाद लिखाने वाले ने हमें पढ़कर सुनवाया था। तब मैंने शारदा प्रसाद व सूरज प्रसाद के सामने निशान अंगूठा बनाया। मेरे सामने शारदा प्रसाद व सूरज प्रसाद ने दस्तावेज की गवाही किया। तब मैंने रजिस्ट्रार साहब के सामने दस्तावेज पेश किया तब दस्तावेज की रजिस्ट्री हुई गवाह ने दस्तावेज बैनामा इक्स क-2 को देखकर अपने निशान की पुष्टि की।

दस्तावेज का एक नम्बर गलत लिखा गया था। फिर उसको ठीक करने के लिए दूसरा दस्तावेज टिटिम्मा उसके दो माह के बाद लिखा गया मुझे बैनामा में नकद रूपया भी दिया जिसका रूपया लिया उसका हवाला भी दिया था। रजिस्ट्री के समय रूपया लिया था। एक वीघा अपने भाई को लिखा था उसका रूपया पहले पा गयी थी। मुझको ऑख से कम दिखाई देता है। करीब दो साल से बैनामा लिखने के बाद नैहर में रहती हूँ। बैनामा इसलिए लिख दिया क्योंकि कम दिखाई देता है। अपने नैहर में रहने लगी थी। पहले मैं यही रहती थी। आशाराम से पैसा न कभी लिया और न ही जमीन जोतने को दिया। और न ही आशाराम को हमने लिखा पढ़ा है। आशाराम ने हमारी ननद को उभार कर लडाया था। उसी के कारण आशाराम से दुश्मनी भी थी।

यह कहना गलत है कि चन्द्रशेखर की वेवा वलिराजी तीर्थ करने गयी। और लौट कर नहीं आयी। मैं कभी तीर्थ करने नहीं गयी थी। बराबर अपने घर पर और नैहर में रहती हूँ। मेरे भाई रूद्र प्रसाद है। मेरे पिता का नाम विलोधर ग्राम गोपालापुर है।

यह कहना गलत है कि बनावटी बलिराजी बनकर बैनामा लिखा है। यह कहना गलत है कि मैं चन्द्रशेखर की स्त्री बलिराजी नहीं हूँ। और वनावटी बलिराजी बनकर बयान कर रही हूँ। बैनामा की भूमि पर बैदारान चन्दू, दूधनाथ की औरत और लड़के तथा मॉ का कब्जा है। हमारा नाम काट कर उनका नाम दर्ज किया जाय। जो पैसा बैनामा से पाया था वह मैंने कोईरौना बैंक में जमा कर दिया है। एक विघा जो भाई को लिखा है। वह हमारा नाम काटकर हमारे भाई को दर्ज किया जाय।

x x x x x x x

(जिरह)

बैनामा लिखने के दो वर्ष पहले से हमें कम दिखाई देता है, बैनामा मैंने अपनी मर्जी से लिखा था। बैनामा मैंने दूधनाथ व चन्दू और दूधनाथ, चन्दू के औरत व लड़के को लिखा है। बैनामा ज्ञानपुर में लिखा गया था। रजिस्ट्रार साहब के सामने वारह बजे दस्तावेज पेश हुआ था मैं कातिव को पहचानती हूँ। नाम नहीं जानती हूँ। डूहिया का मकान मेरा मौजूद है वह चार पॉच घर की वखरी है। जब मैं डुहिया में रहती थी तो खुद खेती करती थी, हमारे हरवाह गिरधारी अहिर थे जो जिन्दा हैं। ग्राम डुहिया के रहने वाले है। हमारे पास एक हल की खेती तथा एक जोड़ा वैल था। ग्राम सिहपुर में मेरे सास का मैहर है। पं० राजजग मुख्तार के यहॉ। मेरी सगी सास का नाम सुभवत्री है। मेरी सौतेली सास का नाम घूरा था। सुभवन्ती को एक लड़की थी। व एक लड़का था। लड़की का नाम देवराजी था। इसी देवराजी से चकबंदी में मुकदमा चला था। देवराजी व मेरा चक अलग-2 हो गया है। चकबंदी से पहले मुझसे व देवाजी से एक मुकदमा चला था। इसे राजजग मुख्तार ने सुलह करा दिया था, देवराजी पं० रामजगमुख्तार की भॉजी लगती थी। बैनामा लिखने के लिए मैंने चकबंदी विभाग से मैंने परमीशन नहीं लिया था। रजिस्ट्री में मुझे एक बार आना पड़ा था। एक बार बैनामा करने नैहर से आयी थी बैनामा का नं० गाटा नहीं बता सकती हूँ। चक नं० कागज में होगा मैं नहीं बता सकती हूँ जिसका मैंने बैनामा किया है, बैनामें वाले भूमि की चौहददी हमें नहीं मालूम।

जिसके-2 नाम लिखा था वे व शारदा प्रसाद, सूरज और हमारे भाई रजिस्ट्री में आये थे। जिसके-2 नाम बैनामा हुआ है वे लोग भी रजिस्ट्री के समय मौजूद थे, रजिस्टार साहब के सामने नगद रूपया 3500/-3600/-मिला था दस्तावेज बैनामा पर मैंने दो जगह निशान दिया है। इसके अलावा मुझसे कही भी किसी ने निशान अंगूठा नहीं लिया है। जिसके नाम बैनामा हुआ है। उसी से हमारी बातचीत हुई थी। बैनामा लिखाने के एक माह पूर्व बात तय हुई थी। बातचीत के समय रूपये का लेन देन नहीं हुआ था। सब रूपये का लेन रजिस्टार साहब के सामने हुआ था।

बयान गवाही के समय चन्दू, दूधनाथ जिसको मैंने बैनामा लिखा है। ले आये थे। मैं विशेषर चौरसिया को नहीं जानती हूँ। क्यों कि मैंने नहीं देखा है। विशेषर के लड़की लड़का के हक में मैंने बैनामा नहीं किया है। राम सरन चौरसिया के हक में मैंने बैनामा नहीं लिखा है।

कालूराम के लड़की के हक में मैंने बैनामा नहीं किया है मैं कालूराम बरई को नहीं जानती हूँ। अनूप कुमार को नहीं जानती हूँ। अनूपकुमार के हक में कोई बैनामा नहीं लिखा है। जयशंकर बरई को नहीं जानती हूँ और न उनको बैनामा लिखा है। विनोद कुमार को नहीं जानती और न बैनामा लिखा है। चन्दू दूधनाथ ने कहा था कि चलकर बयान दे दों। इस मुकदमें में मैंने कोई दरख्वास्त नहीं दी है। यह जमीन टॅयूबेल से सीची जाती है। टॅयूबेल के सिंचाई की रसीद मेरे पास जरूर होगी। वह रसीद मैंने चन्दू दूधनाथ को नहीं दिया है। डुहिया के प्रधान कमला शंकर है। आशाराम को मैं जानती हूँ वे मेरे गॉव के है। मैं नहीं जानती की आशाराम और मेरे सौहर की कुर्सीनामा एक है। आशाराम पहले चाची कहते थे अब नहीं कहते।

यह कहना गलत है कि मेरी सेवा करते थे। मैं कहीं तीर्थ करने नहीं गयी थी। कभी-2 प्रयाग राज गयी हूँ। मैं बेचने के बाद जमीन के पास नहीं गयी हूँ। यह कहना गलत है कि बैनामे वाले जमीन पर आशाराम का कब्जा है। चन्दू हमकों बताये थे कि आशाराम इस मुकदमें में लड़ रहे है। मुझसे गवाही के लिए चन्दू ने 10 दिन पहले से कहा था। आज चन्दू मुझको लाने नहीं गये है। मैं खुद ही आयी हूँ। आज की तारीख चन्दू ने बताया था आज 14 तारीख है। यही बताया था। चन्दू ने यह नहीं बताया था कि कमला शंकर प्रधान लड़ रहे है।

यह कहना गलत है कि बलिराजी तीर्थ यात्रा को गयी है। यह कहना गलत है कि बलिराजी वेवा चन्द्रशेखर सा० डुहिया नहीं हूँ। यह भी कहना गलत है कि जमीन निजाई पर आशाराम का कब्जा है। मैं राम चन्द्र राय सा० चक हर वंशपुर को नहीं जानती हूँ। उन्होंने मेरे बैनामा या टिटिम्मा दस्तावेज पर गवाही नहीं किया है।

जिरहः- ग्राम सभाः- शारदा प्रसाद द्विवेदी एडवोकेट

यह कहना गलत है कि मु० बलिराजी नहीं हूँ और यह भी कहना गलत है कि मुसम्मात बलिराजी तीर्थ को गयी और लौट कर नहीं आयी और यह भी कहना गलत है कि आराजी निजाई ग्राम सभा की हो गयी है। यह भी कहना गलत है कि आराजी निजाई को मैं जोते वोये नहीं हूँ। बयान सुनकर तस्दीक किया।"

49. In her cross-examination, Balraji has supported the factum of executing the sale deed and its registration by the Registrar in her presence. She has also spoken about the name of her mother-in-law and her step mother-in-law, as well as her step mother-in-law's daughter. She has also mentioned about the case that her step mother-in-law's daughter, Devraji instituted against her relating to her holding and claimed a share therein. She has largely supported the execution of the sale deed except in one aspect of her cross-examination, where she has suddenly said that she did not know the vendees, Anoop Kumar, Vinod Kumar, Jai Shankar and had not executed any sale deed in their favour. Apparently, the said discordant utterance in her cross-examination has been given too much of credence by the Authorities below.

50. The evidence of a witness has to be read as a whole, and if Balraji's testimony in her examination-in-chief is read along with her cross-examination, it is largely consistent. This aspect of the matter has not at all been considered by the

Authorities below, who have read the evidence torn out of context, doing a truncated appraisal of it. It is not this Court's province to reappreciate evidence, but to ensure that the Authorities of fact below do not omit relevant evidence by basing their findings on stray statements here and there. It is also to be borne in mind that Balraji was identified by her blood relatives, who were none else, but her father and brother. They were before the Consolidation Officer. Their evidence carries great weight about Balraji's identity and cannot be trifled with. The evidence on the point may have to be reconsidered by the Authorities below in the right perspective.

51. The Authorities below have also faltered in doubting the execution of the sale deed by Balraji and attributing it to an imposter by finding flaws in the manner of passage of consideration. The recitals in the sale deed clearly state that she had received a sum of Rs.15,000/- in cash before the Sub-Registrar, whereas Rs.17,200/- were paid to Surya Narain Mishra to discharge her liability on a pronote dated 25.05.1971 that Surya Narain held. There is also a description of receipt of the sum of Rs.1005 towards consideration from her brother, Rudra Prasad, petitioner No.7 and a further sum of Rs.2603/-, also received from her brother, Rudra Prasad. This makes for a total consideration of Rs.35,808/-. The Authorities below have ignored from consideration the testimony of Surya Narain, PW-2, Balraji's creditor, besides ignoring the endorsement of the Sub-Registrar and a certificate by the Bank, that is to say, Union Bank of India, Koirauna Branch, where Balraji was certified to hold a sum of Rs.15,000/- in her account. The said sum of money was the consideration of Rs.15,000/- that Balraji received in cash at the time of registration of the sale deed before the Sub-Registrar or as she asserts. All this evidence, that was duly admitted, particularly the bank certificate, was ignored from consideration both by the Settlement Officer and the Deputy Director of Consolidation. Thus, the findings of doubt about passage of consideration recorded by the Authorities below, in the opinion of this Court, are based on ignorance of material evidence on record.

52. There are some other very important issues that have been approached from a manifestly erroneous vantage by the Authorities below. The chief amongst these is the finding holding Balraji, who appeared before the Consolidation Officer, to be a imposter raising a presumption about her civil death. The entire presumption about her civil death is based on the assertion in the objections filed by Asharam, respondent No.4 that Balraji went on a pilgrimage 7-8 years ante-dating the date of the objections, that is to say, 22.11.1975 and ever since not returned to Village Duhia; and, her whereabouts are not known. A case of civil death has been built on the edifice of Balraji going on a pilgrimage 6-7 years before the objections were heard by the Consolidation Officer and some evidence about 10 years before that date, and not being heard of ever since at Duhia or by respondent No.4. The case about Balraji's civil death has been too readily accepted by all the Authorities below; and accepted on manifestly illegal premises. The Consolidation Officer has recorded the following finding about Balraji's civil death based on a presumption, under Section 108 of the Indian Evidence Act:

"द्वितीय पक्ष की तरफ से आशाराम, जगदम्बा, सभाजीत, गिरधारी यादव तथा महेन्द्र नाथ

पंचायत सचिव और उन्होंने ग्राम डुहिया के कुटुम्ब रजिस्टर को सावित किया है इस रजिस्टर में मु० बलिराजी का नाम दर्ज नहीं है इससे यह सिद्ध होता है कि श्रीमती वलिराजी कम से कम10 साल से ग्राम डुहिया में नहीं रहती है जगदम्बा प्रसाद विजय नाथ तथा सभाजीत गवाहो ने अपने बयानों में कहा है कि मु० बलिराजी तीर्थ करने गयी थी किन्तु लौटकर नहीं आयी है गवाहो के बयान पर अविश्वास करने का कोई कारण नहीं है अतः तथ्य सिद्ध हो जाता है कि बलिराजी सात साल से अधिक समय से लापता है और उनकी मृत्यु कानूनी तौर पर मानी जायेगी दिनांक 29.7.74 को मु० बलिराजी का रहना सिद्ध नहीं होता इस तथ्य को कमलाशंकर प्रधान ने भी स्वीकार किया है कि मु० बलिराजी का तीर्थयात्रा जाने के बाद से उनका पता नहीं चला।""

53. The Assistant Settlement Officer of Consolidation has written a outrageously cryptic finding accepting the Smt. Balraji's civil death in the following few words:

"बलिराजी तीर्थयात्रा करने गयी और वहां से वापिस नहीं आयी इसलिए उसकी सिविल डेथ हो गयी है।"

54. The Deputy Director of Consolidation has not written any finding of his own on the said issue. Since he has affirmed the judgments of the two Authorities below in toto, it has to be held that if the view of the two Authorities below is erroneous, the Deputy Director of Consolidation has failed to exercise his jurisdiction and rectify it about this finding. The cryptic findings inferring Balraji's civil death are manifestly illegal and vitiated. Sections 107 and 108 of the Evidence Act, which are relevant to the issue, are extracted hereinbelow:

"107. Burden of proving death of person known to have been alive within thirty years.--When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Burden of proving that person is alive who has not been heard of for seven years.--Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

55. Section 107 raises a presumption that a person is alive if it is shown that he/ she was alive within thirty years, and the burden of proving that he/ she is dead is on the person who asserts the fact. Balraji was admittedly alive, even according to respondent No.4, Asharam 6-7 years ago when she proceeded on pilgrimage. Therefore, if the presumption under Section 108 is not attracted, the burden would lie upon respondent No.4 to show by positive evidence that Balraji was dead on the date of execution of the sale deed. Here, however, the fourth respondent has invoked the provisions of Section 108 to plead a case of Balraji's whereabouts not being known within the last seven years. Section 108 is in the nature of a proviso to Section 107. Though an independent Section, it opens with words 'Provided that when". Harmoneously construed, Sections 107 and 108 form an integral scheme on the question, who in the normal course of events is to be presumed alive and who can be presumed dead, that is to say, at the time when this question arises. The general rule is that a person, who is shown to be alive within thirty years from the date when the question arises, the presumption would be that the person lives. Section 107, therefore, raises a presumption about life, whereas Section 108 as a proviso engrafts a

rule of presumption about death. It would be noticed that Section 107 is based on the sound experience of life that given the life span of a human being, a person who is shown to be alive within thirty years of the date when the question arises, can be presumed to be alive with burden on the person, who asserts that he/ she is dead, to prove it by affirmative evidence.

56. The fourth respondent has invoked the presumption under Section 108 on the foot of facts and evidence that 7-8 years ante-dating the filing of his objections before the Consolidation Officer, Smt. Balraji borrowed a sum of Rs.5000/- from Asharam, respondent No.4 and proceeded on pilgrimage. He has then said that she has not been heard of in Village Duhia eversince. The Consolidation Officer, as already remarked, has readily accepted a case of civil death by holding that witnesses Jagdamba Prasad and Sabhajeet in their testimony have said that Balraji proceeded on pilgrimage, but never returned. From this testimony, an inference has been readily drawn by the Consolidation Officer that looking to the evidence of these witnesses, there is no reason to disbelieve it.

57. The inference drawn is that it is proven that Balraji is missing for the past 7 years and would be presumed to be dead under the law on 29.05.1974, that is to say, the date of the sale deed. Also taken into account is the fact that the Family Register of Village Duhia produced by Mahendra Nath, the Panchayat Secretary, does not show Balraji's name recorded therein. The Consolidation Officer has concluded that absence of Balraji's name in the Family Register of Village Duhia would show that Balraji does not live in Duhia for the last 10 years. It is almost impossible on these facts or state of evidence to invoke the provisions of Section 108 of the Indian Evidence Act. The facts and evidence noticed by the Consolidation Officer at best can lead to the inference that the whereabouts of Balraji are not known in Village Duhia and nothing more. A presumption of civil death under Section 108 cannot be drawn merely because some persons of acquaintance have not heard of the missing person in the span of seven years last. The *sine qua non* to attract the presumption under Section 108 is: "proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive", to borrow the phraseology of the Statute.

58. Balraji in this case was married into a family in Village Duhia, where her husband, Chandra Shekhar passed away long ago. She inherited the land in dispute from her husband, wherein her step sister-in-law, Devraji laid a claim before the Consolidation Authorities and secured a share for herself in a compromise with Smt. Balraji. This happened in 1966. Thereafter, if Balraji went away and settled in her father's Village Gopalpur, where her father was still alive, it can hardly be said that anyone in Duhia would have "naturally heard of her". There is positive evidence to show that Balraji was living with her father at Gopalpur. There is no one in Duhia, entitled to say that he or she ought to have naturally heard of Balraji during the past seven years, ante-dating 1974, if she were alive. The presumption under Section 108 about Balraji being dead cannot be raised, because she was not heard of by anyone in Duhia. It would arise only if those persons did not hear of her, who ought to have naturally heard of her. Asharam, Jagdamba Prasad, Sabhajeet, all natives of Village Duhia are not persons, who would have

naturally heard of Balraji, if she had gone and settled with her father at Gopalpur. It is a case, where the Authorities below have completely misapplied the presumption under Section 108 of the Indian Evidence Act to infer a civil death for Balraji.

59. The issue as to how important it is to the rule in Section 108 of the Evidence Act that who are the persons who would naturally have heard of the person during the period of seven years if he had been alive, fell for consideration of the Punjab High Court in **East Punjab Province v. Bachan Singh and others, AIR 1957 Punj 316.** In that case, the issue arose in the context of extreme facts which present a remarkable situation to bring out the rule in its fullest effect. In **Bachan Singh** (*supra*), a man called Mal Singh was to be charged with murder. He absconded. His property was attached and possession taken under Sections 87 and 88 of the Criminal Procedure Code then in force. The facts as disclosed in the report of the case show that all this happened several years ago before action commenced at the instance of Mal Singh's reversioners. In 1946, Bachan Singh and Tara Singh, claiming to be reversioners of Mal Singh, brought a suit for possession of the attached property on the ground that Mal Singh must be presumed dead and they being his heirs were entitled to succeed to his estate. The two plaintiffs aforesaid also impleaded Mal Singh's widow, who had remarried in the meantime, as a party to the suit. The sole question before the Court was whether Mal Singh could be presumed dead. And if so, its effect. The suit was decreed by both the Courts below, accepting the absconder dead on a presumption raised under Section 108 of the Evidence Act. Speaking for the Division Bench on a second appeal carried by the Government, which was allowed and the reversioners' suit dismissed, it was held by Khosla, J.:

"4. Section 108 is nothing more than a proviso to Section 107 and the two sections must, therefore, be read together in order to appreciate their full import. The sections read :

"107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

5. The important phrase in Section 108 is "those who would naturally have heard of him if he had been alive." In the present case Mal Singh was absconding from justice in order to evade a trial upon a charge of murder. He would, therefore, not communicate with any relation in the natural course of events because to do so would reveal his whereabouts and he might be apprehended by the police and prosecuted. It is in evidence that after the alleged commission of the murders he ran away and remained in hiding. In a case of this nature no presumption, therefore, can arise because it is Section 107 and not S. 108 which would apply.

Shifting of the onus under Section 108 would have taken place only if the plaintiffs "would naturally have heard of him if he had been alive." Now, the plaintiffs being the reversioners, Mal Singh would not communicate with them. Indeed, he would not communicate with anyone in the village. One of the witnesses examined by the plaintiffs is the father of the two men

who are alleged to have been murdered by Mal Singh, and this man would be the last person to whom Mal Singh would reveal his whereabouts or with whom he would communicate."

60. The principles regarding invocation of the presumption under Sections 107 and 108 of the Evidence Act has been enunciated by the Supreme Court in **LIC of India v. Anuradha, (2004) 10 SCC 131.** In **Anuradha** (*supra*), their Lordships have held:

"14. On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words: the law as to presumption of death remains the same whether in the common law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. In the scheme of the Evidence Act, though Sections 107 and 108 are drafted as two sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years, the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person whose life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a court, tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings, the occasion for raising the presumption does not arise."

61. There is another facet about raising the presumption of death under Section 108 of the Evidence Act, which has been misunderstood by the Authorities below. The presumption under Sections 108 arises at the time when action commences and the issue raised in the suit whether a particular person can be presumed dead on account of him/ her not being heard of in the past seven years by those, who would have naturally heard of him/ her. The rule does not foster a presumption about the time of the presumed death, precise or approximate. It cannot, therefore, be presumed that a person, who has not been heard of for the past seven years, or even more when action commences, can be presumed dead at the beginning of the period of seven years or at a particular point of time. If a party desires

to prove that a person was dead on a particular date in the past, may be unheard of for seven years or more, it has to be proved by the person so claiming by affirmative evidence. The only presumption that can be raised in this case, if at all, and subject to the other things that have been said, is that on the date when action commenced before the Consolidation Officer, Balraji was dead. There can be no presumption that she was dead seven years prior to the year 1974 or on the date she executed the sale deed.

62. There is a wealth of authorities on the point that the presumption under Section 108 of the Evidence Act cannot be invoked to prove the death of a person at a particular point of time or period of time in the past. One of the early authorities on the point is **Fani Bhusan Banerjee v. Surja Kant Roy Chowdhury and another, 1907 SCC OnLine Cal 20 : (1906-07) 11 CWN 883,** where their Lordships of the Division Bench wrote concurring opinions. The more eloquent expression of the rule in **Fani Bhusan** (*supra*) is to be found in the concurring opinion of Geidt, J., where His Lordship held:

"..... The question for which provision is made in that section is the question whether a man is alive or dead, that is, whether he is alive or dead when the question is raised, not whether he was alive or dead at some antecedent date, and the presumption that may, in certain circumstances, be raised is a presumption that the man is dead when the question is raised, and not a presumption that he was dead at some antecedent date....."

63. The rule was again reiterated by the Bombay High Court in **Jeshankar Revashankar v. Bai Divali, AIR 1920 Bom 85 (2),** where also their Lordships, constituting the Division Bench, wrote concurring judgments. The rule in **Jeshankar Revashankar** (*supra*) was stated thus by Macleod, C.J.:

"..... But the earliest date to which the death can be presumed can only be the date when the suit was filed. It cannot have a further retrospective effect..." (emphasis by Court)

64. The principle was eloquently discussed in a Full Bench decision of this Court in **Muhammad Sharif and another v. Bande Ali and others, (1911) 8 ALJ 1052,** where Richards, C.J. held:

"The plaintiffs rely on the case of Dharup Nath v. Gobind Saran [(1886) I.L.R., 8 All., 614.]. It was decided in that case that the presumption which the plaintiffs contend for did arise. With all respect to the learned judge who delivered the judgement in the case, I think that he misinterpreted and misunderstood the passage from Taylor on Evidence, which he quotes. The period of seven years which the learned author there speaks of, is in my opinion, the minimum period during which it is necessary for the plaintiff to show that the person whose life or death is in question has not been heard of, and that if the evidence shows the person had not been heard of for 14 or 15 years instead of seven, the presumption would not be carried one bit farther. There would be merely the presumption that the man was dead; but there would be no presumption that he died at any particular moment of the period during which he has not been heard of. In the last edition of *Taylor on Evidence* the passage is as follows:--"although, however, a person who has not been heard of for 7 years is presumed to be dead, the

law raises no presumption as to the time of his death, and if any one who seeks to establish the precise period during those seven years at which some person died, he must do so by actual evidence." It is said that the anomalous position is created that if Dildar had sued during his lifetime, he would have succeeded, and that now his heir is not entitled to succeed. It seems to me that this argument proceeds upon the assumption that if Dildar had sued during his lifetime, the evidence as to the disappearance of Madad Ali would have been exactly the same. This would be a very rash assumption. Seven or eight years ago there must have been many persons who might have heard of the existence of Madad Ali who are now dead and gone.

X x x x x

The view I take in the case of *Narayan Bhagwant v. Shriniwaa Trimbak* [(1905) L.R., 8 Bom., 226.] and in the case of *Fani Bhushan Banerji v. Surjya Kanta Roy Chowdhry* [(1907) I.L.R., 35 Calc., 25.]. This last ruling was cited with approval in the case of *Srinath Das v. Probodh Chunder Das* [(1910) 11 C.L.J. 580.] . Mookerjee, J., says at page 585:--

"The only presumption which is enacted by section 107 of the Indian Evidence Act, is, that the party is dead at the time of the suit, but there is no presumption as to the precise time of his death.""

65. In **Muhammad Sharif** (*supra*), the short and concurring opinion of Banerji, J. reads:

"I am of the same opinion. The case turns upon the construction of section 108 of the Indian Evidence Act. Under that section there is no doubt a presumption that a person who has not been heard of for seven years should be deemed to be dead, but there is no presumption as to the time of his death. The true construction of the section has, in my opinion, been correctly laid down in the note to section 108 in *Ameer Ali and Woodroffe's* edition of the Evidence Act. The learned authors say:--

"The rule is the same whether only seven years or more than seven years have elapsed. There is no presumption either as to the time of death within the period of seven years, or that the person died at conclusion of the period. * * * The only presumption enacted by the section is that the party is dead at the time of suit, but there is no presumption in any case as to the time of his death.""

66. There is to be found in **Narayana Pillai v. Velayuthan Pillai, AIR 1963 Mad 385** valuable guidance about the presumption postulated under Section 108 of the Evidence Act. In **Narayana Pillai** (*supra*), it has been observed:

"Section 108 lays down a presumption when the question as to a person's existence is raised in issue before the Court. If the question is raised before the Court at a particular point of time, and more than seven years had elapsed by that time from the time when a man was last heard of, the presumption will be that he had died before the date when the question was raised. That is not the same thing as saying that when such a question is raised long after the seven years period is over there is a further presumption that he had died at any particular time during that period or at the end of seven years from the date of disappearance. In Halsbury's Laws of England, 3rd Edn., Vol. 15, dealing with this question, it is stated (at page 345):

"There is no legal presumption either that the person concerned was alive up to the end of the period of not less than

seven years, or that he died at any particular point of time during such period, the only presumption being that he was dead at the *time the question arose* if he has not been heard of during the preceeding seven years. If it is necessary to establish that a person died at any particular date within the period of seven years, this must be proved as a fact by evidence raising that inference....."(the italics are mine).

This question is put beyond doubt by the Privy Council in *Lalchand Marwari v. Ramrup Gir, 50 Mad LJ 289:* (AIR 1926 PC 9):

"Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England.....and, searching for an explanation of this very persistent heresy their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from In *re Phene's Trusts*, 1870-5 Ch. A-139 runs as follows: "If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.' Following these words, it is constantly assumed--not perhaps unnaturally--that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This of course is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous; though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years'."

It is implicit in the observations stated above that the presumption can arise only when the question for determination, whether a man or woman is alive or dead, is raised.

In *re Seshi Ammal*, 1958-2 Mad LJ 53: (AIR 1958 Mad 463), Subrahmanyam J. referred to the presumption under Sec. 108 and stated that it would extend to the fact of death and not to the time of death at any particular period. The learned Judge observed that the exact time of death was not a matter for presumption but of proof by evidence by a person who claims a right for the establishment of which the fact is essential. In a more recent case *Gnanamuthu v. Anthoni, AIR 1960 Mad 430,* Ramaswami J. after a full analysis of the provisions of Ss. 107 and 108 observed that the presumption under S. 108 would only be as to the fact of death at the time the question is raised and not at any particular antecedent time."

67. The question fell for consideration of the Supreme Court in **Anuradha**, where it has been held by their Lordships:

"12. Neither Section 108 of the Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man

was dead at the time when the question arose subject to a period of seven years' absence and being unheard of having elapsed before that time. The presumption stands unrebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death."

68. Of particular relevance to the issue that arises in this are the observations of the Supreme Court in **Saroop Singh v. Banto and others, (2005) 8 SCC 330.** In **Saroop Singh** (*supra*), it has been observed:

"22. There is neither any doubt nor dispute that the date of death of Indira Devi is not certain. By reason of the aforementioned provision, a presumption of death can be raised. In this case, however, death of Indira Devi is not in question, the date of death is. In the instant case, both the parties have failed to prove the date of death of Indira Devi. However, having regard to the presumption contained in Section 108 of the Evidence Act, the Court shall presume that she was dead having not been heard of for a period of seven years by those who would naturally have heard of her, if she had been alive, but that by itself would not be a ground to presume that she had died seven years prior to the date of institution of the suit."

69. There is, thus, not the slightest of doubt that the presumption under Section 108 of the Evidence Act is not available to Asharam to prove that Smt. Balraji was dead in the year 1974, when she executed the sale deed.

70. In the circumstances, it is for the Authority, before whom the matter now comes up to determine on the basis of evidence led by the party, who affirmatively asserts the fact of Balraji's death on the date that the sale deed was executed, whether Balraji was in fact dead on the said date. This question has to be gone into while examining the wider issue if Balraji, who executed the sale deed and proved it in Court, was in fact an imposter.

71. Considering the next submission advanced on behalf of the petitioners, this Court finds that it is true that in the objections filed by Asharam under Section 12 of the Act of 1953, there does not appear to be a case of heirship to Balraji's estate pleaded by him. No pedigree of the family is pleaded in the objections filed under Section 12 before the Consolidation Officer. Instead, the case there appears to be about an oral agreement to sell by Balraji taking an earnest from Asharam in the sum of Rs.5000/- before proceeding on pilgrimage and delivering possession of the land in dispute to him. There is no case of inheritance even remotely pleaded.

72. The pedigree, which the Authorities below have taken into consideration in accepting Asharam's case, has figured for the first time in his evidence led after the petitioners had closed their evidence. It would indeed be impermissible

to look into a case, even for a Consolidation Authority trying a title matter, which is never pleaded, but figures for the first time in the parties' dock evidence. This is again a matter, which may require some further examination by the Consolidation Officer, if indeed apart from the objections annexed to the writ petition as Annexure No.4, there is no other pleading before the Consolidation Officer putting forward a claim based on heirship, about which evidence has been led at the trial by Asharam.

73. This Court must also notice that some additional evidence in these proceedings was admitted before the Assistant Settlement Officer of Consolidation and is part of the record. That evidence was also required to be looked into by the Authority, which determines the case under Section 12 of the Act of 1953 afresh. The submissions of Mr. Triveni Shanker, all of which are directed to say that the findings of the three Authorities below are concluded by the findings of fact, cannot be accepted because there are manifest illegalities, vitiating the approach of all the three Authorities below in judging the parties' case. Since findings purely of fact would have to be recorded on issues arising between parties on a correct perspective of the law, this Court does not consider it appropriate to enter those findings here in a writ petition, where all the three Authorities below have held otherwise, may be on an approach erroneous in law. The findings in the correct legal perspective have to be recorded by the Authorities of fact below. It is unfortunate indeed that there is no option with this Court, despite the long lapse of time that this litigation has consumed, but to remand the matter to the Consolidation Officer for hearing and determination afresh in accordance with the guidance in this judgment.

74. In the result, this petition succeeds and is **allowed in part.** The impugned order dated 05.06.1986 passed by the Deputy Director of Consolidation, Varanasi, Camp Gyanpur, the order dated 05.09.1985 passed by the Assistant Settlement Officer of Consolidation, Varanasi (West) and the order 02.11.1979 passed by the Consolidation Officer, Gyanpur, District Varanasi are hereby **quashed** and the matter is remitted to the Consolidation Officer with a direction to decide afresh. The Consolidation Officer shall proceed to hear and decide the application/ objections under Section 12 of the Act of 1953 on the existing evidence of parties and such other evidence which the parties may wish to lead bearing in mind the guidance in this judgment.

75. It is further directed that the Consolidation Officer shall hear the case afresh in the manner that two dates of effective hearing shall be fixed every week and the case decided, as far as possible, within a period of six months of the date of receipt of a copy of this order by the Consolidation Officer.

76. Let a copy of this order be communicated to the Consolidation Officer, who would now have jurisdiction through the Collector/ District Deputy Director of Consolidation, Bhadohi by the Registrar (Compliance). A copy of this order will also be communicated to the Collector/ District Deputy Director of Consolidation, Varanasi, who formerly had jurisdiction for the purpose of transmission of records etc., if any, available at Varanasi.

(2023) 4 ILRA 298
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.04.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Matter Under Article 227 No. 1271 of 2023

Deepak & Anr. ...Petitioners
Versus
Distt. Judge Hardoi & Ors. ...Respondents

Counsel for the Petitioners:
Anujrag Narain Srivastava, Sudhanshu Tripathi

Counsel for the Respondents:

A. Civil Law – Code of Civil Procedure, 1908 - Order XXI Rule 29 - Section 37 - Invoking the provision contained in Order 21 Rule 29 CPC is discretionary and should be exercised judiciously and not mechanically as a matter of course. Mere satisfaction of the pre-conditions stipulated in Order 21 Rule 29 CPC is not sufficient for execution proceedings to be stayed and the power under this Rule has to be exercised only in exceptional cases where the interest of justice requires it and the fundamental consideration should be that the decree holder should not be deprived of the fruits of the decree, except for compelling reasons and unless an extraordinary case is made out, no stay should be granted and the decree should be allowed to be continued. (Para 19)

(i) Order 21 Rule 29 CPC is applicable only if the suit and the execution proceedings referred to in the said provisions are pending before the very same Court and not before two different courts which are not of co-ordinate jurisdiction.

(ii) In the event the execution proceedings have already been instituted, mere institution of suit subsequently and its pendency cannot be made the basis to invoke Order 21 Rule 29 CPC. The said provisions will not apply if the suit is instituted subsequent to institution of the execution proceedings.

(iii) The power and jurisdiction to stay its own proceeding pending before itself by the executing Court has to be exercised only under extraordinary and exceptional circumstances and not as a matter of course and care/caution has to be taken by the executing Court to find out if staying its own proceedings would result in abuse of process of law and in that event, the executing Court would not stay further proceedings under these provisions. (Para 19)

In the present case, the application preferred by the petitioner u/Order XXI Rule 29 r/w Section 151 of the Code is also required to be adverted to in which the only ground taken is that in the Suit filed by the petitioner subsequently, the issue of title over the Suit property is also required to be adjudicated and therefore prayer has been made for stay of execution proceedings pertaining to aforesaid Suit property. (Para 20)

A reading of the application makes it evident that the application has been drafted in a very cursory manner. No specific reason has been indicated for invocation of provisions of Order XXI Rule 29 of the Code particularly the fact that no explanation has been furnished as to how the petitioner was unaware of the initial Suit proceedings pending since the year 1988 and that too when the petitioner has staked a claim in Suit property on the basis of co-ownership. It is also a relevant factor to be considered that the real brother of petitioner was party to the initial Suit proceedings in Regular Suit No. 355 of 1988 and in case petitioner was claiming co-ownership of the Suit premises, it does not stand to reason that he was or could have been unaware of the aforesaid Suit proceedings which culminated in proceedings right up-till this Court in Second Appellate Jurisdiction. (Para 21)

The provisions of Order XXI Rule 29 of the Code being inapplicable in the present facts and circumstances of the case, no exception can be taken to the orders impugned. (Para 28)

B. Words & Phrases – (i) '*such court*' - The words 'such court' means, the Court in which Suit is pending. In other words, the Suit instituted against the decree holder and execution proceedings should simultaneously be pending in the same Court.

This implies that one Court cannot stay proceedings of another Co-ordinate Court. Even in case where a decree is transferred for execution to another Court, provisions of Order XXI Rule 29 of the Code would be inapplicable. The provisions of Section 37 of the Code have also been adverted to explain the expression ***'Court which passed a decree'***. (Para 12, 13)

In the present case, it is admitted between the parties that while Regular Suit proceedings are pending in the Court of Additional Civil Judge, Senior Division, Hardoi, the execution case is pending consideration before Civil Judge, Senior Division, Hardoi. Obviously both the Courts are different and cannot be construed to be same Court to come within the definition of 'such court' as envisaged in Order XXI Rule 29 of the Code. (Para 14)

At the time of filing of application u/Order XXI Rule 29 of the Code, the Suit as well as execution proceedings were pending in the same Court of Additional Civil Judge, Senior Division, Hardoi but at the time of final adjudication of the application by means of impugned order, they were pending in separate Courts. (Para 15, 16)

(ii) '*where the suit is pending*' – It connotes that a Suit filed against holder of a decree of such Court should be pending as on the date when decree is sought to be executed. (Para 17)

(iii) '*simultaneous proceedings*' - In case execution proceedings were filed prior to institution of Regular Suit against the decree holder, the same would not come within the definition of 'simultaneous proceedings' so as to invoke provisions of Order XXI Rule 29 of the Code. (Para 18)

(iv) '*pending*' - The meaning of the word 'pending' is that the Suit against the judgment decree holder should be pending as on the date of institution of execution. (Para 22)

C. Uttar Pradesh Judicial Service Rules, 2001 - Rule 4(o) - With regard to reliance placed upon Rules, 2001 is concerned, it is quite evident that the same pertains to service regulation of judicial officers, which would be administrative in nature and by no stretch of imagination can be deemed to include judicial proceedings as has been submitted. (Para 25)

Writ petition dismissed. (E-4)

Precedent followed:

1. Satyawati Vs Rajinder Singh, (2013) 9 SCC 491 (Para 9)

2. Shaukat Hussain @ Ali Akram & ors. Vs Smt. Bhuneshwari Devi (Dead) by L.R.S. & ors., (1972) 2 SCC 731 (Para 9)

3. Krishna Singh Vs Mathura Ahir & ors., AIR 1982 Supreme Court 686 (Para 9)

4. Balammal & ors. Vs Muthiar Begum & anr., 2013-5-L.W. 9 (Para 9)

5. Sikandar Mohammad Ali Dalal & anr. Vs Babu Hanumanth Mindolkar deceased by hi Lrs & ors., Writ Petition No. 103071 of 2017 (in the High Court of Karnataka, Dharwad Bench) (Para 9)

6. Inayat Beg Vs Umrao Beg, AIR 1930 AHD 121 (Para 12)

Precedent distinguished:

1. Bansraj & anr. Vs Jeet Narayan & ors., 2017 (35) LCD 1708 (Para 8, 26)

2. Guru Dayal Vs Vedmati, 2015 (1) ARC 869 (Para 8, 26)

Present petition challenges the order dated 10.02.2023, passed in Civil Revision No. 6 of 2023 as well as order dated 21.12.2022, passed by the trial Court u/Order XXI Rule 29 of the CPC, 1908, as well as revisional order dated 06.03.2023 affirming the same.

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

1. Heard Mr. Anurag Narain Srivastava, learned counsel for the petitioners and Mr. Sharad Dwivedi, learned counsel for opposite party no.3.

2. Vide earlier order dated 24th March, 2023, notices to opposite party nos.2, 4 and 9, being proforma in nature, were dispensed with.

3. Counter and rejoinder affidavits filed on behalf of parties today are taken on record.

4. Petition under Article 226 of the Constitution of India has been filed raising challenge to the order dated 10th February, 2023 passed in Civil Revision No.6 of 2023 as well as order dated 21st December, 2022 passed by the trial Court under Order XXI Rule 29 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") as well as revisional order dated 06th March, 2023 affirming the same.

5. Learned counsel for the petitioner submits that initially Regular Suit No.355 of 1988 was filed by the opposite party no.3 against late Suresh Chandra initially seeking relief of permanent injunction and subsequently by amendment, the relief of possession. The said Suit although was initially dismissed on 08th May, 1996 but Appeal No.115 of 1996 was allowed by means of judgement and order dated 25th September, 2001. Said Appellate Order was thereafter challenged in Second Appeal No.422 of 2001 and was dismissed on merits on 23th November, 2001 where after Execution Application No.1 of 2002 was filed by the opposite party no.3. It is relevant to indicate that the present petitioner was not a party to any of the proceedings.

6. During pendency of the execution proceedings, the present petitioner filed Regular Suit No.474 of 2005 against the opposite party no.3 for permanent injunction which is still pending consideration. During pendency of the said Suit proceedings, an Application under Order XXI Rule 29 of the Code was filed by the petitioner on 19th October, 2005 in the execution proceedings. The said application was rejected vide order dated 18th August, 2009 but Civil Revision No.79 of 2009 filed therein was allowed vide judgment and order dated 16th November, 2010 and the issue was remanded for consideration afresh. After remand, the said application for stay of execution proceedings was rejected vide order dated 21st December, 2022 which was challenged in Revision No.6 of 2023 and which has been rejected by means of impugned order dated 10th February, 2023.

7. Learned counsel for petitioner submits that the Regular Suit No.355 of 1988 was filed behind the back of petitioner who also had a titular interest in the Suit property. It is submitted that the petitioner did not have any notice of either the Suit or subsequent proceedings and had therefore filed the Regular Suit No.474 of 2005 against opposite party no.3 claiming relief of permanent injunction. It is further submitted that when petitioner came to know about the execution proceedings pending at the instance of opposite party no.3, the said application under Order XXI Rule 29 of the Code was filed. It is submitted that the petitioner has not filed any objection under Section 47 of the Code in execution proceedings.

8. It is submitted that the trial Court has rejected the application without considering the impact of Suit filed by petitioner in execution proceedings particularly to the effect that petitioner also had an interest in the Suit property and therefore in case of completion of execution proceedings, he would naturally be aggrieved by the said order and therefore it was incumbent upon the trial Court to have stayed execution proceedings till adjudication of Regular Suit instituted by petitioner. It has been further submitted that the trial Court as well as Revisional Court has lost sight of the purpose of Order XXI Rule 29 of the Code. He has also placed reliance upon the Uttar Pradesh Judicial Service Rules, 2001 to submit that Civil Judge, Senior Division means and includes various other judicial authorities including any member of the service posted under any other nomenclature in terms of Rule 4 (o) of the aforesaid Rules. In keeping with the aforesaid statement, it is further submitted that the terminology used under Order XXI of Rule 29 of the Code would include not only the Civil Judge, Senior Division but also the Additional Civil Judge, Senior Division since Regular Suit No.474 of 2005 is pending consideration in the Court of Additional Civil Judge, Senior Division, Hardoi and execution proceedings are pending in the Court of Civil Judge, Senior Division, Hardoi. He has also placed reliance on the judgments rendered by Co-ordinate Benches of this Court in the case of **Bansraj and Anr. vs. Jeet Narayan and Ors.** reported in *2017 (35) LCD 1708* and **Guru Dayal vs. Vedmati** reported in *2015(1) ARC 869* to buttress his submissions.

9. Mr. Sharad Dwivedi, learned counsel appearing on behalf of opposite party no.3 as refuted submissions advanced by learned counsel for the petitioner with the submission that the provisions of Order XXI Rule 29 of the Code will be inapplicable in present facts and circumstances particularly when the Suit instituted by petitioner was filed subsequent to institution of execution proceedings and therefore cannot be said to be simultaneous proceedings. It is also submitted that since the execution and Regular Suit are pending in separate Courts, then the provision of Order XXI Rule 29 of the Code would be inapplicable. It is further submitted that even otherwise the aforesaid provisions are not to be made applicable in a mechanical manner, otherwise no decree can ever be satisfied and therefore the word 'pending' in Order XXI Rule 29 of the Code would be of particular importance. It has also been submitted that the application has been rightly rejected. Learned counsel has placed reliance on the following judgments:-

1. **Satyawati vs. Rajinder Singh** reported in *(2013) 9 SCC 491*

2. **Shaukat Hussain @ Ali Akram and Others vs. Smt. Bhuneshwari Devi (Dead) by L.RS. and Others** reported in *1972 2 SCC 731*

3. **Krishna Singh vs. Mathura Ahir and Others** reported in *AIR 1982 Supreme Court 686*

4. **Balammal & Others vs. Muthiar Begum & Another** reported in *2013-5-L.W. 9*

5. **Sikandar Mohammad Ali Dalal and another vs. Babu Hanumanth Mindolkar** deceased by his Lrs and Others in *Writ Petition No.103071 of 2017 (in the High Court of Karnataka, Dharwad Bench)*

For the purposes of determination of present Lis, the applicability of Order XXI Rule 29 of the Code is required to be

analyzed as per applicable provision which is as follows:-

"29. Stay of execution pending suit between decree-holder and judgment-debtor.- Where a suit is pending in any Court against the holder of a decree of such Court [or of a decree which is being executed by such Court], on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided:

[Provided that if the decree is one for payment of money, the Court shall, if it grants stay without requiring security, record its reasons for so doing]."

The aforesaid provision has subsequently been amended as applicable to Allahabad High Court and is in the following manner:-

"ALLAHABAD.- In Rule 29-

(1) insert the comma and thereafter the words "or any person whose interests are affected by the decree, or by any order made in execution thereof" after the words "was passed ind before the words "the Court may";

(2) delete the words "on such terms as to security or otherwise occurring in the rule;

(3) substitute "if" for "as" before the words "it thinks fit"; and

(4) add the following as proviso to the said rule, namely:

"Provided that in all cases where execution of the decree is stayed under this ne the Court shall require the person seeking such stay to furnish such security as it may deem fit." (1-6-1957)."

10. A perusal of Order XXI Rule 29 of the Code makes it evident that the same would be applicable in case a Suit is pending in any Court against the holder of a decree of such Court or of a decree which is being executed by such Court on the part of a person against whom the decree is passed or any person whose interest is affected by the decree or any order made in execution thereof (as per Allahabad amendment).

11. The aforesaid aspects of 'such Court' has been defined by Hon'ble the Supreme Court in the case of **Shaukat Hussain (supra)** in the following manner:-

"It is obvious from a mere perusal of the rule that there should be simultaneously two proceedings in one court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the, instance of the judgment-debtor against the decree-holder. That is a condition under which the court in which the suit is pending may stay the execution before it. If that was the only condition, Mr. Chagla would be right in his contention, because admittedly there was a proceeding in execution by the decree-holder against the judgment-debtor in the court of Munsif 1st Gaya and there was also a suit at the instance of the judgment-debtor against the decreeholder in that court. But there is a snag in that rule. It is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against the holder of a decree of such court. The words "such court" are important. "Such court" means in the context of that rule the court in which the suit is pending. In other words, the suit must be one not only pending in that court but also one against the holder of a decree of that court.T hat appears to be the plain meaning of the rule.

It is true that in appropriate cases a court may grant an injunction against a

party not to prosecute a proceeding in some other court. But ordinarily courts, unless they exercise appellate or revisional jurisdiction, do not have the power to stop proceedings in other courts by an order directed to such courts. For this specific provisions of law are necessary. Rule 29 clearly shows that the power of the court to stay execution before it flows directly from the fact that the execution is at the instance of the decree- holder whose decree had been passed by that court only. If the decree in execution was not passed by it, it had no jurisdiction to stay the execution. In fact this is emphasised by rule 26 already referred to. In the case before us the decree sought to be executed was not the decree of Munsif 1st Court Gaya but the decree of the Subordinate Judge, Gaya passed by him in exercise of his Small Cause Court jurisdiction. It is, therefore, obvious that the Order staying execution passed by the Munsif, Gaya would be incompetent and without jurisdiction."

12. From reading of aforesaid judgment it transpires that the principal consideration of Hon'ble the Supreme Court with regard to the words 'such court' means in the context of that rule, the Court in which Suit is pending. In other words, the Suit instituted against the decree holder and execution proceedings should simultaneously be pending in the same Court. Obviously, the proposition which would be basis of aforesaid judgment is that one Court cannot stay proceedings of another Co-ordinate Court. Hon'ble the Supreme Court in the aforesaid judgment has also referred to judgment rendered by this Court in the case of **Inayat Beg vs. Umrao Beg** reported in *AIR 1930 AHD 121* to hold that even in case where a decree is transferred for execution to another Court, provisions of Order XXI Rule 29 of the Code would be inapplicable. The dissenting view of Calcutta High Court was overruled.

13. The provisions of Section 37 of the Code have also been adverted to explain the expression 'Court which passed a decree' in the following manner:-

"Section 37. Definition of Court which passed a decree.- The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,-

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

14. In the present case, it is admitted between the parties that while Regular Suit proceedings are pending in the Court of Additional Civil Judge, Senior Division, Hardoi, the execution case is pending consideration before Civil Judge, Senior Division, Hardoi. Obviously both the Courts are different and cannot be construed to be same Court to come within the definition of 'such court' as envisaged in Order XXI Rule 29 of the Code.

15. At this stage, learned counsel for the petitioner has drawn attention to the fact that at the time of filing of application under Order XXI Rule 29 of the Code, the Suit as well as execution proceedings were pending in the same Court of Additional Civil Judge, Senior Division, Hardoi but at

the time of final adjudication of the application by means of impugned order, they were pending in separate Courts. The aspect of proceedings having been transferred has already been considered by Hon'ble the Supreme Court in the case of **Shaukat Hussain (supra)** in the following manner:-

"In Inayat Beg v. Umrao Beg AIR 1930 All 121 (1) the Allahabad High Court had held that where a decree was transferred for execution to a court, the latter could not, under Order 21 rule 29 C.P.C., stay execution of that decree in a suit at the instance of the judgment-debtor, the reason being that the decree sought to be executed was not the decree of 'such court', that is, the court in which the suit was pending. That view was dissented from by the Calcutta High Court in Sarada Kripa v. The Comilla Union Bank(2). The reasoning was that the Privy Council had held in Maharajah of Bobbili v. Narasarajupeda Srinhulu (3) that on transfer of a decree, the original court had ceased to have jurisdiction by virtue of section 37 C.P.C. The holder of a decree of 'such court' will include the court to which the decree has been transferred, the latter having the same powers in executing the decree as if it had been passed by it under section 42 C.P.C.

The above reasoning in the Calcutta case is based upon erro- neous assumptions. The Privy Council was not concerned in Maharajah of Bobbili v. Narasarajupeda Srinbulu(3) with the impact of sections 37 & 42 on Order 21 rule 29 C.P.C. It was only concerned to see whether the District Court was the 'proper court' within the meaning of Art. 182(5) of the 1st Schedule of the Limitation Act, 1908 in which to apply 'for execution or to take same step in aid of execution'."

16. Upon applicability of aforesaid judgment, it is evident that even where a decree is transferred for execution, stay of that decree cannot be sought under Order XXI Rule 29 of the Code since it would not come within the definition of 'such court' i.e. the Court in which the Suit is pending. In view of the aforesaid, even after transfer of execution proceedings, in the considered opinion of this Court the said judgment will apply with full vigour. The aforesaid judgment of **Shaukat Hussain (supra)** has thereafter been followed with approval in the subsequent judgment of **Krishna (supra)** in the following manner:-

"We are fortified in our view by a decision of this Court in Shaukat Hussain @ Ali Akram and Ors. v. Smt. Bhuneshwari Devi (1973) 1 SCR 1022 : (AIR 1973 SC 528), where this Court observed as follows :

"Rule 29 clearly shows that the power of the Court to stay execution before it flows directly from the fact that the execution is at the instance of the decree-holder whose decree had been passed by that court only. If the decree in execution was not passed by it, it had no jurisdiction to stay the execution."(Emphasis supplied)"

17. The aspect of the word 'where the Suit is pending' is also of particular importance since the same connotes that a Suit filed against holder of a decree of such Court should be pending as on the date when decree is sought to be executed which has also been considered by High Court of Madras in the case of **Balamnal and others (supra)** in the following manner:-

"21.Further, under Order XXI Rule 29 CPC, to stay the execution of the decree, the following conditions must be satisfied viz.:

a)there must be simultaneous proceedings;

b)an execution by the decree holder must be pending against the judgment debtor;

c)the judgment debtor must have filed a suit against the decree holder; and

d)the suit must be pending.

22.In so far as this case is concerned, the first condition viz., there must be simultaneous proceedings, is not at all satisfied by the revision petitioners herein. The suit in O.S.No.270/2004 was filed in the year 2004 and the suit was decreed on 22.06.2005. The appeal was filed in the year 2005 and the same was dismissed on 10.10.2006. The second appeal was filed in the year 2006 and the same was also dismissed on 27.01.2011. The suit in O.S.No.104/2012 was filed on 20.04.2012 whereas the execution petition in E.P.No.107/2011 was filed on 02.11.2011. In such circumstances, it cannot be said that simultaneous proceedings are pending so as to invoke Order XXI Rule 29 CPC.

23.Even assuming that simultaneous proceedings are pending and even all the conditions of Order XXI Rule 29 CPC get satisfied, still staying the execution of the decree is not automatic, as the Execution Court has to exercise its discretion whether by staying the decree, great injustice would be caused to the decree holder or not."

18. In the aforesaid case also it is evident that execution proceedings were filed prior to institution of Regular Suit against the decree holder and in such circumstances, High Court at Madras has held that the same would not come within the definition of 'simultaneous proceedings' so as to invoke provisions of Order XXI Rule 29 of the Code.

19. In another judgment rendered by the High Court of Karnataka in the case of **Sikandar Mohammad Ali Dalal (supra)**, the applicability of Order XXI Rule 29 of the Code has been defined as follows:-

"13. The issue regarding applicability of Order 21 Rule 29 CPC can be examined from yet another angle. It is an undisputed fact that the instant execution proceedings were instituted by the petitioners/ decreeholders against the respondent/ judgment debtor in the year 2012 while the suit in O.S. No. 22/2016 was instituted by the respondent/ judgment debtor subsequently , i.e., in the year 2016. It is relevant to state that Order 21 Rule 29 CPC to be applicable, it is also essential that the suit ought to be pending as on the date of institution of the execution proceedings and Order 21 Rule 29 CPC will not apply to suits which are instituted subsequent to institution of the execution proceedings. To put it differently, the power of the executing Court to stay its own proceedings can be invoked only in cases where a suit has already been instituted by the judgment debtor prior to institution of the execution proceedings and the same will not apply to suits which are instituted subsequent to institution of the execution proceedings. Any another interpretation or construction placed on Order 21 Rule 29 CPC will lead to disastrous consequence since every judgment debtor would be in a position to scuttle, stall and obstruct the execution proceedings by filing a suit after institution of the execution proceedings seeking to enforce the decrees which have attained finality and become conclusive and binding upon judgment debtor. Viewed from this angle also, in the undisputed facts of the instant case which disclose that the execution proceedings were instituted prior to institution of the suit in O.S. No. 22/2016 filed by the respondent/ judgment debtor, Order 21 Rule 29 CPC would be inapplicable to the facts of the instant case

and on this score also, the application I.A. No. 12 was liable to be dismissed.

14. It is well settled that invoking the provision contained in Order 21 Rule 29 CPC is discretionary and should be exercised judiciously and not mechanically as a matter of course. It is equally well settled that mere satisfaction of the pre-conditions stipulated in Order 21 Rule 29 CPC is not sufficient for execution proceedings to be stayed and the power under this Rule has to be exercised only in exceptional cases where the interest of justice requires it and the fundamental consideration should be that the decreeholder should not be deprived of the fruits of the decree, except for compelling reasons and unless an extraordinary case is made out, no stay should be granted and the decree should be allowed to be continued.

17. As can be seen from the aforesaid judgments, the principles underlying Order 21 Rule 29 CPC can be summarized as under:

a) That, Order 21 Rule 29 CPC is applicable only if the suit and the execution proceedings referred to in the said provisions are pending before the very same Court and not before two different courts which are not of co-ordinate jurisdiction;

b) That the said provisions will not apply if the suit is instituted subsequent to institution of the execution proceedings: In other words, the said provision would apply only if the suit is instituted prior to institution of the execution proceedings and in the event the execution proceedings have already been instituted, mere institution of suit subsequently and its pendency cannot be made the basis to invoke Order 21 Rule 29 CPC;

C) The power and jurisdiction to stay its own proceeding pending before itself by the executing Court has to be exercised only under extraordinary and exceptional circumstances and not as a matter of course and care/ caution has to be taken by the executing Court to find out if staying its own proceedings would result in abuse of process of law and in that event, the executing Court would not stay further proceedings under these provisions."

20. In the present case, for the purpose of applicability of aforesaid judgment, the application preferred by the petitioner under Order XXI Rule 29 read with Section 151 of the Code is also required to be adverted to in which the only ground taken is that in the Suit filed by the petitioner subsequently, the issue of title over the Suit property is also required to be adjudicated and therefore prayer has been made for stay of execution proceedings pertaining to aforesaid Suit property.

21. A reading of the aforesaid application makes it evident that the application has been drafted in a very cursory manner. No specific reason has been indicated for invocation of provisions of Order XXI Rule 29 of the Code particularly the fact that no explanation has been furnished as to how the petitioner was unaware of the initial Suit proceedings pending since the year 1988 and that too when the petitioner has staked a claim in Suit property on the basis of co-ownership. It is also a relevant factor to be considered that the real brother of petitioner was party to the initial Suit proceedings in Regular Suit No.355 of 1988 and in case petitioner was claiming co-ownership of the Suit premises, it does not stand to reason that he was or could have been unaware of the aforesaid Suit proceedings which culminated in proceedings right up-till this Court in Second Appellate Jurisdiction.

22. Although the provisions of Order XXI Rule 29 of the Code empower the Executing Court to stay the execution of decree, at the same time, it is evident that such a power is not to be exercised in a cursory or mechanical manner but in exceptional circumstances only when a Suit against the decree holder is pending consideration at the time of filing of execution. Applying the aforesaid provisions to Suits filed subsequent to execution proceedings would lead to absurd results whereby no decree of any Court of competent jurisdiction can ever be satisfied. This cannot be the meaning and purpose of Order XXI Rule 29 of the Code particularly keeping in view the specific provisions of Rule 29 of the Code itself which indicates that a Suit should be pending against the holder of a decree or of a decree which has been executed. The obvious conclusion of the word 'pending' is that the Suit against the judgment decree holder should be pending as on the date of institution of execution. This Court is in respectful agreement with the judgments rendered by the High Courts of Madras and Karnataka.

23. Another aspect to be considered is that Hon'ble the Supreme Court in the case of **Satyawati (supra)** deprecated unreasonable delays in execution of decrees rendered by Courts of competent jurisdiction in the following manner:-

"14. This Court, again in the case of Marshall Sons & Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. & Anr. [(1999) 2 SCC 325] was constrained to observe in para 4 of the said judgment that

?4. ?..it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes long time?..?

16. As stated by us hereinabove, the position has not been improved till today. We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain."

24. It is also relevant to indicate that any person having an interest in the Suit property with regard to which a decree has been passed has a remedy not only under Section 47 but also under Rule XXI Rules 97 to 104 of the Code due to which also the provisions of Order XXI Rule 29 of the Code are required to be used only in exceptional circumstances.

25. With regard to reliance placed upon U.P.Judicial Services Rules, 2001 is concerned, it is quite evident that the same pertains to service regulation of judicial officers, which would be administrative in nature and by no stretch of imagination can be deemed to include judicial proceedings as has been submitted.

26. So far as the judgments relied upon by learned counsel for the petitioner

are concerned, reading of the same makes it evident that the same have been passed only on the ground that the trial Court had passed orders impugned therein without considering the provisions of Order XXI Rule 29 of the Code and therefore the petition had been allowed remanding the cases for fresh consideration in terms of the said provision. A reading of the aforesaid judgments makes it evident that no proposition of law nor any ratio decidendi is evident in the aforesaid judgments and as such in the considered opinion of this Court would not have any binding nature.

27. This Court as such is in respectful agreement with the summary of principles pertaining to Order XXI Rule 29 of the Code as indicated herein-above in the case of **Sikandar Mohammad Ali Dalal (supra)** by the High Court of Karnatka.

28. In view of the aforesaid discussion, the provisions of Order XXI Rule 29 of the Code being inapplicable in the present facts and circumstances of the case, no exception can be taken to the orders impugned.

29. Resultantly, the petition being devoid of merits is **dismissed**.

(2023) 4 ILRA 308
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matter Under Article 227 No. 2393 of 2023

Mohd. Usman ...Petitioner
Versus
Smt. Shagupta Begum ...Respondent

Counsel for the Petitioner:
Sri Ashish Kumar Singh, Sri Ajay Kumar Singh

Counsel for the Respondents:
Sri Prashant Rai, Sri Krishna Nand Rai

A. Civil Law – Striking off of the defence - Code of Civil Procedure,1908 - Order XV, Rule 5 - Under sub-rule (2) of Rule 5 of Order XV C.P.C., striking off of the defence is in the nature of penalty leading to serious consequences, therefore, a serious liability rests upon the Court in the matter and power is not to be exercised mechanically while passing the order under sub-rule (2) of Rule 5 of Order XV C.P.C. Even in case, representation has not been filed under sub-rule (2) of Rule 5 of Order XV C.P.C, it is required on the part of Court to consider the facts and circumstances already existing on record. (Para 19)

Impugned order dated 14.11.2022 allowed the application 65-C and struck off the defence of the petitioner-defendant only on the ground that an earlier application Paper No. 41-Ga has been rejected vide order dated 29.08.2018 and also affirmed by High Court vide order dated 07.02.2019.

In fact, Judge, Small Causes Court has wrongly interpreted the order of High Court dated 07.02.2019. Once the Court has granted liberty to petitioner-defendant to challenge the order of striking off of the defence, the implied meaning would be that, while considering the application to strike off the defence, it is mandatory on the part of the court below to decide the issue afresh, including the application Paper No. 41-Ga on merits again. The order of High Court dated 07.02.2019 has annulled the effect of order dated 29.08.2018 passed by Judge, Small Causes Court, with liberty to petitioner to raise this issue again after, in case, any order has been passed for striking off of the defence.

The spirit of the order of High Court is that, in case of passing of fresh order for striking off of the defence, petitioner would have full liberty to challenge the same and court below is required to decide the same on merits, without being impressed with the its earlier order dated 29.08.2018. (Para 23, 24)

While passing the order considering all the evidence u/Order XV Rule 5, C.P.C. Court must have been very conscious, as passing of such order would take away the liberty of petitioner-defendant to lead the evidence and all other consequences, certainly resulting into allowing of suit without any protest. (Para 25)

Writ petition allowed. (E-4)

Precedent followed:

1. Bimal Chand Jain Vs Sri Gopal Agarwal, (1981) 3 SCC 486, decided on 27.07.1981 (Para 13)

2. Asha Rani Gupta Vs Vineet Kumar, 2022 SCC Online SC 829 (Para 13)

3. Gulshan Pahwa & ors. Vs Dargah Peer Dariyanath Ji Shrawannath Nagar, Haridwar & anr., (2022) 157 RD 573 (Para 13)

Present petition challenges the order dated 14.11.2022, passed by Judge, Small Causes Court, Saharanpur, by which defence of petitioner-defendant was struck off under provision of Order XV, Rule 5, C.P.C. and order dated 31.01.2023 passed by District Judge, Saharanpur dismissing the SCC Revision, which was filed by the petitioner-defendant challenging the previous order.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Ashish Kumar Singh, learned counsel for the petitioner and Sri Krishna Nand Rai alongwith Sri Prashant Rai, learned counsel for opposite party.

2. Present petition has been filed challenging the order dated 14.11.2022, passed by Judge, Small Causes Court, Saharanpur in SCC Suit No. 25 of 2014, by which defence of petitioner-defendant was struck off under provision of Order XV, Rule 5, C.P.C. and order dated 31.01.2023 passed by District Judge, Saharanpur dismissing the SCC Revision No. 132 of 2022, which was filed by the petitioner-defendant challenging the order dated 14.11.2022.

3. Since, only legal question is involved in this petition, therefore, with the consent of parties without inviting for affidavits, the matter is being decided at the admission stage itself.

4. Learned counsel for the petitioner-defendant submitted that plaintiff-respondent had filed SCC Suit No. 25 of 2014 before the Judge, Small Causes Court, Saharanpur for arrears of rent and ejectment on the ground of default in payment of rent. On service of summons, petitioner-defendant has filed application Paper No. 12-Ga dated 14.10.2014 to deposit the rent as provided under Order XV, Rule 5, C.P.C. The aforesaid application was allowed vide order dated 27.10.2014 and petitioner-defendant had deposited rent alongwith interest on 14.10.2014 for the period from 01.08.2011 to 05.08.2014 and also filed written statement.

5. He next submitted that suit is being contested, but due to illness of petitioner, he could not deposit monthly rent, as provided under Order XV, Rule 5, C.P.C., therefore, he has filed application Paper No. 41-Ga dated 31.05.2017 for permission to deposit the entire amount for the period from 30.09.2015 to 30.10.2017 and also presented tender for the same. Against the said application, objection paper No. 44-Ga dated 27.02.2018 has been filed by plaintiff-respondent and ultimately, application Paper No. 41-Ga has been rejected by Judge, Small Causes Court vide order dated 29.08.2018.

6. He further submitted that petitioner-defendant subjected to challenge

the order dated 29.08.2018 before the District Judge, Sharanpur vide SCC Revision No. 31 of 2018, which was rejected vide order dated 07.01.2019 with the finding that Trial Court has rightly rejected the application Paper No. 41-Ga and also rightly struck off the defence of the petitioner-defendant. Petitioner-defendant has challenged both the orders dated 29.08.2018 and 07.01.2019 before this Court by filing Civil Misc. Writ Petition No. 805 of 2019, which was disposed of vide order dated 07.02.2019. This Court, while disposing of the said writ petition, has clarified that order impugned dated 29.08.2018 would not amount to order of striking off of the defence with liberty to petitioner-defendant to challenge the order, in case defence is struck off.

7. He next submitted that vide order dated 24.11.2021, Judge, Small Causes Court has suo moto struck off the defence of petitioner-defendant, upon which, he has filed application Paper No. 62-C-2 for recalling the order dated 24.11.2021. The said application was allowed vide order dated 12.07.2022. On 10.12.2021, plaintiff-respondent has also filed application Paper No. 65-C under Order XV, Rule 5, C.P.C. to strike off the defence of the petitioner-defendant, upon which, petitioner-defendant has filed objection Paper No. 67-C dated 18.05.2022 with specific plea that all amount due, as provided under Order XV, Rule 5, C.P.C. has been deposited by him and tenders have also been annexed, therefore, the application to strike off the defence is not maintainable.

8. He next submitted that by the impugned order dated 24.11.2021, Judge, Small Causes Court, after going through the application of plaintiff-respondent and reply of petitioner-defendant, has struck off the defence of the petitioner-defendant only on the ground of earlier order passed on 29.08.2018.

9. Learned counsel for the petitioner has assailed the order dated 24.11.2021 only on the ground that once the High Court vide order dated 07.02.2019 has granted liberty to petitioner-defendant to challenge the striking off of the defence at later stage, it is required on the part of the Judge, Small Causes Court to decide the issue afresh and not in light of earlier order dated 29.08.2018, which was subject matter of Civil Misc. Writ Petition No. 805 of 2019.

10. He firmly submitted that the finding of the Trial Court is perverse and also ignoring the order of the High Court dated 07.02.2019, which has given liberty to petitioner to challenge the order of striking off of the defence. In fact, once the Court has given liberty to petitioner-defendant to challenge the striking off of the defence as and when the defence is struck off, principle of merger shall be applicable and, while entertaining the application Paper No. 65-C and objection Paper No. 67-C, it is required on the part of Judge, Small Causes Court to decide the applications 41-Ga and 44-Ga also afresh, considering the circumstances prevailing on the date of filing of applications, ignoring the earlier order dated 29.08.2018, as the same has lost the effect in light of order of High Court dated 07.02.2019.

11. It is also petitioner's case that Order XV, Rule 5, C.P.C. provides for filing of representation and even in case of absence of representation, it is required on the part of the Small Causes Court to consider all materials available on record

while passing the order for striking off the defence.

12. He next submitted that this fact is undisputed that on the date of filing of application Paper No. 65-C, all amount as required under Order XV, Rule 5, C.P.C. had already been deposited and available with the Court. Therefore, while passing the impugned order 14.11.2022, the same cannot be ignored.

13. In support of his contention, learned counsel for the petitioner has placed reliance upon the judgment of the Apex Court in matter of ***Bimal Chand Jain Vs. Sri Gopal Agarwal: (1981) 3 Supreme Court Cases 486***, decided on 27.07.1981, judgment of Apex Court in the matter of ***Asha Rani Gupta Vs. Vineet Kumar: 2022 SCC Online SC 829*** and judgment of High Court of Uttarakhand at Nainital in the matter of ***Gulshan Pahwa and Others Vs. Dargah Peer Dariyanath Ji Shrawannath Nagar, Haridwar and Another: (2022) 157 RD 573.***

14. Sri Krishna Nand Rai, learned counsel for the opposite party has raised preliminary objection to the submission of learned counsel for the petitioner and submitted that High Court while passing the order dated 07.02.2019, has affirmed the order dated 29.08.2018 passed by Judge, Small Causes Court, by which application of petitioner 41-Ga has been rejected to deposit the arrears of rent as required under Order XV, Rule 5, C.P.C. Thereafter, District Judge has rightly rejected SCC Revision No. 31 of 2018 filed by petitioner-defendant vide order dated 07.01.2019, relying upon the earlier order dated 29.08.2018. But, he could not dispute the fact that while disposing of the writ petition No. 805 of 2019, this Court vide order dated 07.02.2019 has given liberty to petitioner to challenge, if any specific order is passed for striking off the defence of the petitioner.

15. I have considered the rival submissions made by the counsel for the parties, perused the records and also judgments relied upon.

16. Facts of the case are undisputed. The only issue before the Court is about interpretation of order dated 07.02.2019 passed by the High Court in Civil Misc. Writ Petition No. 805 of 2019. Once this Court has given liberty to petitioner-defendant to challenge the order of striking off of the defence, what would be the effect of the order of High Court and fate of earlier order dated 29.08.2018 pass by Judge, Small Causes Court.

17. Order dated 07.02.2019 passed by the High Court in Writ Petition No. 805 of 2019 is not very lengthy and the same is being reproduced hereinbelow:

"By impugned order dated 29.8.2018, the trial Court in SCC Suit No. 25/2014 had rejected the application 41Ga filed by the petitioner seeking permission to deposit rent from 30.9.2015 to 30.6.2017. The order has been affirmed in revision.

Counsel for the petitioner submitted that certain observations have been made by the Revisional Court that defence of the petitioner has been struck off by the trial Court, while there is no such order in existence.

It is true that in the penultimate paragraph of the order of the Revisional Court, an observation has been made that the trial Court has rightly rejected the application 41Ga and has also rightly struck off the defence of the petitioner. A

perusal of the order of the trial Court reveals that it had simply rejected the application 41Ga without their being any specific order for striking off the defence.

It is noteworthy that the Revisional Court has simply dismissed the revision and has upheld the order of the trial Court, without itself recording any independent finding for striking off the defence.

In such view of the matter, this Court is of the opinion that as and when any specific order is passed by the trial Court striking off the defence, it shall be open to the petitioner to challenge the same, but at the present moment, it cannot be said that its defence stands struck off, as sought to be urged. Consequently, this Court is not inclined to interfere with the impugned orders.

The petition is disposed of, subject to the above clarification."

18. From the perusal of order of High Court dated 07.02.2019, it is apparently clear that the Court has not entered into merits of the impugned order 29.08.2018, but disposed of the petition with liberty to petitioner-defendant to challenge any specific order, if any, passed for striking off of the defence, meaning thereby, petitioner was given liberty to raise all issues while challenging the order of striking off of the defence, which is the subject matter of earlier order dated 29.08.2018, otherwise, order of High Court dated 07.02.2019 would be of no effect. While declining to interfere with the impugned order dated 29.08.2018, High Court has not given a word in favour of order dated 29.08.2018 except liberty to petitioner to challenge the striking off of the defence. Therefore, it is required on the part of the Judge, Small Causes Court to decide the application Paper No. 65-C on merits and not relying upon the earlier order dated 29.08.2018.

19. The Apex Court while dealing with the matter of ***Bimal Chand Jain(Supra),*** has taken a firm view that under sub-rule (2) of Rule 5 of Order XV C.P.C., striking off of the defence is in the nature of penalty leading to serious consequences, therefore, a serious liability rests upon the Court in the matter and power is not to be exercised mechanically while passing the order under sub-rule (2) of Rule 5 of Order XV C.P.C. The Court went to the extent that even in case, representation has not been filed under sub-rule (2) of Rule 5 of Order XV C.P.C, it is required on the part of Court to consider the facts and circumstances already existing on record. Relevant paragraphs of the said judgment is quoted hereinbelow:

"5. It appears on the facts in this case that no representation under sub-rule (2) was made by the appellant. The only question raised before us is whether, in the absence of such representation, the court was obliged to strike off the defence of the appellant.

6. It seems to us on a comprehensive understanding of Rule 5 of Order 15 that the true construction of the Rule should be thus. Sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, "the court may subject to the provisions of sub-rule (2) strike off his defence". We shall presently come to what this means. Sub-rule (2) obliges the court, before making an order for striking off the defence to

consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred, there is good reason for it. Now, it is not impossible that the record may contain such material already. In that event, can it be said that sub-rule (1) obliges the court to strike off the defence? We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so. It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under sub-rule (2), the defence should or should not be struck off. The word "may" in sub-rule (1) merely vests power in the court to strike off the defence. It does not oblige it to do so in every case of default. To that extent, we are unable to agree with the view taken by the High Court in Puran Chand (supra). We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order 15."

20. Again, Apex Court in the matter of ***Asha Rani Gupta(Supra)*** has taken the same view. Relevant paragraphs of the said judgment are quoted hereinbelow:

"37. Though the aforesaid decisions in cases of Miss Santosh Mehta, Smt. Kamla Devi and Manik Lal Majumdar related to the respective rent control legislations applicable to the respective jurisdictions, which may not be of direct application to the present case but and yet, the relevant propositions to be culled out for the present purpose are that any such provision depriving the tenant of defence because of default in payment of the due amount of rent/arrears have been construed liberally; and the expression "may' in regard to the power of the Court to strike out defence has been construed as directory and not mandatory. In other words, the Courts have leaned in favour of not assigning a mandatory character to such provisions of drastic consequence and have held that a discretion is indeed reserved with the Court concerned whether to penalise the tenant or not. However, and even while reserving such discretion, this Court has recognised the use of such discretion against the defendant-tenant in case of wilful failure or deliberate default or volitional non-performance. This Court has also explained the principles in different expressions by observing that if the mood of defiance or gross neglect is discerned, the tenant may forfeit his right to be heard in defence. The sum and substance of the matter is that the power to strike off defence is considered to be discretionary, which is to be exercised with circumspection but, relaxation is reserved for a bonafide tenant like those in the cases of Miss Santosh Mehta and Smt. Kamla Devi (supra) and not as a matter of course. The case of Bimal Chand Jain (supra)

directly related with Order XV Rule 5 CPC where the tenant had deposited the arrears admitted to be due but, failed to make regular deposits of monthly rent and failed to submit representation in terms of sub-rule (2) of Rule 5 of Order XV. The defence was struck off in that matter with the Trial Court and the High Court taking the said provisions of Order XV Rule 5 CPC as being mandatory in character. Such an approach was not approved by this Court while indicating the reserve of discretion in not striking off defence if, on the facts and circumstances existing on record, there be good reason for not doing so. The common thread running through the aforesaid decisions of this Court is that the power to strike off the defence is held to be a matter of discretion where, despite default, defence may not be struck off, for some good and adequate reason.

38. The question of good and adequate reason for not striking off the defence despite default would directly relate with such facts, factors and circumstances where full and punctual compliance had not been made for any bonafide cause, as contradistinguished from an approach of defiance or volitional/elective non-performance."

21. High Court of Uttarakhand at Nainital has also followed the same ratio of law in the matter of ***Gulshan Pahwa and Others(Supra).*** Relevant paragraphs of the said judgment are quoted hereinbelow:

"6. Thus, it can be seen that power to strike off defence is not to be exercised by treating it to be a statutory mandate. Since exercise of such power inflicts severe penal consequences, the court has discretion not to strike off, if on facts it finds good reason for not doing so, therefore, the power should be exercised after considering the facts and circumstances appearing on the record and in the event of their being a representation, after considering the representation.

9. In the humble opinion of this Court, revisional court's interference with the order passed by learned trial court was not warranted in the facts of the case, as it is not obligatory for the court in every case to strike off defence because of some delay in deposit of admitted rent. Since learned trial court has discretion in the matter, which was exercised well within jurisdiction, therefore, learned revisional court fell into error in interfering with the order passed by learned trial court."

22. In the present case, impugned order has been passed upon the application Paper No. 65-C filed by plaintiff-respondent and objection Paper No. 67-C dated 18.05.2022, filed by the petitioner-defendant. In the objection, petitioner has made a clear cut averment that all amount due has already been deposited. While passing the impugned order, Judge, Small Causes Court has not returned any finding upon that, but allowed the application 65-C and struck off the defence of the petitioner-defendant only on the ground that earlier application Paper No. 41-Ga has been rejected vide order dated 29.08.2018 and also affirmed by High Court.

23. In fact, Judge, Small Causes Court has wrongly interpreted the order of High Court dated 07.02.2019. Once the Court has granted liberty to petitioner-defendant to challenge the order of striking off of the defence, the implied meaning would be that, while considering the application to strike off the defence, it is mandatory on the part of the court below to decide the issue afresh, including the application Paper No. 41-Ga on merits again, but due

to incorrect interpretation, application Paper No. 65-C was allowed only on the ground of earlier order dated 29.08.2018, taking away the mandate of order of the High Court dated 07.02.2019.

24. The order of High Court dated 07.02.2019 has annulled the effect of order dated 29.08.2018 passed by Judge, Small Causes Court, Saharanpur, with liberty to petitioner to raise this issue again after, in case, any order has been passed for striking off of the defence. The spirit of the order of High Court is that, in case of passing of fresh order for striking off of the defence, petitioner would have full liberty to challenge the same and court below is required to decide the same on merits, without being impressed with the its earlier order dated 29.08.2018.

25. Even otherwise, while passing the order considering all the evidence under Order XV Rule 5, C.P.C. Court must have been very conscious, as passing of such order would take away the liberty of petitioner-defendant to lead the evidence and all other consequences, certainly resulting into allowing of suit without any protest.

26. Therefore, under such facts and circumstances of the case, the petition is **allowed**. The impugned order dated 14.11.2022, passed by Judge, Small Causes Court, Saharanpur in SCC Suit No. 25 of 2014, and order dated 31.01.2023 passed by District Judge, Saharanpur in SCC Revision No. 132 of 2022 are hereby quashed.

27. Matter is remanded back to Judge Small Causes Court, Saharanpur to decide afresh the application Paper No. 41-Ga, objection paper No. 44-Ga, application Paper No. 65-C and objection Paper No. 67-C maximum within two months from the production of certified copy of this order in light of observation made herein above.

28. It is made clear that petitioner-defendant is not granted liberty to file any fresh paper except judgments of courts.

(2023) 4 ILRA 315
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Matter Under Article 227 No. 10928 of 2022

Satyabhan Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondent

Counsel for the Petitioner:
Sri Ashutosh Singh

Counsel for the Respondents:
G.A.

A. Criminal Law – Confiscation of truck - Delhi Excise Act, 2009 - Section 61 - U.P. Excise Act, 1910 - Sections 5(A)(2), 60, 61 & 72 - N.D.P.S. Act,1985 - Section 21/22 - Collector is sole authority under the Act to pass an order for confiscation/release of vehicle so seized under the law.

Collector is vested with exclusive jurisdiction to confiscate any such thing like animal cart or other conveyance, if he is of opinion that this is subject to speedy wear and tear or natural decay or it is otherwise expedient in public interest, whether or not prosecution charges has been instituted or concluded while exercising powers of confiscation provided u/s 2 and 3 of the Act. The collector has not to wait for conclusion of trial relating to criminal offence under the Act and while confiscation order, he

has to record his satisfaction that the offence under the Act has been committed and the vehicle has been seized by competent official under provisions of the Act after giving opportunity of hearing to the person who claims to be owner of the vehicle. (Para 17)

In present case, this is admitted fact that no application was filed by the applicant before Court of Judicial Magistrate concerned for release of seized truck, the confiscation proceedings were initiated by Collector (ADM F&R) and on report of S.S.P, Mathura and after giving opportunity of hearing to the applicant/petitioner, learned ADM (F&R)/ collector passed impugned order of confiscation of the vehicle as such. Confiscation proceedings are not pending and are already decided by competent authority. (Para 16)

B. Once a vehicle is seized in violation of the provisions of U.P. Excise Act by competent police or Excise officer, a heavy burden is lied upon the owner of the vehicle which he has to discharge before the authorities concerned that firstly, he had no knowledge that an illegal act (carrying the illegal liquors) was being done with said vehicle and secondly, that he applied all the necessary safety and precautions to see that such an Act may not be committed by the said vehicle. The petitioner, in fact, failed to discharge his burden before ADM, as well as before the District Judge, that is the appellate authority.

The learned Additional District Magistrate while passing confiscation order stated that due to transportation of illicit liquor in the State of U.P., the vehicle is found to be involved in smuggling of liquor and its seizure, therefore its confiscation is found proper and therefore, it has to be disposed of in terms of Section 72 U.P. Excise Act. (Para 19)

C. Principle of Vicarious Liability - Even if the owner/petitioner was not found on the spot along with when the vehicle was seized in presence of co-accused, the principle of vicarious liability will apply to this police case as the vehicle was operated by the driver at the time of incident who was not the owner. The petitioner has failed to prove the fact before the Court below that the vehicle was transported with illicit liquor without knowledge or connivance except the stand taken by him that he was not aware about day to day movement of the vehicle as the same was operated by the driver on a fix rate paid to him on monthly basis. (Para 20)

D. An option has been given to the petitioner to pay the market value of the vehicle as ascertained by ARTO in lieu of its confiscation and therefore, it cannot be said that the petitioner has become entirely deprived of his vehicle by the impugned order and if the vehicle has not been auctioned yet, the collector will afford him an opportunity to deposit the market price of the vehicle as determined by ARTO concerned in lieu of confiscation and if he does so, the vehicle will be released in his favour and the amount deposited by him in lieu of confiscation will lie in the custody of Government subject to provisions of Section 72(8). (Para 21)

Writ petition dismissed. (E-4)

Precedent followed:

1. Ved Prakash Vs Uttar Pradesh, 1987 AWC 167

2. Virendra Gupta Vs State, Criminal Revision No. 2177 of 2018 (Para 6)

3. State (NCT of Delhi) Vs Narender, 2014 (13) SCC 100 (Para 6, 13)

4. Mustafa Vs St. of U.P. & anr., Civil Appeal No. 6418 of 2019, SCC online Web edn p. 1 (Para 6, 16)

Precedent cited:

1. Sunder Bhai Ambalal Desai Vs St. of Guj., 2003 (46) A.C.C. 223 (Para 8)

2. Chadra Pal Vs St. of U.P. & anr., Judgment of this Hon'ble Court dated 12.02.2021 in Application u/s 482 No. 1325 of 2021 (Para 9)

3. Pappu Yadav @ Bhoo Prakash Yadav Vs St. of U.P., (2014) AILJ 50 (Para 10)

Present petition challenges the order dated 30.05.2022, passed by learned

District Judge, Mathura in Civil Appeal No. 25 of 2020 (Satyabhan Vs. District Magistrate and another) as well as order dated 17.01.2019 passed by Additional District Magistrate (F&R), Mathura in Case No. 01798 of 2018 (Satyabhan Vs. State State).

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard learned counsel for the petitioner Shri Ashutosh Singh and learned A.G.A. for the State.

2. Instant criminal Misc. petition under Article 227 of the Constitution of India has been filed by the petitioner to set aside the order dated 30.05.2022 passed by learned District Judge, Mathura in Civil Appeal No. 25 of 2020 (Satyabhan Vs. District Magistrate and another) as well as order dated 17.01.2019 passed by Additional District Magistrate (F&R), Mathura in Case No. 01798 of 2018 (Satyabhan Vs. State State) under Section 72 U.P. Excise Act, 1910 otherwise petitioner shall suffer irreparable loss. By the impugned order dated 17.01.2019, learned A.D.M (F&R) has passed an order of confiscation of the truck bearing registration No. HR 67 B 1888 seized by police under Sections 60/72 Excise Act under Crime No. 382/2017 under Sections 420, 120B I.P.C.

3. Learned ADM (F&R) has directed auction of said vehicle and sale proceeds be deposited with Government treasury in criminal head, and also given an option to vehicle owner to deposit the current price of vehicle as ascertained by R.T.O.

4. Feeling aggrieved by the said confiscation order passed by learned ADM (F&R), the petitioner/owner of vehicle preferred a civil appeal under Section 72 Excise Act, before District Judge, Mathura who dismissed the appeal and affirmed the impugned order passed by learned ADM (F&R). The factual matrix of the case in brief are that the informant Excise Inspector, during his course of duty received an information on 22.09.2017 that a truck of Ashok Leyland bearing registration No. HR 67 B 1888 was likely to pass through Laxminagar crossing Mathura which is loaded with cartons of illicit liquor. The informant laid a trap placing reliance on said information with assistance of his colleagues and intercepted the said truck, however, the truck driver tried to run away by stepping down from the truck, but he was caught by one Excise Constable at around 1900 hours and another person who was sitting beside the driver in the cabin of the truck was also caught by team of excise officials in the process of escape. The arrested person disclosed their name as Vinod (Driver) and Parmendra. On searching the truck 100 cartons of Royal Stag brand classic whisky bottles and 40 half bottles of Royal Stag were found. The wrappers of said bottles displayed that "For Sale in Haryana Only". The papers of the truck were seized from dashboard of the vehicle which revealed that Satyawan s/o Ram Singh resident of Risalu, Panipat was registered as owner of the vehicle. The intensity of the seized liquor was tested on spot by breaking open the seal of three bottles which were separately sealed as sample. The cartons consisted 1200 full and 960 half bottles of whisky.

5. As said truck was caught on the charge of in the inter-state smuggling of the liquor, a report was made by S.S.P. Mathura on 31.10.2017 to District Magistrate for initiating confiscation proceedings under

Section 72 Excise Act, according to rules, a suo moto notice was issued on 6.11.2017 to the petitioner and service of notice on petitioner was held to be sufficient and an ex-parte confiscation order was passed on 22.11.2017. However, same was recalled on application of petitioner and after affording him an opportunity of hearing the impugned order for confiscation of vehicle was passed by ADM(F&R) on 17.01.2019 and civil appeal against that order was dismissed by District Judge on 30.05.2022.

6. Learned District Judge placing reliance on observations of Apex Court in **Mustafa Vs. State of Uttar Pradesh and others, C.A. No. 6418/ 2019 (SC), (GNTC of Delhi) Vs. Narender (2014) 13 SCC, 100 and Ved Prakash Vs. Uttar Pradesh 1987 AWC 167, Virendra Gupta Vs. State Criminal Revision No. 2177 of 2018** decided by this Court that the case law cited by learned counsel for the appellant is not applicable to the facts of the case as the alleged vehicle was carrying the illegal liquors seized by Excise officials and was involved in inter-state transportation of the same against rules. No fault could be found in impugned order passed by learned ADM (F&R) Mathura, while issuing confiscation order in regard to said truck. He finally concluded that there is no perversity, illegality, impropriety, material irregularity or jurisdictional error in order passed by learned Additional District Magistrate concerned and thus, affirmed the impugned order and dismissed the civil appeal preferred by the petitioner.

7. Learned counsel for the petitioner submitted that the said truck was hired by Vinod son of Ramphal for Rs. 45,000/- rent on oral agreement as he was known to the petitioner for last 4 to 5 years. However, on 22.09.2017 said truck was seized by excise officials within jurisdiction of P.S. Jamunapur, District- Mathura on charges of inter-state smuggling of liquor and was lodged by Excise Inspector in this regard. There is no dispute regarding ownership of the petitioner regarding the vehicle, he is registered owner of the said truck and wrongly added as an accused in said criminal case only due to the fact that he is owner of the said truck. The police filed a charge-sheet against him in said offence and cognizance has been taken against him by the Court. The petitioner had prayed for bail before the Court below and he has been released on bail. The order passed by learned Additional District Magistrate dated 22.11.2017 was an ex-parte order in which the vehicle is directed to be confiscated, the petitioner filed an restoration application for reviewing the said ex-parte order before learned ADM and same was recalled vide order dated 27.10.2018 and matter was reheard by him, however, confiscation order with regard to said vehicle was passed on 17.01.2019 and he did not consider the fact that said truck was used by driver Vinod on condition of paying Rs. 45,000/- per month as rent to the owner. The petitioner was not present at the time of the incident on the spot and he is not supposed to be aware of the day to day commercial activities of the driver in whose custody the truck was lying. Learned District Judge also failed to appreciate the facts of the case in proper manner and dismissed his civil appeal preferred against order of learned ADM. The said liquor was not obtained from possession of the petitioner, therefore the petitioner had to seek constitutional remedy before this Hon'ble Court. He further submitted that the vehicle has been kept idle since long resulting in wear and tear of the vehicle and its efficacy is deteriorating day by day, he earns his livelihood from this vehicle. This

is admitted position that he was not arrested on the spot.

8. Learned counsel for the appellant placed reliance on pronouncement of Hon'ble Apex Court in **Sunder Bhai AmbalaI Desai Vs. State of Gujarat 2003 (46) A.C.C.223** wherein Hon'ble Apex Court observed that it is of no use to keep such-seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of the applications for return of such vehicles. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court.

9. Learned counsel for the appellant also placed reliance on an AFR judgment of this court dated 12.02.2021 in Application under Section 482 No.1325 of 2021 **Chadra Pal Vs. State of U.P. and Another**, wherein it is held in view of law laid down by Apex Court as well as this Court as cited in judgment, Magistrate as well as Revisional Court ought to have decided the issue regarding their own jurisdiction for releasing seized vehicle in exercise of powers under the Code in respect of vehicle which has been seized and confiscation proceedings with regard to which are pending consideration before District Magistrate under Section 72 of Act, 1910. However, the said issue remains unanswered by both the courts below. Thus, the order impugned in present application cannot be sustained on account of erroneous reasoning and therefore, liable to be quashed and matter is remitted to concerned Magistrate to decide release application of the applicant afresh in the light of observations made herein above within a period of one month.

10. Learned counsel for the appellant further placed reliance on judgment of this Court in **Paapu Yadav alias Bhoo Prakash Yadav Vs. State of U.P.(2014) AIILJ 50**,the fact of the case were somewhat similar to present case as S.H.O Sikandrarau, District-Hathras intercepted an Indica car which was loaded with illicit liquor and intoxicating power, acting on a secret information. The petitioner was sole occupant of the vehicle, the intoxicating power appeared diazapam powder weighing 110 gms, he was apprehended under Section 60 of United Provinces Excise Act, 1910under Section 21/22 of N.D.P.S. Act. He was released on bail in due course and applied for release of vehicle before Judicial Magistrate who rejected the application on ground that confiscation proceedings with regard to said vehicle were under way before District Magistrate. He made a representation before District Magistrate under Section 5(A)(2) of Section 72 but same was rejected and confiscation order was passed and the vehicle was directed to be sold by public auction. The appeal preferred against order of District Magistrate was also dismissed by learned Additional Sessions Judge, Hathras. This Court observed that the appeal against confiscation order passed by District Magistrate will be heard as civil appeal not criminal appeal by District Judge. The word 'District Judge' is defined in Section 3(17) of the General Clauses Act as follows:-

"(17) "District Judge" shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High

Court in the exercise of its ordinary or extraordinary original civil jurisdiction." It is evident from the It is evident from the Notification that the appointed Appellate Judicial Authority is District Judge. An appeal to the District Judge should not have been heard or registered as Criminal Appeal. It should have been registered as Civil Appeal and should have been disposed of by the District Judge himself. Whenever a Judicial Authority is appointed as persona designata, hearing should be done by that Authority and as far as possible benefit of other Acts should not be taken." Endeavour should be made to decide the appeal by the District Judge himself. In Pappu Yadav's case this Court quashed impugned order of District Magistrate confiscating the vehicle of the petitioner and the order passed by the lower appellate court being erroneous and illegal and the respondents were directed to release the said Car in favour of the petitioner immediately in the same condition as it was on the date of its seizure. However, aforesaid case appears to be decided on ground that the Additional District Judge had decided the appeal as a criminal appeal instead of civil appeal and the same should have been decided by District Judge himself instead of transferring the same to concurrent of Additional District Judge. The Collector while exercising powers of confiscation under Section 72 of said Act is not a criminal court rather the Collector exercises its powers as a revenue authority. This Court also observed that the lower appellate court, thus, has not applied his mind to the facts of the case and the law applicable thereto and dismissed the appeal on the same ground as taken by the Collector for his satisfaction to confiscate the vehicle. It further observed in para 11that there is even not a single word in the confiscation order to meet out the objections made as above by the petitioner. This clearly indicates that the Collector while passing the impugned order of confiscation of the vehicle of the petitioner has not applied his mind to satisfy himself that the petitioner has committed any offence under any provisions of the U.P. Act No. IV of 1910. Thus, the impugned order is in the sheer violation of the legislative mandate as mentioned in sub-section (2) of Section 72 of the Act. The reason recorded by the Collector in his satisfaction that the petitioner has committed an offence due to which his car has become liable to confiscation simply because he disclosed his name as Pappu Yadav while in fact his name was Bhoo Prakash. In this regard, on inquiry made by the Collector itself, it was found that Pappu and Bhoo Prakash are one and the same person and Pappu Yadav is his nick name. Thus, the reason recorded for his satisfaction by the Collector that the petitioner has committed offence due to which his car has became liable to confiscation, is baseless. The Collector while exercising its discretionary power under Section 72 of U.P. Act No. IV of 1910 is not supposed to pass an order in a routine manner. The Collector has to apply his mind after going through the record or material of his own and record independent reasons for satisfaction that an offence under the said Act has been committed due to which the said vehicle is liable to be confiscation in sub-section (1) of Section 72 of the Act."

11. Provisions of Section 72 of the Act is reproduced as follows:-

72. What things are liable to confiscation - (1) Whenever an offence punishable under this Act has been committed-

(a) every [intoxicant] in respect of which such offence has been committed ;

(b) every still, utensil, implement or apparatus and all materials by means of which such offence has been committed ;

(c) every [intoxicant] lawfully imported, transported, manufactured, held in possession or sold along with or in addition to any [intoxicant] liable to confiscation under clause (a) ;

(d) every receptacle, package and covering in which any [intoxicant] as aforesaid or any materials, still, utensil, implement or apparatus is or are found, together with the other contents (if any) of such receptacle or package ;

(e) every animal, cart, vessel or other conveyance used in carrying such receptacle or package shall be liable to confiscation.

(2) Where anything or animal is seized under any provision of this Act and the Collector is satisfied for reasons to be recorded that an offence has been committed due to which such thing or animal has become liable to confiscation under sub-section (1), he may order confiscation of such thing or animal whether or not a prosecution for such offence has been instituted :

Provided that in the case of anything (except an intoxicant)or animal referred to in sub-section (1), the owner thereof shall be given an option to pay in lieu of its confiscation such fine as the Collector thinks adequate not exceeding its market value on the date of its seizure.

(3) Where the Collector on receiving report of seizure or on inspection of the seized thing, including any animal, cart, vessel or other conveyance, is of the opinion that any such thing or animal is subject to speedy wear and tear or natural decay or it is otherwise expedient in the public interest so to do, he may order such thing (except an intoxicant) or animal to be sold at the market price by auction or otherwise.

(4) Where any such thing or animal is sold as aforesaid, and -

(a) no order of confiscation is ultimately passed or maintained by the Collector under sub-section (2) or on review under sub-section (6) ; or

(b) an order passed on appeal under sub-section (7) so requires ; or

(c) in the case of a prosecution being instituted for the offence in respect of which the thing or the animal seized, the order of the Court so requires ;

the sale proceeds after deducting the expenses of the sale shall be paid to the person found entitled thereto ;

(5) (a) No order of confiscation under this section shall be made unless the owner thereof or the person from whom it is seized is given -

(i) a notice in writing informing him of the grounds on which such confiscation is proposed ;

(ii) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice ; and

(iii) a reasonable opportunity of being heard in the matter.

(b) Without prejudice to the provisions of clause (a), no order confiscating any animal, cart, vessel, or other conveyance shall be made if the owner thereof proves to the satisfaction of the Collector that it was used in carrying the contraband goods without the knowledge or connivance of the owner, his agent, if any, and the person-in-charge of the animal, cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

(6) Where on an application in that behalf being made to Collector within one month

from any order of confiscation made under sub-section (2), or as the case may be, after issuing notice on his own motion within one month from the order under that sub-section refusing confiscation to the owner of the thing or animal seized or to the person from whose possession it was seized, to show cause why the order should not be reviewed, and after giving him a reasonable opportunity of being heard, the Collector is satisfied that the order suffers from a mistake apparent on the face of the record including any mistake of law, he may pass such order on review as he thinks fit.

(7) Any person aggrieved by an order of confiscation under sub-section(2) or sub-section (6) may, within one month from the date of the communication to him of such order, appeal to judicial authority as the State Government may appoint in this behalf and the judicial authority shall, after giving an opportunity to the appellant to be heard, pass such order as it may think fit, confirming, modifying or annulling the order appealed against.

(8) Where a prosecution is instituted for the offence in relation to which such confiscation was ordered the thing or animal shall, subject to the provisions of sub-section (4), be disposed of in accordance with the order of the Court.

(9) No order of confiscation made by the Collector under this section shall prevent the infliction of any punishment to which the person affected thereby may be liable under this Act. "

12. On a meticulous analysis of Section 72 of U.P. Act No. IV of 1910, it emerges out that the Collector is empowered to confiscate anything described under Section 72(1) of the Actwhere the conditions prescribed in sub Section(1)(a) to (e) is satisfied and he has to afford a reasonable opportunity of being heard to the owner of the vehicle after issuing a notice in writing informing him of the grounds on which such confiscation is proposed and an opportunity of making a representation in writing against such proposed confiscation.

13. *Per contra*, learned A.G.A. submitted that there is no illegality, irregularity or perversity in impugned orders passed by learned confiscating authority, Additional District Magistrate (F&R) who has confiscated the vehicle in question, in exercise of powers under Section 72 of U.P. Excise Act, 1910 conferred on collector as well as order passed by learned District Judge, Mathura. The impugned orders are well within jurisdiction of both the statutory authorities and in consonance with provisions of Section 72 of the Act. So far as the judgment of this Court in Chandra Pal Vs. State of U.P. and Another (supra) is concerned, this case was decided on its own facts as in that case the release application of the vehicle seized under provisions of Section 62, 63, 72 U.P. Excise Act was moved before learned Additional Chief Judicial Magistrate who had rejected the application for release of the vehicle by placing reliance upon judgment of Apex Court in **State (NCT of Delhi) Vs. Narender 2014 (13) SCC 100** without deciding his jurisdiction to entertain the release application filed by the applicant seeking release of seized vehicle in terms of Section 457 Cr.P.C. and the same was affirmed by learned Sessions Judge in criminal revision filed by the applicant against the order of learned Magistrate.

14. This Court observed that orders impugned could not be sustained on account of erroneous reasoning and therefore, liable to be quashed.

15. This Court also observed that upon comparison of provisions in Delhi Excise Act 2009 as well as U.P. Excise Act,

1910, the Court finds that there is no provision in Act of 1910 similar to the provisions contained in Section 61 of U.P. Excise Act accordingly, ratio laid down in Section 61 of the Delhi Excise Act, 2009 bars the jurisdiction of all Courts but, even in the absence of similar provisions in the State (NCT of Delhi) Vs Narender (supra) is confined to matters arising out of Delhi Excise Act as such, aforesaid judgement is distinguishable and the ratio laid down therein cannot be applied ipso facto for deciding release application in respect of seized vehicle regarding which confiscation proceedings are pending in terms of Section 72 of Act, 1910.

16. In present case, this is admitted fact that no application was filed by the applicant before Court of Judicial Magistrate concerned for release of seized truck, the confiscation proceedings were initiated by Collector (ADM F&R) and in present case on report of S.S.P, Mathura and after giving opportunity of hearing to the applicant/petitioner, learned ADM (F&R)/ collector passed impugned order of confiscation of the vehicle as such. In present case, confiscation proceedings are not pending and are already decided by competent authority. It is not in dispute that collector is sole authority under the Act to pass an order for confiscation/release of vehicle so seized under the law. In this regard has been stated by Hon'ble Apex Court in Civil Appeal No. 6418 of 2019 **Mustafa Vs. State of U.P. and Anothers reported in SCC** online Web edn p.1, wherein Hon'ble Apex Court observed that Section 61 of the Delhi Excise Act, 2009 bars the jurisdiction of all Courts but, even in the absence of similar provisions in the Act, the principle laid down in State(NCT of Delhi) Vs. Narender 2014, is applicable in the present case as the Act is inconsistent with the provisions of the Code. The Court held that Collector has exclusive jurisdiction to confiscate the vehicles and in case the seized things are subject to speedy wear and tear or natural decay, he may order to sell the same in the manner prescribed under sub-section (3) of Section 72 of the Act. Sub- section (4) deals with distribution of sale proceeds when the seized thing is sold which is subject to wear and tear and natural decay or when it is expedient in public interest to do so. Sub-section (8) of Section 72 of the Act deals with a situation where a prosecution of an offence is instituted in relation to which confiscation was ordered, the thing or animal shall be disposed of subject to the provisions of sub-section (4) of Section 72 of the Act in accordance with the order of the Court. The order of the Court in sub-section (8) of Section 72 of the Act is after conclusion of the prosecution which is different from the seized things which are subject to speedy wear and tear or natural decay as contemplated by sub-section (3) of Section 72 of the Act.

17. On perusal of aforesaid dictum of Hon'ble Apex Court together with the statutory provisions under Section 72 of the Act, it can be held that collector is vested with exclusive jurisdiction to confiscate any such thing like animal cart or other conveyance, if he is of opinion that this is subject to speedy wear and tear or natural decay or it is otherwise expedient in public interest, whether or not prosecution charges has been instituted or concluded while exercising powers of confiscation provided under Section 2 and 3 of the Act. The collector has not to wait for conclusion of trial relating to criminal offence under the Act and while confiscation order, he has to record his satisfaction that the offence under the Act has been committed and the

vehicle has been seized by competent official under provisions of the Act after giving opportunity of hearing to the person who claims to be owner of the vehicle.

18. On perusal of Section 72 of the Act, it appears that in Section 72(V)(b) it is provided that *"Without prejudice to the provisions of clause (a), no order confiscating any animal, cart, vessel, or other conveyance shall be made if the owner thereof proves to the satisfaction of the Collector that it was used in carrying the contraband goods without the knowledge or connivance of the owner, his agent, if any, and the person incharge of the animal cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use."*

19. Now, it is absolutely clear that once a vehicle is seized in violation of the provisions of U.P. Excise Act by competent police or Excise officer, a heavy burden is lied upon the owner of the vehicle which he has to discharge before the authorities concerned that firstly, he had no knowledge that such an act was being done with said vehicle and secondly, that he applied all the necessary safety and precautions to see that such an Act may not be committed by the said vehicle. The petitioner, in fact, failed to discharge his burden before Addl. District Magistrate, as well as before the District Judge, that is the appellate authority. The learned Additional District Magistrate while passing confiscation order with regard to the vehicle has dealt with the case of petitioner with prayer to release the vehicle in his favour and after arriving at a conclusion that the said vehicle has been used in illegal smuggling of illicit liquor which consists of 140 cartons of Royal Stag brand manufactured in Haryana against U.P. Excise, which is a serious offence against State revenue and a conspiracy to defeat the U.P. Excise policy and for that reason an F.I.R lodged under Section 60/72 Excise Act along with Section 420, 120B I.P.C. He also stated that due to transportation of illicit liquor in the State of U.P., the vehicle is found to be involved in smuggling of liquor and its seizure, therefore its confiscation is found proper and therefore, it has to be disposed of in terms of Section 72 U.P. Excise Act.

20. Learned District Judge has also not found any infirmity, illegality or perversity in appeal preferred against the confiscation order which is by learned Collector/ADM (F&R). Even if the owner/petitioner was not found on the spot along with when the vehicle was seized in presence of co-accused, the principle of vicarious liability will apply to this police case as the vehicle was operated by the driver at the time of incident who was not the owner. The petitioner has failed to prove the fact before the Court below that the vehicle was transported with illicit liquor without knowledge or connivance except the stand taken by him that he was not aware about day to day movement of the vehicle as the same was operated by the driver on a fix rate paid to him on monthly basis.

21. Learned Collector has also given an option in impugned order to owner of the vehicle(present petitioner) to deposit the current price of vehicle as ascertained by ARTO and in that case, the vehicle will not be auctioned, otherwise same will be auctioned and the sale proceeds will be deposited in Government treasury and this order is in consonance with the provisions of Section 72(2) proviso which provided *that in the case of anything (except an*

*intoxicant) or animal referred to in sub-section (1), the owner thereof shall be given an option to pay in lieu of its confiscation such f*ine as the Collector thinks adequate, not exceeding its market value on the date of its seizure. Therefore, the option given to the petitioner to pay the market value of the vehicle as ascertained by ARTO in lieu of its confiscation and therefore, it cannot be said that the petitioner has become entirely deprived of his vehicle by the impugned order and if the vehicle has not been auctioned yet, the collector will afford him an opportunity to deposit the market price of the vehicle as determined by ARTO concerned in lieu of confiscation and if he does so, the vehicle will be released in his favour and the amount deposited by him in lieu of confiscation will lie in the custody of Government subject to provisions of sub-Section 8 of Section 72.

22. In view of the foregoing discussions, I find no illegality, irregularity or perversity in impugned orders passed by learned District Judge as well as Collector/ADM (F&R) concerned and the appeal is liable to be dismissed.

23. With above observations, the present writ petition stands **dismissed.**

(2023) 4 ILRA 325
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.03.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 706 of 2021

Manoj Gupta @ Manoj Kumar Gupta
...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Shashank Tripathi, Sri Atharva Dixit, Sri Manish Tiwary (Senior Adv.)

Counsel for the Opp. Parties:
G.A., Sri Manish Tandon, Sri Rakesh Dubey, Sri Sayed Imran Ibrahim

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 & Indian Penal Code, 1860-Sections 147, 148, 149,302, 34, 307, 120B and Section 7 of Criminal Law (Amendment) Act-The applicant was arrested at Chindwara, Madhya Pradesh by U.P. Police-No transit remand was obtained by the U.P. Police from the concerned Magistrate at Chindwara-applicant was produced before the remand Magistrate Kanpur Nagar, much after the expiry of 24 hours from the date and time of his arrest.-the detention of applicant by police after expiry of a period of 24 hours from the time of his arrest is manifestly illegal, the order of remand passed by the Magistrate Kanpur Nagar will not wipe out the aforesaid illegality-Thus, the fact that the charge sheet has been submitted against the applicant within 90 days from the date subsequent to the order of remand is wholly misconceived and is of no help to the state or the opposite party.(Para 1 to 38)

The application is allowed. (E-6)

List of Cases cited:

1. Madhu Limaye & ors. Vs St. of Bih. (1969) AIR SC 1014

2. Manoj Vs St. of M.P. (1999) 3 SCC 715

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

1. Heard Mr. Anoop Trivedi, the learned senior counsel assisted by Mr. Ramesh Chandra Agrahari, the learned counsel for applicant-Asim @ Pappu Smart, Mr. Sayed Imran Ibrahim, the

learned counsel for applicant- Manoj Gupta @ Manoj Kumar Gupta, Mr. Manuraj Singh along with Mr. Prashant Kumar, the learned A.G.A. for State and Mr. Rakesh Dubey, the learned counsel representing first informant/opposite party-2 in both the applications.

2. Perused the record.

3. Mr. Sayed Imran Ibrahim, the learned counsel for applicant- Manoj Gupta @ Manoj Kumar Gupta submits that the application filed by aforesaid applicant has been rendered infructuous by efflux of time. As such, on instructions received by him, he does not wish to press the application.

4. Learned A.G.A. for state and Mr. Rakesh Dubey, the learned counsel representing first informant/opposite party-2 have no objection to the prayer made by learned counsel for applicant-Manoj Gupta @ Manoj Kumar Gupta.

5. Consequently, Application under 482 Cr.P.C. No. 706 of 2021 (Manoj Gupta @ Manoj Kumar Gupta Vs. State of U.P. and another) is dismissed as having rendered infructuous.

6. Criminal Misc. Application under section 482 Cr.PC No. 19101 of 2020 (Asim @ Pappu Smart Vs. State of U.P. and another) has been filed by applicant Asim @ Pappu Smart challenging the order dated 01.10.2020 passed by Chief Metropolitan Magistrate, Kanpur Nagar in Criminal Case No. 15681 of 2020 (State Vs. Mohd. Asif @ Pappu Smart and Others) under Sections 147, 148, 149, 307, 302, 34, 120B IPC and Section 7 Criminal Law Amendment Act, Police Station-Chakeri, District-Kanpur Nagar, arising out of Case Crime No. 425 of 2020 (State Vs. Mohd. Asim @ Pappu Smart) under Sections 147, 148, 149, 302, 34, 307, 120-B I.P.C. and Section 7 Criminal Law (Amendment) Act, Police Station Chakeri, District-Kanpur Nagar, whereby the application for default bail filed by applicant has been rejected. Consequently, applicant, who is in custody, has been denied default bail.

7. Record shows that in respect of an incident, which is alleged to have occurred on 20.06.2020, a prompt F.I.R. dated 20.06.2020 was lodged by first informant/opposite party-2, Dharmendra Singh Sengar and was registered as Case Crime No. 425 of 2020 (State Vs. Mohd. Asim @ Pappu Smart) under Sections 147, 148, 149, 302, 34 I.P.C. and Section 7 Criminal Law (Amendment) Act, Police Station Chakeri, District-Kanpur Nagar. In the aforesaid F.I.R., six persons, namely, Mohd. Asif @ Pappu Smart, Saud Akhtar, Deenoo Upadhyay, Aridaman Singh, Mahfooz Akhtar and Manoj Gupta have been nominated as named accused, whereas certain unknown persons have also been arraigned as accused.

8. The gravamen of the allegations made in the F.I.R is to the effect that named accused alongwith their associates conspired/committed the crime in question by using firearm on account of which, one Pintoo Sengar sustained firearm injury and died on the spot.

9. After registration of aforesaid F.I.R., Investigating Officer proceeded with statutory investigation of above-mentioned case crime number in terms of Chapter XII Cr.P.C. He first took possession of the dead body of the deceased and accomplished the preliminary formality. Thereafter, a detailed police scroll was prepared and the dead

body of the deceased was dispatched for postmortem on 20.06.2020. Accordingly, post-mortem of the body of deceased was conducted on the same day i.e. on 20.06.2020. In the opinion of Autopsy Surgeon, the cause of death of deceased was shock and hemorrhage as a result of ante-mortem firearm injuries

10. Subsequent to above, Investigating Officer proceeded to undertake other formalities. Attempts were made to secure the arrest of named accused. Information appears to have been received by Investigating Officer that applicant, who is a named accused in concerned case crime number, is residing at Chindwara, Madhya Pradesh, Accordingly, Commissioner of Police, Commissionerate Kanpur Nagar constituted a police team, which went to Chhindwara, Madhya Pradesh to secure the arrest of accused-applicant. On 01.07.2020 applicant was arrested by U.P. Police at Chhindwara, Madhya Pradesh but produced before remand Magistrate at Kanpur Nagar on 03.07.2020 i.e. after an expiry of a period of 24 hours from the time of his arrest.

11. In the aforesaid background, applicant filed his bail application in terms of Section 167 (2) Cr.PC. claiming default bail before the Chief Judicial Magistrate, Kanpur Nagar primarily on the grounds that since the charge-sheet has been submitted beyond the period of 90 days from the date of the arrest of applicant i.e. 01.07.2020, therefore, he is liable to be enlarged on bail by default. In support of above, it was further stated that the applicant was arrested on 01.07.2020 at Chindwara, Madhya Pradesh. However, applicant was produced before the remand Magistrate on 03.07.2022 at Kanpur Nagar i.e. after an expiry of more than 24 hours from the time of his arrest which is illegal. Consequently, the detention of applicant after expiry of 24 hours from the time of his arrest is illegal. As the detention of applicant beyond 24 hours is illegal his subsequent detention after the order of remand passed by concerned Magistrate is also illegal. The remand order passed by concerned Magistrate on 03.07.2022 will not wipe out the aforesaid illegality which came into existence on account of the failure of the prosecution to act diligently by producing the applicant before the remand Magistrate within aforesaid period. The prosecution cannot be permitted to derive benefit from it's own wrong by placing reliance upon the order of remand passed by remand Magistrate and on basis thereof contend that the irregularity, if any, in the detention of applicant shall be wiped out with the passing of the remand order by the remand Magistrate. Consequently, applicant is entitled to be released on bail by default.

12. Prayer made by applicant did not find favour with the court below. Concerned Magistrate concluded that since applicant was produced before remand Magistrate on 03.07.2022, the period of 90 days shall be counted from the next date i.e. 04.07.2020. Since the charge sheet has been submitted against applicant on 01.10.2020 which is before the expiry of a period of 90 days from the date subsequent to the order of remand, therefore, applicant is not entitled to be enlarged on default bail. Consequently, concerned Magistrate declined bail by default to applicant by means of impugned order dated 01.10.2020.

13. Thus feeling aggrieved by above, applicant has now approached this Court by means of present application under Section 482 Cr.P.C.

14. Present application was vehemently opposed by Mr. Rakesh Dubey,

the learned counsel for first informant and the learned A.G.A.. Referring to the material on record, the learned counsel for first informant submits that it is clearly recorded in the case diary that applicant was arrested at Kanpur on 03.07.2020 and thereafter produced before remand Magistrate on 03.07.2020. Since the charge-sheet has been submitted against applicant on 01.10.2020 i.e. before expiry of a period of 90 days from the date succeeding 03.04.2020, therefore, applicant is not entitled to claim default bail.

15. Learned A.G.A. has also opposed the present application.

16. After hearing the respective counsel for the parties on 17.01.2023, this Court came to the conclusion that there is a serious dispute between the parties regarding the date and place of arrest of applicant. Accordingly, Court passed the following order:

"Supplementary affidavit filed by Mr. Rakesh Dubey, learned counsel representing opposite party no.2 in court today is taken on record.

Heard Mr. Anoop Trivedi, the learned Senior Counsel assisted by Sri Ramesh Chandra Agrahari, the learned counsel for applicant, the learned A.G.A. for State and Mr. Rakesh Dubey, the learned counsel representing first informant-opposite party no.2.

This is an application for default bail. One of the issue that has cropped up during the course of hearing for default bail is regarding the date of arrest of the accused-applicant. According to the learned Senior Counsel, the accused was arrested on 01.07.2020 at District Chindwara, Madhya Pradesh. The document evidencing the aforesaid fact are on record as Annexures 4, 5, 6 and 7 to the affidavit as well as the information received under the RTI Act, copy of which is on record as Annexure RA-1 to the rejoinder affidavit to the counter affidavit filed by State.

In the counter affidavit filed by the State with reference to the case diary, it has been averred in paragraph 10 that the applicant was arrested on 03.07.2020 at Kanpur. However, there is no document accompanying the counter affidavit filed by the State regarding above.

From perusal and evaluation of the material on record as noted hereinabove, there is a serious dispute between the parties regarding the date of arrest of the accused-applicant. Since the right to default bail is being canvassed before this Court, therefore the date of arrest has to be categorical and specific by this Court. In view of the conflicting claims and counter claims of the parties, it is hereby directed that the Commissioner of Police Commissionerate, Kanpur shall file his personal affidavit with regard to the actual date and place of arrest of the applicant with reference to the material on record that is Annexures 4, 5, 6 and 7 to the affidavit as well as Annexure RA-1 to the rejoinder affidavit filed by applicant to the counter affidavit filed by State.

Let the requisite supplementary affidavit be filed on or before 24.01.2023.

Matter shall reappear as unlisted on 30.01.2023 at 2:00 PM.

Copy of the order be supplied to the learned A.G.A. for compliance during course of the day.

Order Date :- 17.1.2023 "

17. Pursuant to above order dated 17.01.2023, Commissioner of Police, Police Commissionarate, Kanpur Nagar constituted a three member Special

Investigating Team i.e. SIT to examine the matter and submit its report. The SIT so constituted submitted its report dated 03.02.2023. The copy of same has been brought on record by means of a compliance affidavit on behalf of Commissioner of Police, Police Commissionerate, Kanpur Nagar filed by the learned A.G.A in Court.

18. Perusal of the aforesaid report submitted by the SIT clearly goes to show that the applicant was arrested at Chhindwara, Madhya Pradesh on 01.07.2020 but produced before the remand Magistrate at Kanpur Nagar on 03.07.2020 i.e. beyond 24 hours of his arrest.

19. In view of the above noted factual position, that has emerged before this Court, Mr. Anoop Trivedi, the learned senior counsel for applicant has urged that since arrest of applicant was made on 01.07.2020 but applicant was produced before remand Magistrate after expiry of 24 hours i.e. on 03.07.2020, which is manifestly illegal in view of Section 57 Cr.P.C. He, therefore, submits that police custody of applicant after expiry of 24 hours from the date and time of arrest of applicant is illegal. The order of remand passed by remand Magistrate dated 03.07.2020 purported to be in exercise of jurisdiction under Section 167(2) Cr.P.C. will not wipe out the illegality in the detention of applicant beyond 24 hours which has emerged on account of the failure of prosecution to produce the applicant before remand Magistrate within 24 hours from the date and time of his arrest. On the above premise, the learned senior counsel for applicant submits that applicant is thus clearly entitled to default bail in terms of Section 167(2) Cr.P.C. To buttress his submission, he has relied upon the following judgements of Supreme Court **Madhu Limaye and others Vs. State of Bihar AIR 1969 Supreme Court 1014 and Manoj Vs. State of Madhya Pradesh 1999 (3) SCC 715**.

20. He also submits that the Apex Court in the case of **Madhu Liimaye (Supra)** examined the right of a detenue to be produced before remand Magistrate within 24 hours of his arrest, in the light of the constitutional provision and the provisions of the Code (Cr.P.C.) and on basis thereof came to the conclusion that in no circumstance the detenue can be deprived of his right to be produced before the remand Magistrate within 24 hours of his arrest. According to the learned senior counsel, paragraphs 11 and 12 of the report are relevant for the issue in hand. He has thus laid much emphasis upon same.

21. According to the learned senior counsel, the issue that has cropped up for consideration before this Court in present application was incidentally, directly considered by the Supreme Court in **Manoj (supra).** Paragraph 9 of the report re-capitulates the issue involved herein as well as the view delineated by the Court. Accordingly, the same has been relied upon by the learned senior counsel.

22. Ratio laid down in both the judgments is to the effect that in case an accused, who has been taken into custody but has not been produced before remand Magistrate within 24 hours of his arrest as required under the constitutional mandate i.e. Article 22(1) of the Constitution of India, then the detention of such an accused beyond the period of 24 hours from the time of his arrest shall be rendered illegal and the same cannot get cured as legal with the passing of an order of remand by the

remand Magistrate in exercise of power under Section 167(2) Cr.P.C.

23. On the above premise, it is thus vehemently urged by the learned senior counsel for applicant that the impugned order denying default bail to the applicant cannot be sustained. The same is, therefore, liable to be quashed by this Court and applicant is entitled to be enlarged on bail.

24. Per contra, the learned A.G.A. for State has opposed the present application. He submits that it is an undisputed fact that applicant is involved in a heinous offence which is punishable under Section 302 I.P.C. Applicant is involved in a crime which is not private in nature but a crime against society. Applicant has been avoiding the judicial process. He was arrested by U.P. Police and thereafter produced before the remand Magistrate on 03.07.2022. Once the order of remand has been passed by concerned Magistrate, the irregularity, if any, in the detention of applicant beyond 24 hours from the time of his arrest stands cured. As such, the claim of applicant for default bail on the ground as noted herein above is wholly misconceived. No illegality has been committed by court below in passing the impugned order. It is thus strenuously urged by the learned counsel for first informant that no indulgence be granted by this Court in favour of applicant.

25. Mr. Rakesh Dubey, the learned counsel representing first informant/opposite party-2 has adopted the arguments raised by learned A.G.A.

26. In addition to above, the learned counsel representing first informant-opposite party 2 submits that once the order of remand has been passed by the remand Magistrate in exercise of jurisdiction under Section 167 (2) Cr.P.C., the right to claim default bail will be available only if the charge sheet has not been submitted within a period of 90 days from the date subsequent to the order of remand. In the present case, the police report under Section 173(2) Cr.P.C.(charge-sheet) has been submitted on 01.10.2020 which is within a period of 90 days from the date subsequent to the date of remand order itself. As such, the claim of applicant for grant of default bail is misconceived and therefore, present application is liable to be dismissed.

27. Having heard Mr. Anoop Trivedi, the learned Senior Counsel for applicant, Mr. Manuraj Singh and Mr. Prashant Kumar, the learned A.G.A. for State and Mr. Rakesh Dubey, the learned counsel representing first informant/opposite party-2, this Court finds that following issues need to be answered before considering the claim of applicant for grant of default bail.

I. What is the actual date and place of arrest of the applicant.

II. On what date the applicant was produced before remand Magistrate after his arrest. In case, the applicant was produced before remand Magistrate after expiry of a period of 24 hours from the date and time of his arrest then the detention of applicant subsequent to the order of remand passed by concerned Magistrate shall be rendered legal or irrespective of above shall continue to be illegal.

III. If the detention of applicant beyond 24 hours is proved to be illegal then whether applicant is entitled to claim default bail or the remand order passed by the remand Magistrate even after expiry of a period of 24 hours from the date and time of arrest of applicant will wipe out the

irregularity, if any, in the detention of the applicant beyond 24 hours of his arrest Or the remand order passed by the remand Magistrate after expiry of a period of 24 hours from the date and time of arrest of applicant will not wipe out the right of the applicant as guaranteed by Article 22(1) of the Constitution and the applicant, is entitled to default bail.

28. All the issues are interlinked and intertwined and therefore incapable of being dealt with, in isolation of each other. Accordingly, they are taken up together.

29. The Court takes notice of the fact that upon the rival submissions being urged before this Court regarding the actual date, time and place of arrest of applicant, this Court in order to ascertain the factual position regarding the day, date, time and place of arrest of applicant, passed the order dated 17.01.2023 which has already been quoted herein above. Pursuant to above order dated 17.01.2023, the Commissioner of Police, Police Commissionerate, Kanpur Nagar constituted a three member team i.e. SIT. The said SIT team has examined the documents and also verified the documents relied upon by the learned senior counsel for applicant in support of his contention that applicant was arrested on 01.07.2020 at Chindwara, Madhya Pradesh by conducting a fact finding enquiry. Thereafter, the SIT submitted its report dated 03.02.2023. Aforesaid report has been brought on record as Annexure-1 to the affidavit of compliance filed by the Commissioner of Police, Police Commissionerate, Kanpur before this Court through the learned A.G.A. The said report clearly goes to show that the accused-applicant was arrested at Chhindwara, Madhya Pradesh on 01.07.2020 and was thereafter produced by the UP police before the remand Magistrate, at Kanpur Nagar on 03.07.2020. Accused-applicant was handed in the Supurdagi of U.P. Police also. Thus the stand of the State before this Court is that the applicant was arrested on 01.07.2020 at Chindwara, Madhya Pradesh but was produced before the remand Magistrate at Kanpur Nagar on 03.07.2020 i.e. after expiry of a period of 24 hours from the date and time of his arrest.

30. The right of an accused to be produced before the remand Magistrate within 24 hours of his arrest is a fundamental right of the accused by virtue of Article 22 (1) of the Constitution of India. The said Article has been enshrined for protecting the life and liberty of citizens. It is like a safeguard against the might of the State. It manifests the principle of Rule of law. For ready reference, Article 22 (1) of the Constitution of India is reproduced herein-under:

" Article 22(1)

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

31. The scope of Article 22(1) of the Constitution of India and the nature and scope of the right which flows in favour of a detenue by reason of the said Article came to be examined by the Supreme Court in the case of **Madhu Limaye (Supra)**. The Apex Court examined the said question in the light of the provisions of the Constitution the Code i.e. (Cr.P.C.) and the submissions urged before it. The Court ultimately delineated its views in

paragraphs 11 and 14 of the report, which read as under:

"11 Article 22(1)embodies a rule which has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where the rule of law prevails. For example, the 6th amendment to the Constitution of the United States of America contains similar provisions and so does Article XXXIV of the Japanese Constitution of 1946. In England whenever an arrest is made without a warrant, the arrested person has a right to be informed not only that he is being arrested but also of the reasons or grounds for the arrest. The House of Lords in Christie & Another v. Leachinsky ((1947) 1 All EER 567) went into the origin and development of this rule. In the words of Viscount Simon if a policeman who entertained a reasonable suspicion that X had committed a felony were at liberty to arrest him and march him off to a police station without giving any explanation of why he was doing this, the prima facie right of personal liberty would be gravely infringed. Viscount Simon laid down several propositions which were not meant to be exhaustive. For our purposes we may refer to the first and the third :

"1. If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.

2. X X X X

3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained."

Lord Simonds gave an illustration of the circumstances where the accused must know why he is being arrested.

"There is no need to explain the reasons of arrest if the arrested man is caught red-handed and the crime is patent to high Heaven."

The two requirements of clause (1) ofArticle 22are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and, also, to know exactly what the accusation against him is so that he can exercise the second right, namely, of consulting a legal practitioner of his choice and to be defended by him. Clause (2) ofArticle 22provides the next and most material safeguard that the arrested person must be produced before a Magistrate within 24 hours of such arrest so that an independent authority exercising judicial powers may without delay apply is mind to his case. TheCriminal Procedure Codecontains analogous provisions inSection 60and340but out Constitution-makers were anxious to make these safeguards an integral part of fundamental rights. This is what Dr. B. R. Ambedkar said while moving for insertion ofArticle 15-A (as numbered in the Draft Bill of the Constitution)which corresponded to presentArticle 22 :

"Article 15-Amerely lifts from the provisionsof the Criminal Procedure Codetwo of the most fundamental principles which every civilised country follows as principles of international justice. It is quite true that these two provisions contained in clause (1) and

clause (2) are already to be found inthe Criminal Procedure Codeand thereby probably it might be said that we are really not making any very fundamental change. But we are, as I contend, making a fundamental change because what we are doing by the introduction ofArticle 15-Ais to put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate the two provisions, because they are now introduced in our Constitution itself."

"14.Once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters. This the State has failed to do. The remand orders are patently routine and appear to have been made mechanically. All that Mr. Chagla has said is that if the arrested persons wanted to challenge their legality the High Court should have been moved under appropriate provisionsof the Criminal Procedure Code. But it must be remembered that Madhu Limaye and others have, by moving this court underArt. 32of the Constitution, complained of detention or confinement in jail without compliance with the constitutional and legal provisions. If their detention in custody could not continue after their arrest because of the violation ofArt. 22(1)of the Constitution they were entitled to be released forthwith. The orders of remand are not such as would cure the constitutional infirmities. This disposes of the third contention of Madhu Limaye."

32. The same issue came up for consideration again before the Supreme Court in **Manoj (supra)**, weherein Court concluded in paragraph 9 of the report, as follows:-

"Here the prayer for bail is opposed on the ground that detention is without such authorisation. Can the benefit of bail be denied on such a ground?Section 167(1)of the Code is relevant in this context as it enjoins on the police officer concerned a legal obligation to forward the arrested accused to the nearest magistrate. That sub-section reads thus.

"Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed bysection 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of subb-inspector, shall forthwith transmit to the nearest judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate." .

33. On the above premise, Mr. Anoop Trivedi, the learned Senior counsel submits that it is now a proved fact that the applicant was arrested on 01.07.2020 at Chindwara, Madhya Pradesh but was produced before the remand Magistrate at Kanpur Nagar on 03.07.2020 i.e. after expiry of a period of 24 hours which is in clear derogation of Section 57 Cr.P.C. As a result, the right of the applicant as guaranteed under Article 22(1) of the Constitution of India stood clearly infringed. The detention of the applicant after expiry of a period of 24 hours from the date and time of his arrest is, therefore, clearly illegal The order of remand dated 03.07.2020 passed by the remand Magistrate at Kanpur Nagar, whereby applicant was sent to judicial remand will not wipe out the illegality in the detention

of the applicant beyond 24 hours from the time of his arrest and therefore, applicant is clearly entitled to default bail.

34. Learned A.G.A for State and Mr. Rakesh Dubey, the learned counsel for first informant have opposed this application. They have reiterated their submissions as already noted above. It is again urged that applicant is a named accused and involved in a heinous offence punishable under Section 302 I.P.C. Criminality committed by applicant is a crime against society. Applicant has been avoiding the process of the Court. Applicant could be arrested only on 01.07.2020 i.e. after 11 days from the date of the FIR and was produced before the remand Magistrate on 03.07.2020. However with the passing of the order of remand by the remand Magistrate on 03.07.2020, whereby applicant was sent to judicial remand the irregularity, if any, in the detention of applicant beyond 24 hours from the time of his arrest gets wiped out and the procedural defect shall stand cured. In view of above and coupled with the fact that the charge sheet was submitted against applicant before expiry of 90 days from the date subsequent to the date on which applicant was remanded to judicial custody, no ground exists to enlarge the applicant on bail by default. As such, no interference is warranted by this Court in present applications

35. Having heard, the learned Senior counsel for applicant, the learned A.G.A. for State, Mr. Rakesh Dubey, the learned counsel for first informant-opposite party 2 and upon perusal of record, the position that has emerged is that applicant is a named accused in Case Crime No. 425 of 2020 (State Vs. Mohd. Asim @ Pappu Smart) under Sections 147, 148, 149, 302, 34, 307, 120-B I.P.C. and Section 7 Criminal Law (Amendment) Act, Police Station Chakeri, District-Kanpur Nagar. The FIR regarding same was lodged on 23.08.2018. Applicant has been avoiding the process of Court. He did not surrender before the Court, but was arrested by the U.P. Police at Chindwara, Madhya Pradesh on 01.07.2020. The police report dated 30.09.2020 under Section 173(2) Cr.P.C. (charge-sheet) has been submitted against applicant on 01.10.2020 As such, on date, the applicant is a named/charge sheeted accused.

36. However, as noted above, the applicant was arrested on 01.07.2020 at Chindwara, Madhya Pradesh by U.P. Police. No transit remand was obtained by the U.P. Police from the concerned Magistrate at Chindwara. Applicant was handed in the Supurdagi of U.P. Police. He was produced before the remand Magistrate at Kanpur Nagar on 03.07.2020 i.e. much after the expiry of 24 hours from the date and time of his arrest. As such, the detention of applicant by police after expiry of a period of 24 hours from the time of his arrest is manifestly illegal. The order of remand dated 03.07.2020 passed by the remand Magistrate will not wipe out the aforesaid illegality. Therefore, the fact which has been strenuously urged before this Court on behalf of first informant that the charge sheet dated 30.09.2020 has been submitted against applicant within 90 days from the date subsequent to the order of remand i.e. 03.07.2020 is wholly misconceived and is of no help to the state or the opposite party 2. In the aforesaid circumstance, the law laid down by Supreme Court in **Madhu Limaye and others Vs. State of Bihar AIR 1969 Supreme Court 1014** and **Manoj Vs. State of Madhya Pradesh 1999 (3) SCC 715**. is clearly applicable to the present case.

37. In view of the discussion made above, the present application succeeds and is liable to be allowed.

38. It is accordingly **allowed.**

39. The impugned order dated 01.10.2020 passed by Chief Metropolitan Magistrate, Kanpur Nagar in Criminal Case No. 15681 of 2020 (State Vs. Mohd. Asif @ Pappu Smart and Others) under Sections 147, 148, 149, 307, 302, 34, 120B IPC and Section 7 Criminal Law Amendment Act, Police Station-Chakeri, District-Kanpur Nagar, arising out of Case Crime No. 425 of 2020 (State Vs. Mohd. Asim @ Pappu Smart) under Sections 147, 148, 149, 302, 34, 307, 120-B I.P.C. and Section 7 Criminal Law (Amendment) Act, Police Station Chakeri, District-Kanpur Nagar is hereby quashed.

40. The applicant shall be released on bail in aforesaid case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE/SHE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES ARE PRESENT IN COURT. IN CASE OF DEFAULT OF THIS CONDITION, IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT IT AS ABUSE OF LIBERTY OF BAIL AND PASS ORDERS IN ACCORDANCE WITH LAW.

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

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

(iv) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANT IS DELIBERATE OR WITHOUT SUFFICIENT CAUSE, THEN IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT SUCH DEFAULT AS ABUSE OF LIBERTY OF BAIL AND PROCEED AGAINST THE HIM/HER IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

(2023) 4 ILRA 336
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.03.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Application u/s 482 No. 727 of 2023
with
Application u/s 482 No. 27887 of 2022

Nasir Khan ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Satyendra Narayan Singh, Sri Saurabh Mishra

Counsel for the Opp. Parties:
G.A., Sri Rakesh Kumar Mishra

(A) Criminal Law - Code of Criminal procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections - 323, 417, 420, 452, 467, 468, 471, 504, 506 & 447 - The Code of criminal procedure, 1973 - Section 161, 156 (2) , 200 & 202 - ex debito justitiae (as a debt of justice ; as a matter of right) - Every High Court has inherent power to act *ex debito justitiae* to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court - correctness or otherwise of any deed like will-deed, power of attorney, sale-deed etc., which is registered by a public/government authority - can be more appropriately adjudicated by a Civil Judge on the basis of oral as well as documentary evidence to be led by the parties - unless or until the same is not decided that the same is false and fabricated deed - criminality cannot come into picture for making such deed.(Para - 24,46)

Applicant summoned in two cases - Quashing of - charge sheet, cognizance/summoning order as well as entire proceedings - Civil suit filed by opposite party no.2 - questioning - power of attorney executed in favour of applicant - various sale-deeds executed in respect of 14 bighas' of land in dispute for permanent injunction qua the said land - cancellation of power of attorney and sale-deeds - filed criminal cases after one by one against applicant - to exert pressure and to harass him.(Para -2,45)

HELD:-None of the offences for which the applicant is summoned in both the cases, is made out from the FIR and the complaint and material on record. Complainant/opposite party no.2 abuses process of law to implicate the applicant in criminal cases. Section 482 is designed to achieve the purpose of ensuring that criminal proceedings are not permitted to generate into weapons of harassment. Summoning orders impugned in both the applications as well as entire proceedings quashed. (Para - 45,47)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:

1. Mitesh Kumar Vs St. of Karn. & ors. , 2021 AIR (S.C.) 5298

2. St. of Karn. Vs L. Muniswamy & ors., (1977) 2 SCC 699

3. Madhavrao Jiwajirao Scindia & ors. Vs Sambhajirao Chandrojirao Angre & ors. (1988) 1 SCC 692

4. Janata Dal Vs H.S. Chowdhary , (992) 4 SCC 305

5. G. Sagar Suri & anr. Vs St. of U.P. & ors. , (2000) 2 SCC 636

6. Roy V.D. Vs St. of Kerala , (2000) 8 SCC 590

7. Zandu Pharmaceutical Works Ltd. & ors. Vs Mohd. Sharaful Haque & anr. , (2005) 1 SCC 122

8. I.O.C. Vs NEPC India Ltd. & ors. , (2006) 6 SCC 736

9. Inder Mohan Goswami Vs St. of Uttaranchal , (2007) 12 SCC 1

10. Paramjeet Batra Vs St. Uttarakhand , (2013) 11 SCC 673

11. Parbatbhai Aahir @ Parbatbhai Bhimsinbhai Karmur & ors. Vs St. of Guj. & anr. , (2017) 9 SCC 641

12. Sardar Ali Khan Vs St. of U.P. Through Principal Secretary, Home Department & anr., (2020) 12 SCC 51

13. Kapil Agarwal Vs Sanjay Sharma , (2021) 5 SCC 524

14. Randheer Singh Vs St. of U.P. & ors. , 2021 SCC OnLine SC 942

15. Syed Yaseer Ibrahim Vs St. of U. P. & anr. , 2022 SCC OnLine SC 271

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

1. Heard Mr. Satendra Narayan Singh, learned counsel for the applicant, Mr. Rakesh Kumar Mishra, learned counsel for opposite party no.2 and learned A.G.A. for the State.

2. The application under Section 482 Cr.P.C. No. 727 of 2023 has been filed on behalf of the applicant to quash the charge-sheet No. 58 of 2022 dated 10.04.2022, cognizance/ summoning order dated 14.04.2022 as well as entire proceedings of Case No. 517 of 2022 (State Vs. Nasir Khan), arising out of Case Crime No. 130 of 2021, under Sections 420, 467, 468, 471, 504, 506, 447 I.P.C., Police Station Kotwali, District Rampur, pending in the court of Additional Chief Judicial Magistrate, Court No.1, Rampur.

AND

The application under Section 482 Cr.P.C. No. 27887 of 2022 has been filed for quashing the summoning order dated 16th July, 2022 as well as the entire proceedings of Complaint Case No. 2537 of 2022 (Nihaluddin Vs. Nasir Khan & Others), under Sections 417, 452, 323 and 504 I.P.C., Police Station- Kotwali, District Rampur, pending in the court of Additional Chief Judicial Magistrate, Court No.1, Rampur.

3. Since the issue and laws on the subject are similar and identical, both the applications have been clubbed together and are finally decided by means of this common judgment. The application under Section 482 Cr.P.C. No. 727 of 2023 is being treated to be the leading case in which affidavits have been exchanged between the parties.

Version as unfolded in the FIR

4. The present criminal case borne out from a first information report lodged by Nihal-uddin Khan i.e. opposite party no.2 on 4th July, 2021 at 2357 hours against as many as 23 accused persons including the applicants. In the said FIR, it has been alleged that mother of the informant namely Raees Jahan Begum was having 14 Bigha land situated at Mohalla Culcutta, Police Station Kotwali, District Rampur, which was obtained by her through registered sale deed dated 25.06.1966. She died on 01.11.2015 and after her death her sons namely Alauddin, Haseemuddin and Nihaluddin (informant) have become the owners of the said land. It is alleged that taking advantage of the helplessness of the informant, the applicant after committing criminal conspiracy with the help of others obtained forged and fabricated power of attorney by one Sabir Khan but the applicants and their mother had not sold the said land. Sabir Khan died on 17.09.2004 and after his death the Power of Attorney

became invalid. But the applicant has executed sale deeds on 25.07.2018, 28.02.2011, 13.05.2013, 26.07.2016, 17.01.2017, 28.03.2013, 17.02.2016 and the same are illegal and the persons concerned are trying to get possessions for which an application was given to the District Magistrate and an F.I.R. as Case Crime No. 39 of 2020, under Sections 323, 504, 506, 307 I.P.C. was lodged against the applicant. The applicant has threatened the informant hence the present F.I.R. has been lodged.

Case of the Applicant

5. Learned counsel for the applicant submits that the alleged incident was occurred on 18.05.2021, whereas the first information report has been lodged after two months of the incident i.e. 04.07.2021 and there is no plausible explanation about the delay in lodging of the F.I.R.

6. After lodging of the aforesaid FIR, the investigation proceeded and the Investigating Officer has recorded the statement of the informant under Section 161 Cr.P.C. in which he has reiterated same version as unfolded in the F.I.R. The Investigating Officer also recorded the statements of formal witnesses, namely, Constable Sushil Kumar, S.I. Raees Ahmad, S.I. Vishwabandhu, S.I. Dharmendra Singh, Dr. Vivekanand (Executive Officer), Premendra Singh (Lekhpal) and Kaushal Dixit (Sub Registrar) under Section 161 Cr.P.C. and they have not supported the allegations made in the F.I.R. After conclusion of the statutory investigation under Chapter XII Cr.P.C., the Investigating Officer on 10.04.2022 submitted the charge-sheet No. 58 of 2022 against the applicant under Section 420, 467, 468, 471, 504, 506, 447 I.P.C. and upon submission of the same, on 14.04.2022 learned A.C.J.M.-I has taken cognizance. upon the same.

7. Earlier with regard to the same allegation, opposite party no.2 has moved an application under Section 156(3) Cr.P.C. and the same has been registered as Misc. Case No. 181/11 of 2019 (Nihaluddin Vs. Mohd. Akbar and others), which was rejected by the court below vide order dated 14th August, 2019 on the ground that since opposite party no.2 has not produced any document from which can be ascertained as to whose name has been recorded in the records of Nagar Palika over the land in dispute. It has also been recorded by the court below that in the police record it has been mentioned that a civil suit is pending between the parties and such fact has also been accepted by opposite party no.2 during the course of argument. On the basis of the aforesaid finding, the court below has opined that the application under Section 156 (3) has only been made to exert pressure upon the applicant. The court below has not found any merit in the said application filed by opposite party no.2 and ultimately rejected the same.

8. After dismissal of the aforesaid application filed by opposite party no.2 under Section 156 (3), an FIR being Case Crime No. 39 of 2020 under Section 323, 504, 506, 307 I.P.C. was lodged by opposite party no.2 against the applicant wherein nearly same allegations have been made against him due to land in question. In the said case, after investigation, final report has been submitted against the applicant and no protest petition was filed till date.

9. After failing twice in initiating false and frivolous criminal cases against the

applicant, opposite party no.2 lodged the present FIR and thereafter he has also filed a complaint being Complaint Case No. 2537 of 2021 (Nihaluddin Vs. Nasir Khan), under Section 417, 452, 323, 504 I.P.C. on false and frivolous allegations. The proceedings of the aforesaid complaint case were challenged by the applicant before this Court by means of connected application being Application U/s 482 No. 27887 of 2022 (Nasir Khan Vs. State of U.P. and another), wherein this Court vide order dated 20.10.2022 has stayed the further proceeding against the applicant.

10. For ready reference, order of this Court dated 20th October, 2022 is being quoted herein-below:

"Sri Satendra Narayan Singh, learned counsel for the applicant submits that opposite party no.2 is successful to initiate the criminal proceedings against the applicant despite earlier two attempts were rejected that is an application under Section 156 Cr.P.C. submitted by the opposite party no.2 was rejected by an order dated 14.8.2019 where allegations were made of committing forgery. Thereafter, an FIR was lodged by the opposite party no.2 for offence under Section 323, 504, 506 and 307 IPC in regard to an alleged incident occurred on 25.9.2019 and after investigation final report was submitted and as per instruction, till date no protest petition has been filed. Thereafter the present proceedings were initiated by way of filing a criminal complaint on 19.3.2020 making an allegation in the incident occurred on 13.9.2021 wherein after recording the statements under Section 200 and 202 Cr.P.C. applicants are summoned.

Learned counsel for the applicant further submits that the facts of the present case squarely fall under paragraph no.102 Sub Paragraph No.7 of State of Haryana and others vs. Ch. Bhajan Lal and others reported in 1992 AIR 604 SC.

Issue notice to opposite party no.2 returnable at an early date. Steps of service be taken within ten days.

Put up this case as fresh on the date fixed in the notice.

Further proceedings pursuant to Complaint Case No.2537 of 2021 (Nihaluddin vs. Nasir Khan and others) under Section 417, 452, 323, 504 IPC, Police Station Kotwali, District Rampur, pending in the court of learned Additional Chief Judicial Magistrate, Court No.1, Rampur shall remain stayed for a period of four weeks only."

11. It is submitted that under the Right to Information Act, an information was sought by the applicant from the Nagar Palika Parishad, Rampur whether the name of mother of opposite party no.2, namely, Raees Jahan or opposite party no.2 Nihaluddin has ever been recorded over the land in question in the relevant records or not, he has been informed by the Nagar Palika Parishad, Rampur that no such name has been recorded over the land in question.

12. The land in question was belonging to one Hakeem Nabi Ahmad, who has given the said land to Sabir Khan in the year 1957, therefore, he became the owner of the said land. Sabir Khan has executed Power of Attorney in favour of the applicant on 12.03.1997 authorizing him to deliver all rights, a copy of the Hindi translation from Urdu deed executed by Hakeem Nabi Ahmad in favour of Sabir Ali has been enclosed as Annexure-11 to the affidavit accompanying the present application whereas the copy of the registration of the said power of attorney

has been enclosed as Annexure No.9 to the affidavit accompanying the present application.

13. On 3rd February, 2019 for the same land dispute, opposite party no.2 and his brothers, namely, Allah-uddin, Haseen-uddin have a civil suit against as many as 185 persons including the applicant in the Court of Civil Judge (Senior Division), Rampur bearing Original Suit No. 72 of 2019 (Nihal-uddin & Others Vs. Mohd. Ahmad Khan & Others), for permanent injunction restraining the defendants to the said suit from interfering in peaceful possession of the plaintiffs of the said suit over the land in question, a copy of the plaint of the said suit has been enclosed as Annexure No.10 to the affidavit accompanying the present application. The said suit is still pending.

The case of opposite party no.2 as per the counter affidavit filed on his behalf:

14. Mrs. Sarvari Begum wife of Mohd. Ali Khan, who was the maternal grand-mother (Nani) of opposite party no.2 executed a registered sale-deed in favour of mother of opposite party no.2, namely Mrs. Raees Jahan Begum on 27th June, 1966, a copy of which has been enclosed as Annexure-C.A.-3 to the counter affidavit filed on behalf of opposite party no.2. After the death of his mother, names of opposite party no.2 and his two brothers were entered into the records of Nagar Palika Parishad, Rampur.

15. **Submission of the learned counsel for the Applicant**

(i) There is delay of nearly two months in lodging of FIR for the alleged incident but no plausible explanation has been given.

(ii) This is case of no injury nor any medical examination report qua any injured or the part of the case diary has been bought on record.

(iii) On being unsuccessful twice in initiating criminal proceedings against the applicant, Opposite party no.2 has lodged the present FIR only in order to exert pressure upon him on false and frivolous allegations, when as a matter of fact for the dispute of same land, he has already filed a civil suit in the year 2019 against the applicants and others.

(iv) The alleged incident dated 18th May, 2021 as has been mentioned in the FIR has never occurred and all the allegations mentioned therein are wholly false and concocted.

(v) The present criminal case initiated by opposite party no.2 against the applicant is nothing but a bundle of lie and the same has been lodged only for exploiting the applicant by indulging his name in a fake, false and frivolous case. The entire prosecution story as unfolded in the first information report is absolutely a self-made story projected by opposite party no.2.

(vi) The case in hand is purely civil nature and by the present F.I.R. an attempt has been made to enforce the memorandum of understanding by giving criminal colour. In support of his submission he has drawn the attention of the Court to paragraph-47 of the Judgment of the Hon'ble Supreme Court in the case of **Mitesh Kumar Vs. State of Karnataka & Ors.** reported in *2021 AIR (Supreme Court) 5298*.

(vii) The applicant has not committed any forgery nor he has cheated anyone nor he has manufactured any forged documents.

(viii) The Investigating Officer has not recorded statement of any family member

of opposite party no.2 and only recording the statement of opposite party no.2 he has submitted the impugned charge-sheet against the applicant without collecting any material evidence against the applicant.

(ix) The judgment of the Hon'ble Surpeme Court in the case of **State of Haryana & Others Vs. Bhajan Lal & Others** reported in *1992 Suppl. (1) SCC 335* has been referred for drawing the attention of the Court to the issue that in several categories of cases, power under Section 482 Cr.P.C. can be exercised by this Court for quashing the malicious proceedings. The case of the applicant is covered with the seventh category mentioned in the judgment of the Hon'ble Supreme Court in the case of Bhajan Lal (Supra).

(x) The averments made in paragraph-6 of the counter affidavit filed on behalf of opposite party no.2 that the applicant has four criminal antecedents to his credit except the present one is absolutely incorrect. Only three cases are against the applicant, which have been initiated by opposite party no.2 in order to exert pressure upon him for resolving the dispute giving rise to the civil proceedings initiated by him. In case crime no. 39 of 2020 lodged by opposite party no.2 against the applicant, final report has been submitted by the police before the court concerned and opposite party no.2 has not filed any protest petition against the same, the further proceedings of Complaint Case No. 2537 of 2022 initiated by opposite party no.2 have already been stayed by this Court vide order dated 20th October, 2022 in connected application being Application No. 27887 of 2022, whereas case crime no. 130 of 2021 is present one, proceedings of which are under challenge in the leading application under Section 482 Cr.P.C.

16. Learned counsel for the applicants, therefore, submitted that the present criminal proceedings initiated against the applicants are not only malicious but also amount to an abuse of the process of the Court.

On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicants that the proceedings of the above mentioned complaint case are liable to be quashed by this Court.

17. Per contra, learned A.G.A. and the learned counsel for opposite party no.2 have submitted that from the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants. All the submissions made relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. He also submits that it is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings.

18. Learned counsel for opposite party no.2 further submits that the applicant has four criminal antecedents to his credit except the present one and he is habitual offender in grabbing various properties.

19. He also submits that the alleged power of attorney dated 12th March, 1997 executed in favour of applicant, namely, Nasir Khan by Sabir Khan is a forged and fabricated document. In order to grab the property the applicant has got prepared the same. Neither the name of Sabir Khan nor the name of the applicant has ever recorded

in the records of the Nagar Palika Parishad, Rampur over the land in dispute.

On the cumulative strength of the aforesaid, learned A.G.A. and the learned counsel for opposite party no.2 urge that offence under Sections 420, 467, 468, 471, 504, 506, 447 I.P.C. is made out against the applicant. The present application under Section 482 Cr.P.C. is devoid of merit and the same is liable to be dismissed by this Court.

20. I have considered the submissions made by the learned counsel for the parties and have gone through the records of both the applications.

21. It is not in dispute that the dispute arose between the parties is for 14 bighas land situated at Mohalla-Culcutta, Police Station-Kotwali, District-Rampur. It is also an admitted position that for permanent injunction and proclamation over the said land, opposite party no.2 and his two brothers have filed civil suit on 3rd February, 2019 before the court being Original Suit No. 72 of 2019 (Nihal-uddin & Others Vs. Mohd. Ahmad Khan & Others), which is pending consideration. It is therefore, necessary for this Court to refer the averments and the prayer made by opposite party no.2 along with his two brothers in the plaint, which are being quoted herein-below:

उपरोक्त वाद में वादीगण निम्नलिखित निवेदन करते हैं-

"1. यहकि वादीगण आपस में सगे भाई है तथा वादपत्र के अन्त में वर्णित भूमि स्थित मौ० कलकत्ता तहसील सदर जिला रामपुर, जिसे वादपत्र के साथ संलग्न नक्शे में लाल रंग, हरे रंग तथा पीले रंग से प्रदर्शित किया गया है, के मालिक व काबिज है।

2. यहकि वादीगण की माता श्रीमति रईस जहॉ बेगम पत्नी श्री जमालुद्दीन निवासनी मौ० कलकत्ता तहसील सदर जिला रामपुर में स्थित भूमि जिसे वाद पत्र के साथ संलग्न मानाचित्र में प्रदर्शित किया गया है, की मालिक व काबिज थी। उक्त सम्पत्ति में से 14 बीघा पुख्ता भूमि श्रीमति रईस जहॉ बेगम ने श्रीमति सरवरी बेगम से विक्रय पत्र दिनॉकी 25.0.1966के द्वारा खरीदी थी। श्रीमति सरवरी बेगम श्रीमति रईस जहाँ बेगम की माता थी। श्रीमति सरवरी बेगम ने अपनी बेटी के हक में जिस 14 पुख्ता भूमि का वयनामा दिनॉक 25.06.1966 को निष्पादित किया था वह भूमि श्रीमति सरवरी बेगम ने विक्रय पत्र दिनॉक 6.11.1931 के द्वारा मकबूल हुसैन खा आदि से खरीदी थी। इस 1931 के विक्रय पत्र का उपनिबंधक कार्यालय में आग लगने के बाद पुनः इन्द्राज भी हुआ है। इस विक्रय पत्र द्वारा क्रय की गयी भूमि से उत्तर में भी श्रीमति सरवरी बेगम की अन्य भूमि लगभग 50 बीघा खाम थी। यह भूमि भी सरवरी बेगम की मृत्यु के उपरान्त श्रीमति रईस जहाँ बेगम को विरासत में मिली। सरवरी बेगम को उक्त 50 बीघा खाम भूमि उनके पति श्री दूल्हा खाँ से विरासत में मिली थी, जोकि दूल्हा खां की दादालाही भूमि थी।

3. यहकि उपरोक्त वर्णित प्रकार से श्रीमति रईस जहाँ बेगम को 14 बीघा पुख्ता अर्थात 70 बीघा खाम विक्रय पत्र दिनॉक 27.06.1966 के आधार पर तथा 50 बीघा खाम विरासत में प्राप्त हुयी। इस प्रकार श्रीमति रईस जहाँ बेगम की मो० कलकत्ता में कुल 120 बीघा खाम भूमि थी। मो० कलकत्ता में अधिकतर भूमि श्रीमति रईस जहाँ की ही थी। यह भूमि श्रीमति रईस जहाँ के स्वर्गवास पर उनके पुत्रों वादीगण को विरासतन प्राप्त हुयी ।

4. यहकि वर्ष 1931 के विक्रय पत्र के द्वारा सरवरी बेगम द्वारा खरीदी गयी सम्पत्ति की सीमायें उक्त विक्रयपत्र में निम्नप्रकार लिखी है-

1. पूर्व - रास्ता व आराजी अर्जुन मिल्कीयत जोजा हकीम फखरूददीन व खेत अली खाँ

पश्चिम - तालाब व खेत सरवरी फखरूद्दीन अली जान

उत्तर - आराजी व कब्जा फखरुद्दीन

दक्षिण - कब्रस्तान व खेत बुद्धन खा

2. पूर्व - खेत अम्मन खाँ

पश्चिम - रास्ता व खेत सरवरी

उत्तर - कब्रस्तान

दक्षिण - नाला सरकारी

5. यहकि वर्ष 1966 के जिस विक्रय पत्र से श्रीमति रईस जहाँ न सम्पत्तिःखरीदी उस बयनामें के समय मौके पर हुये परिवर्तनों के कारण विक्रय पत्र में निम्नलिखित सीमाओं का उल्लेख है-

क. पूर्व - रास्ता व आराजी खेत अर्जुन।

पश्चिम - नाला संरकारी

उत्तर - आराजी अर्जुन मकानात बागवान

दक्षिण - कब्रस्तान

ख. पूर्व - आराजी खेत अर्जुन

पश्चिम - नाला

उत्तर - आराजी खेत

दक्षिण - आराजी सरवरी

6. यहकि लम्बी अवधि में परिवर्तन होता रहा कुल विवादित भूमि की वर्तमान स्थिति वाद पत्र के साथ संलग्न नक्शे में प्रदर्शित है। विवादित भूमि का रोमपुर नगर पालिका परिषद रामपुर के अभिलेखों में प्लॉट स० 1808, 1809, 1010, 1811 1812, 1813, 286, 287, 288, 289, 290, 291, 292, 293 294 295, 296, 297, 298, 326, 1687, 1688, 1651,1653,1654अंकित है।

7. यहकि वर्ष 1931 के विक्रय पत्र व 1966 के विक्रय पत्र में सम्पत्ति की दो सीमाये दी गयी है। एक सीमा की सम्पत्ति को मानचित्र में हरे रंग तथा दूसरी सीमा की सम्पत्ति को पीले रंग से तथा सरवरी बेगम से राईस जहाँ को विरासत में मिली सम्पति को लाल रंग से प्रदर्शित किया गया है।

8. यहकि रईस जहाँ बेगम को ही कुछ भूमि को सम्मिलित करते हुये सरकार द्वारा आसरा कॉलोनी, पानी की टंकी का निर्माण कर लिया गया तथा कुछ भाग पर मन्दिर व स्कूल बन गया। उक्त सम्पत्ति के सम्बन्ध मैं प्रस्तुत बाद में वादीगण कोई विवाद नही कर रहे है तथा उसे सलग्न मानचित्र में प्रदर्शित किया गया है। यह सम्पत्ति प्रस्तुत बाद में विवादित नहीं है। इस सम्पत्ति के सम्बन्ध मे वादीगण सम्बन्धित व्यक्तियों / सरकार के विरूद्ध अलग से कार्यवाही करेंगे।

9. यह कि श्रीमति रईस जहाँ ने अपने जीवनकाल में अपनी सम्मति में से कुछ सम्पत्ति विक्रय पत्रों के द्वारा बेच दी। उनकी मृत्यु पर विरासतन प्राप्त हुयी सम्पत्ति में से एक भूखण्ड वादी स० 1 व 2 द्वारा विक्रय किया गया बेची गयी सम्पत्ति का विवरण वाद पत्र के साथ संलग्न अनुसूची क 't' मे वर्णित है तथा बेची गयी सम्पत्ति को वाद पत्र के साथ सलग्न नक्शे में नीले रंग से प्रदर्शित किया गया है- -

10. यहकि श्रीमति रईस जहाँ की उक्त सम्पत्ति के सम्बन्ध में उनके जीवनकाल में काफी विवाद भी चला। तुलाराम, रोशनलाल व छोलीराम ने श्रीमति रईस जहाँ बेगम से 919 वर्ग मीटर आराजी खरीदने का इकरारनामा मुआयदावय प्रदर्शित करते हुये एक वाद मूलवाद स० 26/198 तुलाराम आदि प्रति श्रीमति रईस जहाँ योजित किया, जिसमें श्रीमति रईस जहाँ द्वारा उक्त इकरारनामें को घोखाधड़ी के आधार पर निष्पादित होना कहा गया तथा यह भी उल्लेख किया कि श्रीमति रईस जहाँ ने तीन विक्रय पत्रों दिनॉकी 13.11.1986 के द्वारा मसरूर फाल्ना बेगम को 100 गज आराजी ,नन्ही बेगम को 100 वर्गगज आराजी तथा विक्रय पत्र दिनॉकी: 23.11.1986 के द्वारा श्रीमति रहमत जहाँ बेगम को 100 वर्गगज भूमि बेच दी है अन्त में उक्त दावा खारिज हो गया।

11. यहकि श्रीमति रईस जहॉ बहुत सम्पन्न महिला थी। इस कारण विभिन्न व्यक्ति समय-समय पर उनकी सम्पत्ति हडपने का प्रयास करते रहते थे। श्रीमति रईस जहाँ ने विवादित सम्पत्ति पर समय-समय पर मकानात आदि का निर्माण भी किया था।

12. यहकि श्रीमति रईस जहाँ का दिनांक 1.11.2015 को स्वर्गवास हो गया। वादी स० 1 निहालुद्दीन श्रीनगर में कारोबार करते है जबकि वादी स० 2 व 3 दिल्ली में कारोबार करते हैं तथा वादीगण की माता अधिकतर अपने पुत्रों के साथ दिल्ली में रहती थी इसी बात का अबैध लाभ उठाते हुये प्रतिवादीगण स० 1 ता 4 व 10 ने आपस में साजिश करके वादीगण की सम्पत्ति को धोखाधडी व चार सौ बीसी के आधार पर विभिन्न व्यक्तियों के नाम विक्रय पत्र करना प्रारम्भ कर दिये जबकि प्रतिवादीगण स० 1 ता 4 व 10 का विवादित सम्पत्ति के स्वामित्व व कब्जे से कोई सम्बन्ध नही था। प्रतिवादी स० 10 ने स्वयं को साबिर खाँ का मुख्यार प्रदर्शित करते हुये वयनामे किये गये। जबकि साबिर खाँ का भी विवादित सम्पत्ति के कब्जे व स्वामित्व से कोई सम्बन्ध नही था। यह महत्वपूर्ण है कि प्रश्नगत वयनामो में भी यह उल्लेख नही है कि प्रतिवादीगण स० 1 व साबिर खाँ तथा प्रतिवादी सo 10 के पास उक्त सम्पत्ति किस आधार पर आयी है। मौके पर वादीगण का ही कब्जा व दखल है। वादीगण द्वारा कराया गया कुछ निर्माण मौके पर मौजूद है। वादीगण की माँ ने अपने जीवनकाल में विवादित भूमि की प्लॉटिंग करने हेतु कुछ रास्ते बनाये थे जोकि मौके पर मौजूद हैं। श्रीमति रईस जहाँ ने कुछ सम्पत्ति अपने जीवनकाल में बेच दी थी जिसका विवरण पूर्व में दिया जा चुका है। शेष सम्पत्ति वादीगण की है तथा किसी अन्य का उक्त सम्पत्ति पर कोई कब्जा व अधिकार नही है।

13यहकि वादीगण की सम्पत्ति में नये नाले का निर्माण नगरपालिका परिषद रामपुर द्वारा कुछ वर्ष पूर्व किया गया। उक्त नालों से वादीगण को भी लाभ था इस कारण वादीगण ने उक्त नालों के निर्माण में कोई आपत्ति नही की।

14 . यहकि वादीगण ने उपनिबन्धक कार्यालय, तहसील सदर जिला रामपुर में निरीक्षण कराया तो पता लगा कि वादीगण की अनुपस्थिति में तथा श्रीमति रईस जहाँ की वृद्धावस्था व अशिक्षित होने का प्रतिवादीगण ने लाभ उठाया है तथा वास्तविक स्वामियों की बिना सहमति व जानकारी के सम्पत्ति के बयनामें करा दिये, जिसका प्रतिवादीगण को कोई अधिकार नही था।

15 यहकि निरीक्षण से वादीगण को विवादित भूमि के जो विक्रय पत्र प्राप्त हुये उनका विवरण वाद पत्र के साथ संलग्न अनुसूची "ख" में वर्णित है। यह सभी विक्रय पत्र वादीगण की विवादित सम्पत्ति से सम्बन्धित है तथा शून्य व निष्प्रभावी है। विक्रय पत्रों का ज्ञान वादीगण को लगभग । वर्ष पूर्व हुआ है। मुआयना करने व

नकले प्राप्त करने में तथा विवादित भूमि का नक्शा बनवाने में वादीगण को काफी समय लग गया वादीगण अपनी ओर से कोई देर किये बिना प्रस्तुत वाद वास्ते उद् घोषणा व स्थाई निषेधाज्ञा दायर कर रहे है।

16. यहकि वाद पत्र के साथ संलग्न अनुसूची 'ख' में वर्णित सभी बयनामें निःशून्य व निष्प्रभावी एंव अवैध है। उक्त विक्रय पत्रों के आधार पर प्रतिवादीगण को विवादित सम्पत्ति में कोई हक व अधिकार प्राप्त नही होते है। प्रश्नगत विक्रय पत्रों के अस्तित्व में रहने से वादीगण के अधिकारों पर प्रतिकूल प्रभाव पड़ने का खतरा है।

17. यहकि प्रतिवादीगण मौके पर विवादित सम्पत्ति पर कब्जा करके निर्माण कर लेने हेतु प्रयासरत है पिछले 3 माह से प्रतिवादीगण व वादीगण का इस सम्बन्ध में विवाद चल रहा है। वादीगण ने पुलिस की सहायता से प्रतिवादीगण को मौके पर कब्जा कर निर्माण करने से रोका है किन्तु वादीगण की उपस्थिति में दिनांक 22.03.2019 को कुछ प्रतिवादीगण मौके पर आ गये तथा उन्होने कहा कि जैसे ही तुम लोग रामपुर से अपने काम पर वापस जाओगे तो हम मौके पर जाकर कब्जा कर लेगे ऐसी स्थिति में वादीगण के पास प्रस्तुत वाद वास्ते उद्घोषणा व निषेधाज्ञा "दायर करने के अतिरिक्त अन्य कोई विकल्प नही है।

18. यहकि प्रतिवादी सईद अहमद द्वारा विवादित सम्पत्ति के एक भाग को शौकत अली से प्राप्त होना कहकर एक निषेधाज्ञा का वाद मूलवाद स० 96 / 2018 सईद अहमद प्रति अलाउद्दीन आदि वादीगण के विरूद्ध योजित किया गया वाद में प्रतिवादीगण (प्रस्तुत वाद के वादी) द्वारा प्रतिवाद पत्र प्रस्तुत किया गया तथा सिविल जज (कनिष्ठ खण्ड) रामपुर द्वारा आदेश दिनॉकी 1.10.2018 से उक्त सईद अहमद का स्वामित्व ना मानते हुये उनका निषेधाज्ञा प्रार्थना पत्र निरस्त कर दिया गया।

19 यह यदि प्रतिवादीगण को मौके पर कब्जा करने से व निर्माण करने से नही रोका गया तो वादीगण की अपूर्णनीय क्षति होगी तथा मौके की स्थिति परिवर्तित हो जायेगी एवं अनावश्यक मुकदमेबाजी भी प्रारम्भ हो जायेगी।

20. यहकि प्रतिवादीगण स० 10 द्वारा स्वयं को साबिर खां का मुख्तारेआम प्रदर्शित करते हुये विक्रय पत्र निष्पादित किये गये हैं जबकि साबिर अली का नासिर खां से कोई रिश्ता नही था कथित मुख्तारनामा भी जाली व फर्जी अभिलेख है। प्रतिवादीगण स० 5 ता 7 साबिर खॉ के वारिसान है। साबिर खाँ का विवादित सम्पत्ति में कोई स्वामीत्व हक व अधिकार व कब्जा नहीं था इस कारण उन्हें विवादित सम्पत्ति के सम्बन्ध में किसी को अपना मुख्तार बनाने का कोई अधिकार नही था।

21 यहकि मौ० शाकिर के पक्ष में एक विक्रय पत्र निष्पादित हुआ किन्तु उनका स्वर्गवास हो चुका है और प्रतिवादीगण स. 49 ता 54 उनके वारिसान है।

22 यहकि वाद के लिये वाद कारण उपरोक्त तथ्यों से तथा अन्त में दिनांक 22. 03.2019 को प्रतिवादीगण द्वारा मौके पर आकर जबरदस्ती कब्जा कर निर्माण कर लेने की धमकी देने से वादीगण को प्रतिवादीगण के विरुद्ध न्यायालय के क्षेत्राधिकार में हासिल व पैदा हुआ तथा श्रीमान जी को प्रस्तुत वाद सुनने व निर्णीत करने का विचाराधिकार प्राप्त है।

23 यहकि वाद का मूल्याकन वास्ते विचाराधिकार वाबतअनुतोष क व ख ● विवादित सम्पत्ति की अनुमानित बाजारू कीमत 3,00,000/- रूपये, 3,00,000/- तथा बाबत अनुतोष ग विवादित सम्पत्ति की अनुमानित बाजारू कीमत 3,00,000/- कुल 9,00,000/- किया जाता है तथा न्याय शुल्क बावत अनुतोष क एंव ख उदघोषणा के लिये निर्धारित अधिकतम न्याय शुल्क 200/- रूपये, 200/- रूपये तथा न्याय शुल्क यावत अनुतोष ग निषेधाज्ञा के लिये निर्धारित अधिकतम न्याय शुल्क 500/- कुल 900 / - का अदा किया जाता है जोकि पर्याप्त है।

24. यहकि वादीगण निम्नलिखित अनुतोष प्राप्त करने के अधिकारी है-

क. यहकि उदघोषणा की आज्ञप्ति के द्वारा यह घोषित किया जाये कि वादीगण विवादित सम्पत्ति स्थित मो० कलकत्ता तहसील सदर जिला रामपुर, जिसको वाद पत्र के साथ संलग्न मानचित्र में लाल रंग हरे रंग तथा पीले रंग से प्रदर्शित किया गया है, के तन्हा मालिक व काविज है तथा प्रतिवादीगण का उक्त सम्पत्ति के स्वामित्व व कब्जे से कोई सम्बन्ध नही है।

ख . यहकि उदघोषणा की आज्ञप्ति के द्वारा यह घोषित किया जाये कि वाद पत्र के साथ संलग्न अनुसूची ख में वर्णित सभी विक्रय पत्र निशून्य व निष्प्रभावी है तथा उनके आधार पर प्रतिवादीगण को 'विवादित सम्पत्ति में कोई हक व अधिकार प्राप्त नहीं होते है।

ग . यहकि स्थाई निषेधाज्ञा की आज्ञप्ति के द्वारा प्रतिवादीगण को स्वयं ,अपने रिश्तेदारान, ऐजेन्टान कारकुनान व नौकरान आदि के द्वारा वादीगण की विवादित सम्पत्ति स्थित मौ० कलकत्ता तहसील सदर जिला रामपुर, जिसको वाद पत्र के साथ सलग्न मानचित्र मे पीले रंग, हरे रंग तथा लाल रंग से प्रदर्शित किया गया है. में वादीगण के कब्जे में किसी भी प्रकार से से हस्तक्षेप करने से तथा सम्पत्ति को विक्रय द्वारा या अन्य किसी प्रकार से अन्तरित करने से सदैव के लिये निषिद्ध कर दिया जाये।

घ. यहकि वाद की वाद व्यय व हर्जा खर्चा मुकदमा भी वादीगण को प्रतिवादीगण से दिलवाया जाये।

ड. यहकि अन्य अनुतोष, जो न्यायालय वादीगण के पक्ष में उचित समझे वह भी वादीगण को प्रतिवादीगण से दिलवाया जाये।

सत्यापन:- उपरोक्त वाद पत्र के पैरा स० 1 ता 21 व 24 वादीगण हमारे निजी ज्ञान व विश्वास के आधार पर तथा प्रस्तर स०

23 के अभिकथन विधिक परामर्श के आधार पर सही व सत्य है, जिसमें ना कुछ झूठ है और नाही कुछ छिपाया गया है, जिसकी तस्दीक आज दिनांक 03.04.2019 को रामपुर में की गई।"

22. It is also not in dispute that nearly for the same dispute, the present criminal case is the fourth which has been lodged by opposite party no.2 against the applicant. Earlier opposite party no.2 has moved an application under Section 156(3) Cr.P.C. and the same has been registered as Misc. Case No. 181/11 of 2019 (Nihaluddin Vs. Mohd. Akbar and others), which was rejected by the court below vide order dated 14th August, 2019. After dismissal of the aforesaid application filed by opposite party no.2 under Section 156 (3), an FIR being Case Crime No. 39 of 2020 under Section 323, 504, 506, 307 I.P.C. was lodged by opposite party no.2 against the applicant wherein after investigation, final report has been submitted against the applicant and no protest petition was filed till date. After that opposite party no.2 lodged the present FIR and thereafter he has also filed a complaint being Complaint Case No. 2537 of 2021 (Nihaluddin Vs. Nasir Khan), under Section 417, 452, 323, 504 I.P.C. The proceedings of the aforesaid complaint case have been stayed by this Court vide order dated 20th October, 2022 passed in Application U/s 482 No. 27887 of 2022 (Nasir Khan Vs. State of U.P. and another).

Legal Issues, which emerge in both the applications

23. The veracity of the facts alleged by the applicant and the opposite party no.2 can only be ascertained on the basis of evidence and documents by a civil court of competent jurisdiction. The dispute in question is purely of civil nature and opposite party no.2 has already instituted a civil suit in the court of Civil Judge. In the facts and circumstances of this case, initiating criminal proceedings by opposite party no.2 against the applicant is clearly an abuse of the process of the court. Scope and ambit of courts powers under Section 482 Cr.P.C.

24. The Apex Court in a number of cases has laid down the scope and ambit of court's power under Section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court; and

(iii) to otherwise secure the ends of justice.

25. Inherent powers under Section 482 Cr.P.C. though having wide scope is to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.

26. It is also important for this Court to notice that the powers possessed by the High Court under Section 482 Cr.P.C. are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to see that its decision in exercise of this power is based

on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy; more so, when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

CASE LAWS ON THE SUBJECT

27. In the case of State of Haryana Vs. Bhajan Lal (Supra), the Apex Court for exercising powers under Section 482 Cr.P.C. has framed following guidelines:

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

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

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

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

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

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

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

28. The Apex Court in the case of **State of Karnataka Vs. L. Muniswamy & Others**, reported in *(1977) 2 SCC 699* has observed that the wholesome power under Section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The

court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature. This case has been followed in a large number of subsequent cases of this court and other courts.

29. The Apex Court in the case of **Madhavrao Jiwajirao Scindia & Others Vs. Sambhajirao Chandrojirao Angre & Others** reported in *(1988) 1 SCC 692* has observed that the legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

30. Similarly in **Janata Dal Vs. H.S. Chowdhary** reported in *(992) 4 SCC 305*, the Apex Court in paragraph-132 has opined as follows:

"132. The criminal courts are clothed with inherent power to make such orders as may be necessary for the ends of justice. Such power though unrestricted and undefined should not be capriciously or arbitrarily exercised, but should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plentitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles."

31. In the case of **G. Sagar Suri & Another Vs. State of U.P. & Others** reported in (2000) 2 SCC 636, the Apex Court has observed that it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process particularly when matters are essentially of civil nature.

32. In the case of **Roy V.D. Vs. State of Kerala** reported in *(2000) 8 SCC 590* the Apex Court in paragraph-18 has observed as under:-

"18. It is well settled that the power under Section 482 Cr.P.C has to be exercised by the High Court, inter alia, to prevent abuse of the process of any court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused. In our opinion, exercise of power under Section 482 Cr.P.C. to quash proceedings in a case like the one on hand, would indeed secure the ends of justice."

33. The Apex Court in the case of **Zandu Pharmaceutical Works Ltd. & Others VS. Mohd. Sharaful Haque & Another** reported in (2005) 1 SCC 122 has opined that it would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

34. In the case of **Indian Oil Corporation Vs. NEPC India Ltd. & Others** reported in *(2006) 6 SCC 736*, the Apex Court has again cautioned about a growing tendency in business circles to convert purely civil disputes into criminal cases. The court noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. The court further observed that any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.

35. Further in the case of **Inder Mohan Goswami Vs. State of Uttaranchal** reported in *(2007) 12 SCC 1*, has observed as under:

"25. Reference to the following cases would reveal that the courts have consistently taken the view that they must use this extraordinary power to prevent injustice and secure the ends of justice. The English courts have also used inherent power to achieve the same objective. It is generally agreed that the Crown Court has inherent power to protect its process from abuse. In Connelly v. DPP [1964] AC 1254, Lord Devlin stated that where particular criminal proceedings constitute an abuse of process, the court is empowered to refuse to allow the indictment to proceed to trial. Lord Salmon in DPP v. Humphrys [1977] AC 1 stressed the importance of the inherent power when he observed that it is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. He further mentioned that the courts power to prevent such abuse is of great constitutional importance and should be jealously preserved.

46. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressure the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 Cr.P.C. though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the Statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained."

36. In **Paramjeet Batra Vs. State Uttarakhand** reported in *(2013) 11 SCC 673*, the Apex Court has opined that while

exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash criminal proceedings to prevent abuse of process of court. The Apex Court on the basis of such finding has held that as we have already noted, here the dispute is essentially about the profit of the hotel business and its ownership. The pending civil suit will take care of all those issues. The allegation that forged and fabricated documents are used by the appellant can also be dealt with in the said suit. Respondent 2's attempt to file similar complaint against the appellant having failed, he has filed the present complaint. The appellant has been acquitted in another case filed by respondent 2 against him alleging offence under Section 406 I.P.C. Possession of the shop in question has also been handed over by the appellant to respondent 2. In such a situation, in our opinion, continuation of the pending criminal proceedings would be abuse of the process of law. The High Court was wrong in holding otherwise.

37. After the judgment of Apex Court in the case of **Bhajan Lal (Supra)**, a Three Judges' Bench of the Apex Court in the case of **Parbatbhai Aahir @ Parbatbhai Bhimsinbhai Karmur & Others Vs. State of Gujarat & Another** reported in *(2017) 9 SCC 641* has framed principles for deciding application under Section 482 Cr.P.C., which are as follows:

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable;

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

16.5. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the

dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

38. In **Sardar Ali Khan Vs. State of Uttar Pradesh Through Principal Secretary, Home Department & Another** reported in *(2020) 12 SCC 51*, the Apex Court has held as follows:

"It is to be noted that there is no allegation of impersonation and forgery of the signatures in the suit filed by the 2nd respondent. In any event, when the suit filed by the 2nd respondent for cancellation of sale deed, is pending consideration before the competent court of law, the 2nd respondent cannot pursue his complaint in criminal proceedings by improving his case. Having regard to serious factual disputes which are of civil nature, for which civil suits are pending, allowing the 2nd respondent to pursue his complaint in criminal proceedings is nothing but abuse of the process of law. For the aforesaid reasons we are of the considered view that the criminal proceedings are fit to be quashed by allowing this appeal."

39. In **Kapil Agarwal Vs. Sanjay Sharma** reported in *(2021) 5 SCC 524*, the Apex Court has held as follows:

"As observed and held by this Court in catena of decisions, inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal

proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed."

40. The Apex Court in the case of **Randheer Singh Vs. State of U.P. & Others** reported in 2021 SCC OnLine SC 942, referring the case of Kapil Agarwal (Supra) has observed and held as follows:

"32. In Kapil Agarwal (supra), this Court observed that Section 482 is designed to achieve the purpose of ensuring that criminal proceedings are not permitted to generate into weapons of harassment.

33. In this case, it appears that criminal proceedings are being taken recourse to as a weapon of harassment against a purchaser. It is reiterated at the cost of repetition that the FIR does not disclose any offence so far as the Appellant is concerned. There is no whisper of how and in what manner, this Appellant is involved in any criminal offence and the charge sheet, the relevant part whereof has been extracted above, is absolutely vague. There can be no doubt that jurisdiction under Section 482 of the Cr.P.C. should be used sparingly for the purpose of preventing abuse of the process of any court or otherwise to secure the ends of justice. Whether a complaint discloses criminal offence or not depends on the nature of the allegation and whether the essential ingredients of a criminal offence are present or not has to be judged by the High Court. There can be no doubt that a complaint disclosing civil transactions may also have a criminal texture. The High Court has, however, to see whether the dispute of a civil nature has been given colour of criminal offence. In such a situation, the High Court should not hesitate to quash the criminal proceedings as held by this Court in Paramjeet Batra (supra) extracted above.

34. The given set of facts may make out a civil wrong as also a criminal offence. Only because a civil remedy is available may not be a ground to quash criminal proceedings. But as observed above, in this case, no criminal offence has been made out in the FIR read with the Charge-Sheet so far as this Appellant is concerned. The other accused Rajan Kumar has died."

41. In its latest judgment the Apex Court in the case of **Syed Yaseer Ibrahim Vs. State of Uttar Pradesh & Another** reported in *2022 SCC OnLine SC 271*, has opined as follows:

"9. Insofar as the appellant is concerned, none of the ingredients of the offence punishable under Section 420 of the IPC have been found to exist after the investigation was complete. Neither the FIR nor the charge-sheet contain any reference to the essential requirements underlying Section 420. In this backdrop, the continuation of the prosecution against the appellant would amount to an abuse of the process where a civil dispute is sought to be given the colour of a criminal wrong doing."

42. The Apex Court in the case of **Mitesh Kumar (Supra)**, which has been heavily relied upon by the learned counsel for the applicant, has held as follows:

"Having considered the relevant arguments of the parties and decisions of

this court we are of the considered view that existence of dishonest or fraudulent intention has not been made out against the Appellants. Though the instant dispute certainly involves determination of issues which are of civil nature, pursuant to which Respondent No. 2 ***has even instituted multiple civil suits, one can by no means stretch the dispute to an extent, so as to impart it a criminal colour.*** *As has been rightly emphasised upon by this court, by way of an observation rendered in the case of M/s Indian Oil Corporation Vs. M/s. NEPC India Ltd & Ors.7, as under :-*

"14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law."

(Emphasis supplied)

43. The question before this Court is as to whether the case of the applicant comes under any of the categories enumerated in **Bhajan Lal (supra) and Parbatbahi Aahir (Supra)?** Is it a case where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in entirety, do not make out a case against the accused under Sections 420, 467, 468, 471, 504, 506, 447 I.P.C.? For determination of the question it becomes relevant to note the nature of the offences alleged against the applicant, the ingredients of the offences and the averments made in the FIR/complaint.

44. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressure the accused. On analysis of the aforementioned cases, this Court is of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 Cr.P.C. though having wide scope is to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the Statute itself and in the aforementioned cases.

45. From deeper scrutiny of the FIR, charge-sheet submitted in Case No. 517 of 2022 (State Vs. Nasir Khan) including the evidence collected by the Investigating Officer during the course of investigation, the summoning order dated 16th July, 2022, complaint and statements recoded by the court below under Section 200 and 202 Cr.P.C., plaint of the civil suit filed by opposite party no.2, this Court is of the view that in all cases the allegations made by opposite party no.2 are nearly similar and identical and in respect of the same issue in committing forgery for making power of attorney of the land in dispute. All four cases including the present cases initiated by opposite party no.2 by lodging FIR and making complaint giving rise to both the applications under Section 482 Cr.P.C. not only appears to be malicious but also civil in nature. Firstly opposite party no.2 filed a civil suit being Original Suit No. 72 of 2019 (Nihal-uddin & Others Vs. Mohd. Ahmad Khan & Others) questioning the power of attorney executed in favour of the applicant and the various sale-deeds executed in respect of 14 bighas' of land in dispute for permanent injunction qua the said land as also for cancellation of power of attorney and the sale-deeds and

thereafter he filed criminal cases after one by one against the applicant in order to exert pressure and to harass him.

46. This Court is of the view that the correctness or otherwise of any deed like will-deed, power of attorney, sale-deed etc., which is registered by a public/government authority can be more appropriately adjudicated by a Civil Judge on the basis of oral as well as documentary evidence to be led by the parties and unless or until the same is not decided that the same is false and fabricated deed, the criminality cannot come into picture for making such deed. Such stage in the present case has yet to come.

47. In view of the deeper scrutiny of laws laid by the Apex Court referred to herein--above and its discussion and the facts and circumstances of the case, this Court is of the opinion that none of the offences for which the applicant is summoned in both the cases, is made out from the FIR and the complaint and material on record. This Court further finds that it is nothing but abuse of process of law on the part of the complainant/opposite party no.2 to implicate the applicant in such criminal cases. As already settled by the Apex Court that Section 482 is designed to achieve the purpose of ensuring that criminal proceedings are not permitted to generate into weapons of harassment, this Court while exercising its inherent power under Section 482 Cr.P.C. allows both the applications.

48. Consequently, summoning orders impugned in both the applications as well as entire proceedings of the Case No. 517 of 2022 (State Vs. Nasir Khan), arising out of Case Crime No. 130 of 2021, under Sections 420, 467, 468, 471, 504, 506, 447 I.P.C., Police Station Kotwali, District Rampur, pending in the court of Additional Chief Judicial Magistrate, Court No.1, Rampur as also entire proceedings of Complaint Case No. 2537 of 2022 (Nihaluddin Vs. Nasir Khan & Others), under Sections 417, 452, 323 and 504 I.P.C., Police Station- Kotwali, District Rampur, pending in the court of Additional Chief Judicial Magistrate, Court No.1, Rampur are quashed.

48. There shall be no order as to costs.

(2023) 4 ILRA 353
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 2903 of 2023

Sunil Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Anil Kumar Mishra

Counsel for the Opp. Parties:
G.A.

A. Criminal Law -Negotiable Instruments Act, 1881-Section 138-maintainability-complaint rejected when the complainant did not appear before the court, and the accused was acquitted-if an order of acquittal has been passed under section 256 Cr.PC, the complainant has a remedy to file an appeal against the acquittal in High Court after grant of special leave to appeal-where under the code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who would have appealed-If a remedy of appeal is available the petitioner cannot

be permitted to invoke inherent jurisdiction u/s 482 CrPC-Hence the petition is not maintainable.(Para 1 to 9)

The application is dismissed. (E-6)

List of Cases cited:

H.P. in HIM Advances & Savings Pvt. Ltd. Vs Ravinder Kumar Gupta (2002) CrLJ 4741

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

1. Heard Sri Anil Kumar Mishra, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned AGA for the State and perused the record.

2. This petition has been filed to quash the order dated 10.11.2022 passed by the Additional Chief Judicial Magistrate, Court No.6, Meerut in Complaint Case No.6600 of 2016 (Sunil Kumar Vs. Amit Kumar), under Section 138 NI Act, Police Station Lalkurti, District Meerut.

3. In the above noted criminal complaint case under Section 138 NI Act when applicant complainant did not appear on 10.11.2022 the trial court considering the fact that the complaint was pending since 02.09.2016, the statement of the accused had been recorded on 08.10.2021 but since then complainant had not filed any affidavit as evidence and was not attending the court from the past several dates, even last opportunity was provided to him even then he neither appeared nor moved any application, the trial court dismissed the complaint under Section 256 CrPC and acquitted the accused.

4. Being aggrieved, this application under Section 482 CrPC has been filed.

5. Learned AGA raised objection regarding maintainability of the application.

6. In this regard, in course of search of relevant judicial citation this Court finds the judgement of the High Court of **Himachal Pradesh in HIM Advances and Savings Pvt. Ltd. Vs. Ravinder Kumar Gupta, 2002 CrLJ 4741** in which similar facts were involved. For ready reference relevant portion of the aforesaid judgment is reproduced herein below:-

"2. The undisputed facts are that the petitioner filed a complaint against the respondent in the Court of the learned Additional Chief Judicial Magistrate, Shimla, under Section 138 of the Negotiable Instruments Act, 1881. The complaint was listed for hearing on 18.6.2001 for evidence of the complainant. The complainant, however, applied for exemption, but after hearing the parties, the Court declined the exemption, and rejected the application. Thus, the Court observed that the complainant is not present nor he has taken steps for summoning the witnesses, though three opportunities had already been granted to him, but he has failed to take steps to summon the witnesses and acquitted the respondent under Section 256 of the Code.

4. Section 256 of the Code clearly and unambiguously contemplates that on failure of the complainant to appear on the day appointed for the appearance of the accused or any day subsequent thereto, to which the hearing may be adjourned the Magistrate shall, notwithstanding anything contained in the Code, acquit the accused, unless for some reason he thinks the hearing of the case to some other date in the edge in hand, the impugned order acquitting the respondent has been passed

by the learned trial Magistrate because of the absence of the complainant, who was to lead evidence on the date fixed for hearing. Therefore, by virtue of the provisions of Section 256 of the Code, for all intents and purposes the impugned order is an order of acquittal.

5. Sub-section (4) of Section 378 of the Code provides that against an order of acquittal passed in any case instituted upon complaint, the complainant, after grant of special leave to appeal from the order of acquittal may present an appeal to the High Court. Thus, a complainant has a right of appeal against an order of acquittal.

6. Sub-section (1) of Section 410 of the Code provides that where under the Code, an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who would have appealed.

8. Since the remedy of the petitioner was by way of appeal against the impugned order of acquittal, therefore, there being specific grievance, the petitioner cannot be permitted to invoke the inherent jurisdiction of this Court under Section 482 of the Code."

7. In the cited case the complainant had filed a complaint under Section 138 NI Act and when he did not appear before the court, the accused was acquitted which was challenged by the complainant in the High Court by way of a criminal revision and under Section 482 CrPC as well. The High Court of Himachal Pradesh concluded that if an order of acquittal has been passed under Section 256 CrPC, the complainant has a remedy to file an appeal against the acquittal in High Court after grant of special leave to appeal. The Court had also referred Section 410(1) CrPC that where under the Code an appeal lies and no appeal is brought, no proceeding byway of revision shall be entertained at the instance of the party who would have appealed.

8. Whether a petition under Section 482 CrPC lies, has also been discussed by the court that if a remedy of appeal is available the petitioner cannot be permitted to invoke inherent jurisdiction of High Court under Section 482 CrPC.

9. In view of the above discussion, the present petition is not maintainable and is accordingly dismissed without prejudice to any other legal remedy available to the petitioner.

(2023) 4 ILRA 355
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.03.2023

BEFORE

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

Application u/s 482 No. 3473 of 2023

Rinku Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Kripa Kant Pandey, Sri Rajiv Lochan Shukla

Counsel for the Opp. Parties:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 & 91-Narcotics Drugs and Psychotropic Substances Act, 1985-Sections 18/20-applicant arrested and was produced before the court allowing the remand-the court below directed the Superintendent of Police to conduct an inquiry regarding the reality and correctness of the First Information Report-present applicant

appeared before the court and moved an application u/s 91 Cr.P.C. for considering the enquiry report before framing charge - the court below rejected the same stating that allowing the application u/s 91 Cr.P.C. would mean to interfere in the investigation/trial, Section 91 Cr.P.C. does not confer any right on the accused to produce documents in order to prove his defence-It is settled law that at the stage of summoning or framing of charge, the accused cannot ordinarily invoke section 91 Cr.P.C., however the court being under obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case is so require, even if the accused may have no right to invoke section 91 Cr.PC and the court is satisfied that the material available with the investigator, not made part of the charge sheet, has crucial bearing on the issue of summoning or framing of charge, it can always direct the investigator/ prosecutor/ trial court to place the same before the court concerned for proper adjudication of the matter-when the initial order taking cognizance is bad, therefore, the consequential order framing charges against the applicant has to be set aside-It is settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order.(Para 1 to 20)

The application is allowed. (E-6)

List of Cases cited:

1. Nitya Dharmananda @ K. Lenin Vs Gopal Sheelum Reddy (2018) 102 ACC 635

2. St. of Punj, Vs Davinder Pal Singh Bhullar & ors. (2011) 14 SCC 770

3. Mangal Prasad Tamoli Vs Narvadeshwar Mishra (2005) 3 SCC 422

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

1. Heard Mr. Rajiv Lochan Shukla, learned counsel for the applicant and Mr. Amit Singh Chauhan, learned A.G.A. for the State.

2. The Present case has been filed assailing the order dated 03.12.2022 passed by learned Additional District and Sessions Judge, Fast Track Court, Second, District-Hapur in Special Session Trial No.159 of 14 (New No.78 of 2015) vide which the applicant's application under Section 91 Cr.P.C. has been rejected.

3. Brief facts of the case are that an FIR was lodged by opposite party no.2, S.I. Sanjay Tyagi, against the applicant and co-accused Gaurav Tyagi on 03.07.2014, which was registered as Case Crime No.297 of 2014, under Section 18/20 of N.D.P.S. Act, at Police Station- Pilakhua, District- Hapur. The applicant was arrested, after which, he was produced before the Court concerned on 04.07.2014 in police custody and remand was sought by the Police/Investigating Officer and the learned Court below allowed the remand of the applicant till 18.07.2014 vide order dated 04.07.2014. The Court concerned while allowing the remand has recorded the statement of the present applicant on oath. Considering the aforesaid natural and trustworthy statement of the present applicant as well as the provisions of Section 58 N.D.P.S. Act, the Court below directed the Superintendent of Police, Hapur to conduct an inquiry regarding the reality and correctness of the First Information Report dated 03.07.2014 and further directed that the said inquiry report be placed before the learned Court below. The Investigating Officer was directed to give a copy of the aforesaid order to Superintendent of Police, Hapur, DIG, Meerut Range, Meerut by order dated

05.07.2014 and submit a report before the Court concerned. The DIG, Meerut was directed to be given a copy of the aforesaid order with the observation that he may direct Superintendent of Police, Hapur to place the enquiry report before the Court concerned and shall also supervise the enquiry.

4. Pursuant to the order dated 04.7.2014 passed by the learned Additional District and Sessions Judge, Ghaziabad, the Superintendent of Police, Hapur, placed the letter before the learned Court below dated 05.07.2014 whereby one week's further time was sought by him to submit the aforesaid inquiry report as directed by order dated 04.07.2014. On the aforesaid application, the learned Court below vide order dated 07.07.2014 directed that the said enquiry report may be submitted before the learned Court below prior to 17.07.2014.

5. After completing the investigation, charge sheet was submitted against the present applicant on 30.08.2014 and accordingly, the learned Court of Sessions Judge, Ghaziabad took cognizance on the aforesaid charge sheet vide order dated 13.10.2014 and the applicant was summoned to face the trial, registering the case as Special Session Trial No.159 of 2014 (State Vs. Rinku).

6. In the meantime, the present session case was transferred to District Hapur from the Court of District Judge, Ghaziabad on 23.11.2015 by order of District Judge Ghaziabad dated 21.11.2015 in view of order passed by the Hon'ble High Court and the same was received by the District Court Hapur. Thereafter, the aforesaid case was registered before the Sessions Judge, Hapur as Special Session Trial No.78 of 2015 (State Vs. Rinku).

7. The present applicant appeared before the aforesaid Court and moved an application under Section 91 Cr.P.C. on 25.08.2017, whereby he prayed that the enquiry report as directed by Court below vide order dated 04.07.2014 may be considered before framing charge. The aforesaid application has been rejected vide order dated 03.12.2022 and charges have been framed on 02.03.2023, hence, the present application has been filed.

8. Learned counsel for the applicant submits that if the Court is satisfied that the material of sterling quality has been withheld by the Investigator/Prosecutor, it can summon or rely upon the same, even if, such document is not part of the charge sheet, hence, the Court has committed illegality in not considering the fact, though, the enquiry report which was important for proper adjudication of the matter was not placed before the concerned Court. The Court should not have proceeded to take cognizance of the matter. In support of his submission, learned counsel for the applicant has relied upon a judgement of Hon'ble Apex Court, passed in case of **Nitya Dharmananda @ K. Lenin Vs. Gopal Sheelum Reddy also known as Nithya Bhaktananda,** reported in **2018 (102) ACC 635.**

9. He further submits that as per Section 91 of Cr.P.C., documents necessary and desirable for proper adjudication of the matter was to be placed before the Court concerned prior to taking cognizance on the charge sheet so submitted and in the present case when such an enquiry report was directed to be placed before the Court

below by order dated 04.07.2014, therefore, the same could not have been ignored.

10. Learned A.G.A. opposing the submission as placed by learned counsel for the applicant, submits that Section 91 of Cr.P.C. does not confer any right on the accused to produce documents in order to prove his defence. He further submits that allowing the application under Section 91 Cr.P.C. would mean to interfere in the investigation/trial.

11. Before appreciating the legal submission as made by learned counsel for the parties, it would be appropriate to place Section 91 of Cr.P.C., which is as follows:

"'**Section 91 of Cr.P.C. Summons to produce document or other thing:-** (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect, sections 123 and 124 of the Indian Evidence Act, 1872 (1 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

12. This Court feels that the Court below vide order dated 04.07.2014 directed for an enquiry to be conducted and the same be placed before the Court concerned, however, without realizing the fact that the Court had passed the aforesaid order being satisfied that an inquiry was required to find out the reality and save an innocent person from being punished, the inquiry report was a material of sterling quality, which was to be placed before the Court concerned prior to taking cognizance.

13. Section 91 of Cr.P.C. also requires that in case any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary and desirable for the purposes of any investigation, inquiry, trial or any other proceeding under this Code by or before such Court or officer, such Court is required to issue summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it prior to summoning the accused.

14. In the present case, it was by order of the Court below, the inquiry was directed to be conducted and the report to be placed before the Court below and even after the same was pointed out by means of an application being moved by the applicant under Section 91 Cr.P.C., the Court ignoring the aforesaid fact has committed illegality in rejecting the aforesaid application.

15. It is settled law that at the stage of summoning or framing of charge, the accused cannot ordinarily invoke section 91 Cr.P.C. However, the Court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case is so require, even if the accused may have no right to invoke section 91 and the Court is satisfied that the material available with the investigator, not made part of the charge sheet, has crucial bearing on the issue of summoning or framing of charge, it can always direct the investigator/prosecutor/trial Court to place the same before the Court concerned for proper adjudication of the matter.

16. This Court also feels that when the initial order taking cognizance is bad, therefore, consequential order framing charges against the applicant has to be set aside.

17. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. The aforesaid has been held by the Apex Court in the case of **State of Punjab vs. Davinder Pal Singh Bhullar and others** reported in **(2011) 14 SCC 770.**

18. Similarly, the Apex Court in the case of **Mangal Prasad Tamoli vs. Narvadeshwar Mishra** reported in **(2005) 3 SCC 422,** has held that if an order at the initial stage is bad in law, then all further proceedings, consequent thereto, will be non est and have to be necessarily set aside.

19. In view of the above discussion, the impugned order dated 03.12.2022 and consequential order dated 02.03.2022 framing charges against the applicant, cannot be legally sustained and are hereby **set aside**. Matter is remitted back to Additional District and Sessions Judge, Fast Track Court, Second, District Hapur for decision afresh. While deciding the matter, he shall pass a reasoned and speaking order, keeping in mind the relevant provisions of Section 91 of Cr.P.C. and the observation made by this Court, preferably within a period of one month from the date of production of certified copy of this order, if there is no legal impediment.

20. With the aforesaid observation and direction, the application u/s 482 Cr.P.C. is **allowed**.

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

(2023) 4 ILRA 359
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.03.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Application u/s 482 No. 5260 of 2023

Rajesh Kumar Giri ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Dipak Srivastava

Counsel for the Opp. Parties:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860 - Sections 354-A, 504, 506 & 7/8 -The Protection of Children from Sexual offences Act, 2012-Quashing of entire criminal proceedings-

counterblast case-complainant lodge the FIR against the applicant after six years as the applicant filed PIL against the complainant for embezzlement of money when he was village Pradhan-It is impossible that first person harboured enmity with second person for a long period of more than six years-More so, delay in lodging the FIR is not relevant in a case where defamation of a victim who is alleged to be 13 years old is involved-Exercise of power u/s 482 to quash a criminal proceeding is only when an allegation made in FIR or charge-sheet does not constitute ingredients of offence alleged-No mini trial can be conducted by High Court-on the basis of investigation and material collected there appear to be sufficient ground for proceeding against the accused.(Para 1 to 26)

The application is dismissed. (E-6)

List of Cases cited:

1. M/s Eicher Tractor Ltd. & ors. Vs Harihar Singh & anr.(2009) 1 JIC 245 SC

2. St. of Haryana & ors. Vs Bhajan Lal & ors. (1992) Suppl. 1 SCC 335

3. R.P. Kapur Vs St. of Punj. (1960) AIR SC 866

4. St. of Haryana Vs Bhajan Lal (1992) SCC (Cr.) 426

5. St. of Bih. Vs P.P. Sharma (1992) SCC (Cr.) 192

6. Zandu Pharmaceuticals Works Ltd. Vs Md. Saraful Haq & anr. (2005) SCC (Cr.) 283, Para 10

7. Md. Allauddin Khan Vs St. of Bih. & ors. (2019) 0 Supreme SC 454

8. Nallapareddy Sridhar Reddy Vs St. of A.P. & ors. (2020) 0 Supreme SC 45

9. Rajeev Kaurav Vs Balasahab & ors. (2020) 0 Supreme SC 143

10. St. of U.P. Vs Akhil Sharda & ors. (2022) SCC OnLine SC 820

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

1. This application under Section 482 Cr.P.C. has been filed by the applicant with a prayer to quash the charge-sheet no. 40 of 2022 dated 28th September, 2022, cognizance taking order dated 15th November, 2022 as well as entire proceedings of Special Trial No. 1191 of 2022 (State VS. Rajesh Kumar Giri), arising out of Case Crime No. 166 of 2021, under SectionS 354-A, 504, 506 I.P.C. as also under Sections 7/8 POCSO Act, Police Station-Khakheru, District-Fatehpur, pending in the Court of Additional Sessions/Special Judge (POSCO Act), Fatehpur.

2. Heard Mr. Dipak Srivastava, learned counsel for the applicant and the learned A.G.A. for the State.

Case of the Applicant

3. Father of the applicant, namely, Bholi Giri is a farmer and social person in his locality. The complainant was village pradhan of the applicant's village for the period between 2011 to 2015. When the complainant was village pradhan he embezzled public money qua development work of village against which the father of the applicant, namely, Bholi Giri has made complaint against him before the administrative authority of the district. When no action has been taken on the said complaint, Bholi Giri filed a PIL before this Court bearing P.I.L. No. 29962 of 2015 in which this Court has passed order on 21.05.2015 directing Bholi Giri to make an application before the District Magistrate, Fatehpur, who inturn was directed to pass such orders in accordance with law thereon. Pursuant to the above order of this Court

Bholi Giri filed an application before the District Magistrate Fatehpur for its compliance, but no action has been taken due to political power of complainant/opposite party, namely, Dhram Singh Pal. On 29th June, 2015, Bholi Giri preferred an application under Section 156 (3) Cr.P.C before concerned court below qua development work in the village against complainant, who was holding the post of pradhan. The complainant had harboured enmity with applicant' family because he has been defeated in the election of 2015 as Bholi Giri has strongly opposed his candidature as Pradhan and supported his opponent.

4. The Complainant himself went into house of applicant on 08.07.2021 for taking revenge along with his companions, when he did not find any male person, he disrobed the sister of applicant forcefully. Just after knowing such incident with her daughter, applicant's father went to the Police Station on the same day i.e. 8th July, 2021 for lodging the FIR against the complainant and his companions but the Police has not lodged the report. After that, Bholi Giri made an application before the higher Police Officers through registered post on 16th July, 2021, on which again nothing has been done. On one hand the report of Bholi Giri has not been lodged whereas on the other hand under the pressure of present village Pradhan, namely, Lal @ Durga Paswan, the FIR of complainant has been lodged against the applicant i.e. son of Bholi Giri with false and frivolous allegations, as he has concerned with the allegations made in the FIR.

5. Version as unfolded in the FIR is that on 8th July, 2021 at 06:00 p.m. (evening) when the daughter of the complainant (for short "victim") aged about 13 years was returning her home with buffaloes from the field, then on the way, he caught her hand and started bad talking and molesting her with bad intentions. When she protested he abused her by saying as to why she did not talk with him. When the victim came to her house and disclosed entire incident to the complainant and his wife, he went to the house of the applicant along with his wife, where the applicant also abused and threatened them.

6. Initially the Police has deliberately lodged the FIR in wrong sections of the provisions POCSO Act but on the notice being issued by the Additional District Judge/Special Judge (POCSO Act), Fatehpur, the FIR has been lodged under Sections 7/8 POCSO Act also along with other charging sections.

7. During the course of investigation the statement of first informant is recorded by the investigating officer under section 161 of Cr.P.C, in which he supported the prosecution version as narrated in the first information report. In the statement recorded under Section 161 Cr.P.C. the victim has improved the version as unfolded in the FIR and the statement of the complainant under Section 161 Cr.P.C. by stating that the applicant has beaten her by slaps twice. The victim has also been examined by Doctor, Community Health Centre, Khakharau, District Fatehpur and in his report dated 12th July, 2021, the Doctor has opined that no external injury has been found on the victim. On 18th August, 2021, the statement of the victim has been recorded under Section 164 Cr.P.C. in which he has changed her version. The date of birth of the victim is 1st June, 2008 which has been confirmed by the Principal of School concerned. Since the Police was

continuously harassing the applicant and his family, father of the applicant Bholi Giri made an application 20.01.2022 before the Superintendent of Police and concerned Station House Officer for fair and partial investigation. In this regard Bholi Giri has also preferred Criminal Misc. Writ petition No.2368 of 2022 before this Court which is pending. The Police has deliberately submitted charge-sheet. After being aggrieved from the harassment done by the Police, the applicant has approached this Court for seeking anticipatory bail under Section 41-A by means of Criminal Misc. Anticipatory Bail Application No. 1796 of 2022, which has been disposed by this Court vide order dated 10th March, 2022 by observing that there is no need for anticipatory bail as the applicant cannot be arrested without complying with the provisions of Section 41 and 41-A Cr.P.C. This has refused the prayer of the applicant for grant of anticipatory bail. The concerned police is continuously harassing family of Bholi Giri including the applicant and his female members. When applicant has approached this Court for getting relief, the Investigating officer has deliberately filed the charge-sheet on 28.09.2022 and he has failed to consider the evidence on record. On submission of the charge-sheet, the concerned Magistrate has taken cognizance on 15.11.2022.

8. **Submissions advanced on behalf of the applicant**

(i) the applicant is preparing for selection in Indian Force. As a counter blast to the complaint as well as public interest litigation filed by the father of the applicant, namely, Bholi Giri and the complainant has been defeated in the election of village Pradhan in the year 2015 due to opposition of Bholi Giri, the present case has been engineered by the complainant to wreak vengeance, which is not permissible in view of the law laid down by **M/s Eicher Tractor Ltd. and others Vs. Harihar Singh and another**, 2009(1) JIC 245 (SC).

(ii) The applicant has nothing to do with victim as the applicant was not present in the village on 8.7.2021.

(iii) From the perusal of entire prosecution case no offence is made out against the applicant which is narrated in aforesaid FIR and the charges as levelled against the applicant is absolutely incorrect and concocted., as allegations made in the first information report against the applicant are without any substance and no such incident has taken place.

(iv) The applicant is 22 years son of poor farmer and he has no previous criminal History to his credit nor he has convicted by any competent court of law.

(v) There is inordinate delay in lodging the said first information report which creates a serious shadow of doubt on the veracity of first information report.

(vi) The judgment of the Hon'ble Surpeme Court in the case of **State of Haryana & Others Vs. Bhajan Lal & Others** reported in 1992 Suppl. (1) SCC 335 has been referred for drawing the attention of the Court to the issue that in sever categories of cases, power under Section 482 Cr.P.C. can be exercised by this Court for quashing the malicious proceedings. The case of the applicant is covered with the seventh category mentioned in the judgment of the Hon'ble Supreme Court in the case of Bhajan Lal (Supra).

Learned counsel for the applicants, therefore, submitted that the present criminal proceedings initiated against the applicants are not only malicious but also

amount to an abuse of the process of the Court.

On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicants that the proceedings of the above mentioned complaint case are liable to be quashed by this Court.

9. Per contra, learned A.G.A. has submitted that from the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants. All the submissions made relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. He also submits that it is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings. It is clear from the law laid down by the Apex Court as well as by this Court in catena of judgments that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding. On the cumulative strength of the aforesaid, learned A.G.A. urges that offence under Sections 354-A, 504, 506 I.P.C. as also under Sections 7/8 POCSO Act is made out against the applicants. The present application under Section 482 Cr.P.C. is devoid of merit and the same is liable to be dismissed by this Court.

10. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present application.

11. From the perusal of the entire material available on record, this Court finds that the case set up by the learned counsel for the applicant is that as a counter blast to the complaint and PIL filed by the father of the applicant, namely, Bholi Giri in the year 2015 against the complainant, when he was holding the post of Village Pradhan qua embezzlement of public money being made by him, has no legs to stand on the ground that the present FIR has been lodged by the complainant against the applicant on 9th July, 2021 for the alleged incident dated 8th July, 2021 i.e. after more than six years of the aforesaid complaint and PIL. It is impossible to believe for any common man of this country that a person against whom a complaint was filed by another person and for that reason the first person harboured enmity with second person, will take for a long period of more than six years to take revenge by implicating his son in a false and frivolous case. For example: Person-A will take revenge from Person-B in the year 2021 by implicating his son in a false and frivolous case as Person-B has filed complaint against Person-A in the year 2015. This court respects the decision of the highest court i.e. Hon'ble Supreme Court in the case M/s. Eicher Tractor (Supra) relied upon by the learned counsel for the applicant but the said case will not apply in the present case, as this is not the case of counter blast.

12. The submission made by the learned counsel for the applicant that the present proceedings initiated by the complainant/opposite party no.2 against the applicant are malicious proceedings has only been stated to be rejected on the

ground that the reason assigned for the same that in the year 2015 when the complainant was holding the post of Village Pradhan, the father of the applicant, namely, Bholi Giri made complaint against him qua embezzlement of public money before the authorities concerned and also opposed his candidature in the election of village pradhan is too weak. This Court may reiterate again that a person for taking revenge cannot wait seven years by implicating his enemy mala fide in a criminal case. Hence, the judgment of the Apex Court in the case of Bhajan Lal (Supra) relied upon by the learned counsel for the applicant is not applicable in the facts of the present case. No other reasons have been brought on record for establishing his submission that the applicant has been implicated mala fidely in the present case by the complainant.

13. This Court also does not accept the case of the applicant that on 8th July, 2021 the applicant has not committed any offence as alleged by the prosecution and on the same date it was the complainant that he entered into the house of the applicant along with his companions where there was no male members of family of the applicant, he molested his sister and also abused her along with his companions as no such complaint has been brought on record along with the present application, which is said to be filed by the father of the applicant before Police Station or before any court of law.

14. Now this Court comes to the submission made by the learned counsel for the applicant that there is a delay in lodging of the first information report implicating the applicant for which there is no plausible explanation.

15. It is no doubt true that for the alleged incident dated 8th July, 2021 at about 06:00 p.m. (evening), the first information report has been lodged against the applicant on 9th July, 2021 i.e. after 19 hours and 14 minutes from the time of alleged incident. In the opinion of the Court, such delay is not relevant in a case where defamation of a victim who is alleged to be 13 years old is involved. In our country, society has a very big place, where a man or a woman or a family gives importance to the honour of himself/herself/itself. Whenever there is some wrong with a woman or girl or female child, like rape or molestation, most of the master of the family hesitate to lodge report against the accused because of defamation in the society and that is why such delay occurs in lodgment of reports.

16. It is case of such heinous crime where the social ramification of such crimes are very dishonourable to the victim, who suffers social stigma. The offences of this nature which involves social defamation, there is always a general tendency to suppress such events at the initial stage in order to avoid the victim being stigmatized. The offence committed by the applicant is egregious in nature and it speaks about depravity of the applicant's character, who had no moral qualms in violating modesty and honour of a victim.

17. Now this Court comes on the submission made by the learned A.G.A. for the State that all the submissions made relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C.

18. At the pre-trial stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of ***R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of***

Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192 and lastly ***Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283.***

19. The Apex Court in the case of ***Mohd. Allauddin Khan Vs. The State of Bihar & Others*** reported in 2019 0 Supreme (SC) 454, has held that the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 Cr.P.C. because whether there are contradictions or/and inconsistencies in the statements of the witnesses is an essential issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. However, in the present case the said state is yet to come. The relevant paragraph nos. 15 to 17 are being quoted herein below:

"15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379read with Section 34 IPC, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. ***In our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.") because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case."***

(Emphasis added)

20. The Apex Court in its another judgment in the case of **Nallapareddy Sridhar Reddy Vs. The State of Andhra Pradesh & Ors.** reported in 2020 0 Supreme (SC) 45, dealing with a case under Sections 406 and 420 I.P.C. has observed that the Court does not have to delve deep into probative value of evidence regarding the charge. It has only to see if a prima facie case has been made out. Veracity of deposition/material is a matter of trial and not required to be examined while framing charge. The Apex Court further observed that the veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The Apex Court in paragraph nos. 21, 22 and 24 has observed as follows:

"21 The appellant has relied upon a two-judge Bench decision of this Court in Onkar Nath Mishra v The State, (2008) 2 SCC 561 to substantiate the point that the ingredients of Sections 406 and 420 of the

IPC have not been established. This Court while dealing with the nature of evaluation by a court at the stage of framing of charge, held thus:

"11. ***It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence.*** *At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence."*

(Emphasis supplied)

22 In the present case, the High Court while directing the framing the additional charges has evaluated the material and evidence brought on record after investigation and held:

"LW1 is the father of the de facto complainant, who states that his son in law i.e., the first accused promised that he would look after his daughter at United Kingdom (UK) and promised to provide Doctor job at UK and claimed Rs.5 lakhs for the said purpose and received the same and he took his daughter to the UK. He states that his son-in-law made him believe and received Rs.5 lakhs in the presence of elders. He states that he could not mention about the cheating done by his son-in- law, when he was examined earlier. LW13, who is an independent witness, also supports the version of LW1 and states that Rs.5 lakhs were received by A1 with a promise that he would secure doctor job to the complainant's daughter. He states that A1 cheated LW1, stating that he would provide job and received Rs.5 lakhs. LW14, also is an independent witness and he supported the version of LW13. He further states that A1 left his wife and child in India and went away after receiving Rs.5 lakhs.

Hence, from the above facts, stated by LWs. 13 and 14, prima facie, the version of LW1 that he gave Rs.5 lakhs to A1 on a promise that he would provide a job to his daughter and that A1 did not provide any job and cheated him, receives support from LWs. 13 and 14. When the amount is entrusted to A1, with a promise to provide a job and when he fails to provide the job and does not return the amount, it can be made out that A1 did not have any intention to provide job to his wife and that he utilised the amount for a purpose other than the purpose for which he collected the amount from LW1, which would suffice to attract the offences under Sections 406 and 420 IPC. ***Whether there is truth in the improved version of LW.1 and what have been the reasons for his lapse in not stating the same in his earlier statement, can be adjudicated at the time of trial.***

It is also evidence from the record that the additional charge sheet filed by the investigating officer, missed the attention of the lower court due to which the additional charges could not be framed."

(Emphasis supplied)

24 ***The veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced.***

However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The High Court has relied upon the materials on record and concluded that the ingredients of the offences under Sections 406 and 420 of the IPC are attracted. The High Court has spelt out the reasons that have necessitated the addition of the charge and hence, the impugned order does not warrant any interference."

(Emphasis added)

21. Again in the case of **Rajeev Kaurav Vs. Balasahab & Others** reported in 2020 0 Supreme (SC) 143, the Apex Court has held that it is no more res integra that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence/offences alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any law or Court or otherwise to secure the ends of justice.

22. In the latest judgment of the Hon'ble Supreme Court in the case of **State of U.P. Vs. Akhil Sharda & Others** reported in 2022 SCC OnLine SC 820 has held that while deciding the application under Section 482 Cr.P.C., the High Court has conducted mini trial which is not permissible at that stage. The relevant portion whereof reads as follows:

"28. Having gone through the impugned judgment and order passed by the High Court by which the High Court has set aside the criminal proceedings in exercise of powers under Section 482 Cr.P.C., ***it appears that the High Court has virtually conducted a mini trial, which as such is not permissible at this stage and while deciding the application under Section 482 Cr.P.C. As observed and held by this Court in a catena of decisions no mini trial can be conducted by the High Court in exercise of powers under Section 482 Cr.P.C. jurisdiction and at the stage of deciding the application under Section 482 Cr.P.C., the High Court cannot get into appreciation of evidence of the particular case being considered.*** *(See Pratima (supra); Thom (supra); Rajiv (supra) and Niharika (supra).*

29. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and the manner in which the High Court has allowed the petition under Section 482 Cr.P.C., ***we are of the opinion that the impugned judgment and order passed by the High Court quashing the criminal proceedings is unsustainable. The High Court has exceeded in its jurisdiction in quashing the criminal proceedings in exercise of powers under Section 482 Cr.P.C.***

30. It is also required to be noted that even the High Court itself has opined that the allegations are very serious and it requires further investigation and that is why the High Court has directed to conduct the investigation by CBCID with respect to the FIR No.227 of 2019. However, while directing the CBCID to conduct further investigation, the High Court has restricted the scope of investigation. The High Court has not appreciated and considered the fact that both the FIRs namely FIR Nos.260 of 2018 and 227 of 2019 can be said to be interconnected and the allegations of a larger conspiracy are required to be investigated. It is alleged that the overall allegations are disappearance of the trucks transporting the beer/contraband goods which are subject to the rules and

regulations of the Excise Department and Excise Law.

31 The High Court has quashed the criminal proceedings by observing that there was no loss to the Excise Department. ***However, the High Court has not at all appreciated the allegations of the larger conspiracy.*** *The FIR need not be an encyclopedia (See Satpal Vs. Haryana, (2018) 6 SCC 110 Para 7).*

32 Even otherwise, it is required to be noted that the allegation of missing of two trucks was the beginning of the investigation and when during the investigation it was alleged that earlier also a number of trucks were missing transporting contraband goods, the FIR should not have been restricted to missing of the two trucks only and return of on the goods thereafter. ***The High Court has not at all appreciated and/or considered the allegation of the larger conspiracy and that both the FIRs/criminal cases are interconnected and part of the main conspiracy which is very serious if found to be true. We however refrain from making any further observations as at this stage of proceedings as we are at the stage of deciding the application under Section 482 Cr.P.C. only and as the trial of both the cases have yet to take place. Therefore, we refrain from making any further observations which may affect the case of the either of the parties. Suffice it to say and mention that in the facts and circumstances of the case the High Court has committed a grave/serious error in quashing and setting aside the criminal proceedings*** *arising out of Criminal Case No.5694 of 2019 and Case Crime No.260 of 2018 PS lodged under Section 406, registered at PS - Husainganj, District - Lucknow.*

(Emphasis supplied)

23. It is clear from the law laid down by the Apex Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.

24. From the discussions and deliberations held above, this Court is of the view that the submissions made by the applicant's learned counsel call for adjudication on pure questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. I do not find any justification to quash the charge sheet or the proceedings against the applicants arising out of them as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing.

25. The prayer for quashing the impugned charge-sheet as well as the entire proceedings of the aforesaid State case are refused as I do not see any abuse of the court's process at this pre-trial stage.

26. This application under Section 482 Cr.P.C. devoid of merits and is accordingly **rejected.**

(2023) 4 ILRA 369
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 13132 of 2022

Gopal Shriwas & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Umesh Kumar

Counsel for the Opp. Parties:
G.A., Sri Mahabir Yadav

A. Criminal Law -Indian Penal Code, 1860-Sections 498-A, 323, 504 & 506 & ¾ Dowry Prohibition, 1961 Act-Quashing of entire criminal proceeding-mediation failed-victim was physically and mentally tortured on the pretext of payment of additional dowry-her mother-in law and sister in law snatched her jewellery and her husband and father-in law left her at her parental house until the said demand was fulfilled- victim has specifically made allegations against the applicants-two witnesses corroborated the allegations and evidence of the victim-plea of alibi of father-in law that he was on duty is immaterial as the complaint is not filed on the basis of single incident occurred on particular date-she was physically and mentally tortured continuously since long-Hence,it cannot be said that mere general allegations have been leveled against the applicants-No ground to quash the proceedings.(Para 1 to 13)

The application is dismissed. (E-6)

List of Cases cited:

Kahkashan Kausar @ Sonam & ors. Vs St. of Bih. & ors. (2022) 0 Supreme SC 117

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

1. Heard Sri Umesh Kumar, learned counsel for the applicants, Sri Pankaj Kumar Tripathi, learned AGA for the State and perused the record.

2. This application has been moved to quash the entire criminal proceedings of Complaint Case No.476 of 2020 (Smt. Jyoti Vs. Gopal Shriwas and others), under Sections 498-A, 323, 504, 506 IPC and Section 3/4 DP Act to the extent of applicant no.1 and under Sections 498-A, 323 IPC and Section 3/4 DP Act to the extent of applicant nos.2 to 4, Police Station Charkhari, District Mahoba pending before the Civil Judge (JD)/Judicial Magistrate, Charkhari, Mahoba and also the order dated 06.03.2021 passed by the Sessions Judge, Mahoba in Criminal Revision No.48 of 2020 (Smt. Jyoti Vs. Ramsevak and others) alongwith summoning order dated 11.03.2022 passed by the Civil Judge (JD)/Judicial Magistrate, Charkhari, Mahoba.

3. In brief, facts of the case are that applicant no.1 was married with opposite party no.2 with full love and affection and out of the wedlock a son Naman was born. After one year from the marriage opposite party no.2 demanded to live separately from his family at her parental house which was denied by applicant no.1 thereafter opposite party no.2 left the marital house on 04.04.2020 with her all belongings purchased by applicant no.1. On 29.09.2020 opposite party no.2 filed a complaint stating allegation of demand of dowry of Rs.1,00,000/- and one motorcycle and deposed falsely under Section 200

CrPC. PW-1, Kallu of her caste and PW-2 brother of opposite party no.2 deposed a false and fabricated story under Section 202 CrPC and on the basis of that, the Judicial Magistrate summoned applicants accordingly.

4. Learned counsel for the applicants submitted that applicant no.2 is father-in-law, applicant no.3 is mother-in-law and applicant no.4 is the unmarried sister-in-law (nanad) of opposite party no.2 who reside separately. Applicant no.2 being father-in-law has no concern with the alleged offence. He is driver in PWD Department and was on duty on 02.07.2020. Applicants are neither previously convicted nor wanted in any other criminal case and have no criminal history. They belong to a respectable family. Hence, the present application be allowed and the entire proceedings of the criminal complaint case and the order passed by the Sessions Judge in revision be set aside.

5. From the order sheet it is not known as to whether opposite party no.2 was served sufficiently or not. On 25.07.2022 an order for mediation was passed. It is not known to the Court as to whether in compliance of the said order Rs.25,000/- was deposited by the applicants or not. However, as per office report dated 02.11.2022 the Mediation Centre report was awaited and till now no report had been submitted. It appears that either the fee was not deposited by the applicants or the mediation or attempt to mediation remained failed. Hence, on 11.01.2023 learned counsel for the applicants argued the case at length.

6. The proceedings of the case in question was stayed on the assurance of the learned counsel for the applicants that the matter between the parties would be amicably settled and since 25.07.2022 the applicants are availing the stay order.

7. According to the victim, she was physically and mentally tortured on the pretext of payment of additional dowry of Rs.1,00,000/- and a motorcycle. Her mother-in-law and sister-in-law snatched her jewellery after birth of a son in 2019. After six months her father-in-law and husband left her at her parental house and since then they did not take her back until the said demand of dowry was fulfilled. Opposite party no.2 has further deposed that on 02.07.2020 her husband had come but abused and threatened to kill her. Rest two witnesses have also corroborated the allegations and evidence of opposite party no.2. The trial Magistrate has passed an exhaustive and speaking summoning order discussing all the facts and evidences available on record. Initially the Magistrate had summoned only husband but the criminal revision preferred by opposite party no.2 was allowed by the Sessions Judge and in compliance of the order of the revisional court dated 06.03.2021, rest of the accused persons were also summoned. So far as the alibi in respect of the accused applicant no.2, Ramsevak is concerned that on 02.07.2020 he was with the officer, this Court is of the view that the impugned complaint has not been filed only on the basis of single incident occurred on a particular date. As per version of the complaint and the evidence thereon it is the case of the complainant that she was physically and mentally tortured by the accused persons since long. It was a continuous process hence the certificate that on 02.07.2020 accused applicant Ramsevak was on duty is immaterial. Though a case under Section 9 of the

Hindu Marriage Act, 1955 has been filed by applicant no.1, Gopal Shriwas, husband of opposite party no.2 but in this regard no order sheet have been filed to know as to whether opposite party no.2 appeared there or not and as to whether the matter was referred to the Mediation Centre, Mahoba in order to settle the dispute or not. Sometimes husband files a petition under Section 9 of the Hindu Marriage Act only to show his bona fide.

8. Learned counsel for the applicant relied on the judgment **Kahkashan Kausar @ Sonam and others Vs. State of Bihar and others, 2022 0 Supreme (SC) 117**, in which it has been laid down that if general and omnibus allegations are levelled against the accused persons in respect of matrimonial dispute and no specific and distinct allegations have been made and it appears that the case is example of misuse of Section 498-A IPC which was aimed to prevent cruelty committed upon a woman by herself and her in-laws, the court would intervene. The Apex Court held in the recent matter matrimonial litigation in the country has also increased significantly and there is a greater disaffection and friction surrounding the institution of marriage, now, more than ever which has been resulted in an increased tendency to employ provisions such as 498-A IPC as instruments to settle personal scores against the husband and his relatives and if false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law.

9. The Apex Court found that on that case none of the appellants had been attributed any specific role in furtherance of the general allegations made against them. In the cited case since no appeal was preferred by the husband hence the veracity of allegations made against him was not examined.

10. In this case opposite party no.2 has specifically alleged and has made allegations against applicant no.3 mother-in-law and applicant no.4, sister-in-law (nanad) that they had taken her jewellery. She has specifically deposed that though all the applicants were demanding additional amount of Rs.1,00,000/- as dowry and one motorcycle but her husband had again visited her parental house on 02.07.2020 and had abused and threatened to kill her for that. It is nowhere mentioned that on 02.07.2020 her father-in-law Ramsevak had also visited her parental house. He might have been made accused for the offence committed by him when the complainant was at her matrimonial house with the applicants. So far as the role of father-in-law is concerned it has been argued by the learned AGA that Ramsevak, father-in-law of opposite party no.2 is a government employee. He is elder and responsible person of the family. It was his duty to solve the problem and to ensure that opposite party no.2 is not physically and mentally tortured. The victim has deposed that her father-in-law had attended the panchayat at her parental house and had assured to keep her quietly but he and her husband had left her at her parental house.

11. On the basis of above discussion, this Court is of the view that it cannot be said that mere general and omnibus allegations have been levelled against the applicants. Applicants are not remote relatives and were not living separately. Facts of this case is quite different from the

facts and evidence of the cited case. Hence, this Court is of the view that there is no ground to quash the proceedings.

12. The application under Section 482 CrPC is devoid of merit and is liable to dismissed.

13. Accordingly, this application is dismissed.

(2023) 4 ILRA 372
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.03.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application u/s 482 No. 13242 of 2019
with
Application u/s 482 NO. 30345 of 2021

Sh. Mohd. Ali Zafar ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Mehul Khare, Sri Pradeep Singh, Shri Umakant Uniyal (Sr. Advocate), Sri Ashok Mehta (Sr. Advocate)

Counsel for the Opp. Parties:
G.A., A.S.G.I., Sri Gyan Prakash, Sri Satish Kumar Rai, Sri Sudarshan Singh, Sri Sanjay Kumar Yadav

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 21, 120B, 409, 420, 468, 471 & 477A- The Prevention of Corruption Act, 1988 - Sections 2(C), 13(2)/13(1)(d) , The Cantonment Fund Servants Rules, 1937 and CCS Rules , The Cantonment Act, 2006 - Section 38 , The Delhi Special Police Establishment Act, 1946 - Section 5, 6, 6A , The Cantonment Board Employees Service Rules, 2021 , The Cantonment Funds Service Rules, 1937 - unless the State Government gives its consent, the C.B.I. would not have the power for investigation of an offence in any area of the State Government .(Para - 27)

(B) Criminal Law - Code of Criminal Procedure, 1973 - Section 197 - Prosecution of Judges and Public Servants , The Prevention of Corruption Act, 1988 - Section 19 - Taking cognizance under Section 19 of PC Act - incriminating material should be placed before sanctioning authority in order to apply its mind and take a decision for grant of sanction - Distinction between - absence of sanction (entertained at the threshold) and alleged invalidity on account of non-application of mind (entertained during trial). (Para - 34)

Petitioner, a Veterinary Inspector, was officiating as Office Superintendent at Cantonment Board - another petitioner was a Pharmacist/Compounder-cum-Store Keeper at Central Government Hospital – joint surprise check conducted- gross irregularities found - Charges levelled against accused officials - corruption and forging and manipulating the records - resulted wrongful loss to Central Government - possible corresponding gain to accused - Charge-sheet, summoning order & entire proceedings of Special Case under challenge **.**(Para - 2,18)

HELD:- Board granted a sanction for the petitioners' prosecution. Trial court will decide whether the material and evidence were placed before the authority to grant the sanction, which was refused earlier. Court does not find it appropriate to decide on affidavits in these proceedings. (Para - 34)

Petitions dismissed. (E-7)

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

1. Heard Sri Ashok Mehta, learned Senior Advocate assisted by Sri Pradeep S.

Sisodia, learned counsel for the petitioners, Sri Sudarshan Singh, learned counsel appearing on behalf of Union of India, Sri Sanjay Kumar Yadav, learned counsel for C.B.I. and Sri Satish Kumar Rai, learned counsel appearing on behalf of the Cantonment Board.

2. Present petitions under Section 482 Cr.P.C. have been instituted before this Court challenging the Charge-sheet No.1 of 2001 dated 07.02.2009 and summoning order dated 11.03.2019 passed by Special Judge (Anti-Corruption), C.B.I. Court No.3, Ghaziabad in Special Case No.2 of 2019 (C.B.I. vs Sukhjeevan Singh Chahal and Ors) under Sections 120B, 420, 468, 471 IPC and entire proceedings of Special Case No.2 of 2019 pending in the Court of Special Judge (Anti-Corruption), C.B.I.

3. Petitioner, Mohd Ali Zafar was posted as Veterinary Inspector and petitioner-Sushil Kumar was posted as Pharmacist/Compounder-cum-Store Keeper, Central Government Hospital, Meerut Cantt. The petitioner, Mohd Ali Zafar was also officiating on the post of Office Superintendent, Cantonment Board, Meerut at the relevant time.

4. On the basis of a source information, a joint surprise check was conducted on 12.05.2015 and 13.05.2015 by a team of C.B.I., Ghaziabad, Ministry of Defence, Director General (Vigilance), Defence Estates, New Delhi and Drug Inspector, Central Drugs Standard Control Organization (C.D.S.C.O.) in the Cantonment General Hospital, Cantt Board, Meerut.

5. C.B.I. in the year 2015 had carried out a inspection of the Cantonment General Hospital, Meerut Cantt and finding gross irregularities registered a Regular Case No.RC1202016A0003 on 16.03.2016 at C.B.I./A.C.B., Ghaziabad under Sections 13(2)/13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the PC Act') against one Dr Aradhana Pathak, then Resident Medical Officer, posted at Cantonment General Hospital, Meerut Cantt and others on the allegation that during years 2011-14 said Dr Aradhana Pathak entered into criminal conspiracy with the petitioners and one Gaurav Arora, Prop. M/s Arora Pharma, Meerut, U.P. and other unknown persons and in furtherance of the said criminal conspiracy, she dishonestly and fraudulently purchased medicines at exorbitant rates in violation of prescribed procedure and norms and falsified the accounts (medicine stock books) and fabricated the relevant record.

6. During the investigation, role of one Sukhjeevan Singh Chahal, the then Chief Executive Officer (C.E.O.) Cantonment Board, Meerut Cantt. (since retired), petitioner- Mohd. Ali Zafar, the then Officiating Office Superintendent, Office of C.E.O., Cantonment Board, Meerut Cantt. came into light.

7. The C.B.I. after investigating the offence and collecting evidence and material, prepared impugned the charge-sheet under Sections 120B, 409, 420, 468, 471, 477A IPC, 13(2)/13(1)(d) of the PC Act,1988 for causing wrongful loss to the tune of Rs.23,46,436/- to the Cantonment Board Meerut and corresponding wrongful gain to themselves.

8. After carrying out a detailed investigation, the C.B.I. submitted a report and subsequently vide letter dated 23.08.2018 sought sanction for the prosecution of Dr. Aradhana Pathak,

R.M.O. Cantt General Hospital, petitioner-Mohd. Ali Zafar, officiating Office Superintendent of Cantt. Board (both supervisory posts) and petitioner-Sushil Kumar Compounder cum Store Keeper of Cantt. General Hospital (non-supervisory staff).

9. Cantonment Board vide C.B.R. No.169 dated 15.11.2018 resolved by majority of vote that no sanction for prosecution of charged officials be given to the C.B.I., and the Board further resolved that departmental proceedings under the provisions of the Cantonment Fund Servants Rules, 1937 and CCS Rules be initiated against the charged officials namely Dr. Aradhana Pathak and Mohd Ali Zafar, for which a committee was constituted, and it was conveyed to the higher authorities of the Cantonment Board as well as C.B.I./A.C.B. Ghaziabad. The C.B.I. thereafter submitted a charge-sheet against the accused persons on 17.03.2019.

10. Cantonment Board thereafter reviewed its earlier decision after considering the confidential letter dated 27.02.2019 of the Head of Branch C.B.I./A.C.B., Ghaziabad addressed to the D.D.G. (Vigilance), D.E., New Delhi, copy whereof endorsed to the President, Cantt. Board, Meerut and O.S.D. of C.V.C. New Delhi, Directorate of Defence Estate CC letter dated 03.04.2019 addressed to the President, Cantt Board of Cantt Board Meerut, passed Resolution No.139 dated 29.05.2019 granting sanction for prosecution of charged officials after detailed deliberation and discussion in the Board.

11. Charges levelled against the accused officials are of corruption attracting the relevant sections of the Indian Penal Code and provisions of PC Act,1988. Charges against the officials are of criminal conspiracy and mala fide intentions of the officials resulting into monetary loss to the Government of Indian and possible wrongful gain to the officials concerned with other accused persons.

12. Initially, this Court vide order dated 11.04.2019 dismissed the petition for prayers to quash the proceedings of Special Case No.2 of 2019 pending before Special Judge Anti Corruption/C.B.I., Court No.3, Ghaziabad. However, the Court granted three weeks' time to the petitioners to surrender before the trial court and for a period of three weeks, no coercive measure was to be taken against them.

Order dated 11.04.2019 would read as under:-

"Heard Sri Umakant Uniyal, Senior Advocate assisted by Sri Mehul Khare, learned counsel for the applicant, Sri Gyan Prakash, learned counsel for respondent no.2/CBI, Sri R.P.S. Chauhan, learned counsel for respondent no.3 and 4 and Sri Satish Kumar Rai, learned counsel for respondent no.5.

This application under Section 482 Cr.P.C. has been filed for quashing the chargesheet no.1 dated 07.03.2019 and the summoning order dated 11.03.2019 passed by Special Judge (Anti-Corruption), C.B.I., Court No.3, Ghaziabad in Special Case No. 2 of 2019 under sections 120B, 420, 468, 471 IPC as well as entire proceedings of the aforesaid case.

Learned counsel for the applicant has confined his argument to the extent that the order taking cognizance by which the petitioner has been summoned, learned trial court has straightaway issued NBW against the applicant and though he is

ready to appear before the court concerned and further submits that some interim protection may be granted to the applicant for the said purpose.

Learned counsel for the respondents state that as the applicant is ready to appear before the trial court as has been argued by learned counsel for the applicant, hence, they have no objection to it.

After having considered the submissions made by learned counsel for the parties and perused the material on record, I do not find any good ground for quashing the proceedings of the aforesaid case based on the charge-sheet as well as summoning order dated 11.03.2049 passed by the court concerned.The prayer to that extent is hereby refused.

However, for a period of three weeks from today, non-bailable warrant issued against the applicant shall be kept in abeyance.

In case the applicant does not appear before the Court below within the aforesaid period, trial Court is free to take coercive action against him.

It is made clear that the applicant will not be granted any further time by this Court for surrendering before the Court below as directed above.

With the aforesaid observations, the application stands disposed of."

13. The petitioners thereafter challenged the said order passed by this Court before the Supreme Court by filing S.L.P. (Criminal) No.4029 of 2019 converted to Criminal Appeal No.1166 of 2019. The Supreme Court vide order dated 31.07.2019 finding that this Court did not explicate the contentions raised by the petitioners, set aside the order dated 11.04.2019 and remitted the matter back to this Court for consideration afresh on its own merit leaving open all the contentions available to the parties, which should be decided on its merit and in accordance with law.

14. The Supreme Court also recorded a finding that grievance of the petitioners that there was no sanction order against them, did not survive for consideration as C.B.I. had placed on record sanction order dated 29.05.2019 issued by Cantonment Board. Whether that sanction order was just and proper was a matter, could be deliberated before this Court. The Supreme Court observed that it would be open to this court to decline to examine the challenge to sanction order on merits as it would be a triable issue.

Judgment and order dated 31.07.2019 passed by Supreme Court in Criminal Appeal No.1166 of 2019 would read as under:-

"Leave granted.

This appeal takes exception to the judgment and order dated 11.04.2019 passed by the High Court of Judicature at Allahabad in Application under Section 482 No.13242 of 2019, whereby the application for quashing of chargesheet No.1 dated 07.03.2019 and the summoning order dated 11.03.2019 passed by the Special Judge (Anti-Corruption), C.B.I., Court No.3, Ghaziabad in Special Case No.2 of 2019 under Sections 120B, 420, 468, 471 IPC came to be rejected.

From the impugned order, it appears that the High Court essentially dealt with the apprehension of the appellant that he may be arrested pursuant to non-bailable warrant issued against him. The High Court did not explicate on the other contentions raised by the appellant. To wit, there was no sanction order in place qua

the appellant at the relevant time when the application was filed; and that inquiry under Section 6 of the Delhi Special Police Act cannot proceed without a prior permission of the State Government.

As regards the grievance about no sanction order against the appellant that does not survive for consideration. For, the C.B.I. has now placed on record a sanction order dated 29.05.2019 issued against the appellant by the Board, which it is stated is the competent authority to issue such orders. Whether that sanction order is just and proper is a matter also to be deliberated and can be so done before the High Court. We make it clear that it will be open to the High Court to decline to examine the challenge to the sanction order on merits, if the same is a triable issue.

In view of the above, we set aside the impugned order and instead the quashing application under Section 482 of Criminal Procedure Code, filed by the appellant, is restored to its original number for consideration thereof afresh by the High Court on its own merits. All contentions available to the parties are left open, to be decided on its own merits and in accordance with law.

The appellant shall appear before the High Court on 06.08.2019 to enable the High Court to proceed in the matter expeditiously as per law.

The criminal appeal is disposed of in the above terms.

Pending applications, if any, stand disposed of."

15. Sri Ashok Mehta, learned Senior Advocate has submitted that Cantonment Board is an autonomous statutory body under the Cantonment Act, 2006. Employees of the Cantonment Board are neither the employees of the Central Government nor the State Government. Though they are public servants under Section 38 of the Cantonments Act, 2006. It has been submitted that C.B.I. could not have proceeded against the petitioners without there being consent of the State of U.P. under Section 6 of the Delhi Special Police Establishment Act, 1946 and, therefore, the whole investigation was void ab initio and was without jurisdiction and liable to be quashed.

16. It has been further submitted that general consent given by the State Government vide notification dated 15.06.1989 for investigation by the C.B.I. of offences under the provisions of PC Act,1988 would be of no relevance as the petitioners are neither the Central Government employees nor the State Government employees nor they are private individuals but they are employees of statutory body i.e. Cantonment Board under the provisions of Cantonments Act, 2006. Even there is no post facto consent of the State under Section 6 of the Delhi Special Police Establishment Act, 1946, and thus in absence of the consent for investigation by the C.B.I. in respect of the alleged offence committed by the petitioners, whole investigation was without jurisdiction and, therefore, charge-sheet is also invalid and is liable to be quashed. .

17. In respect of petitioner-Mohd. Ali Zafar, Sri Ashok Mehta, learned Senior Advocate has submitted that no sanction for prosecution was given to the C.B.I. by Meerut Cantt Board vide its Resolution dated 15.11.2018. However, during the pendency of said S.L.P. (Criminal) No.4029 of 2019, on 29.05.2019 decision of refusal to grant sanction for prosecution was reviewed, and sanction order was issued. It has been submitted that there was no fresh material available for consideration to grant

sanction for prosecution of the petitioner-Mohd Ali Zafar. In absence of fresh material, the Cantonment Board could not have reviewed its earlier decision refusing sanction for prosecution of the petitioner-Mohd. Ali Zafar. He, therefore, has submitted that the order of granting sanction for prosecution dated 29.05.2019 is bad in law and is liable to be quashed.

18. Sri S.K. Rai, learned counsel appearing for the Cantonment Board has submitted that charges levelled against the accused officials are of corruption and forging and manipulating the records, which has resulted wrongful loss to the Central Government and possible corresponding gain to the accused. Central Government has power to control and regulate the entire functioning of the Cantonment Board, and its employees as per the provisions of Cantonments Act and rules made thereunder. The Central Government has power to revise the penalty imposed by the Board or General Officer-in-Command and thus, ultimate power is vested with the Central Government in respect of functioning of the Board and its employees. It has been therefore, submitted that since Central Government has authority and power to supervise, control and regulate entire functioning of the Cantonment Board and its employees. There is no requirement of taking prior consent for investigation of the offences allegedly committed by the employees of the Cantonment Board by the C.B.I. from the State Government inasmuch as employees of the Cantonment Board are not under the control of the State Government directly or indirectly. The competent authority has already granted sanction for prosecution of the petitioners under Section 19 of the PC Act and, therefore, there is no ground for interference by this Court in the impugned proceedings, and the petitions being devoid of merit and substance are liable to be dismissed.

19. Sri Gyan Prakash Srivastava, learned Senior Advocate assisted by Sri Sanjay Kumar Yadav, learned counsel appearing for the C.B.I. has submitted that the Cantonment Board is an autonomous body under the Cantonments Act, 2006 functioning under the overall control of the Ministry of Defence, Government of India. Supervision and control over the working of the Cantonment Board is exercised by the Principal Director, Defence Estates, and by the Central Government through the Director General, Defence Estates, Delhi Cantt., Ministry of Defence at the highest level. It has been submitted that there is no requirement of any permission from the State Government under the Delhi Special Police Establishment Act for investigation of an offence against the employees of the Cantonment Board by the C.B.I. It is also submitted that the legislative competence over the cantonment are is of the Union Government as subject matter is provided in Entry 3 of the Union List of the VIIth Schedule of the Constitution of India.

20. It has been further submitted that valid general consent of the State Government of Uttar Pradesh under Section 5 of DSPE Act with respect to C.B.I. exists vide Notification dated 15th June, 1989 issued by Government of Uttar Pradesh. The C.B.I. is competent to lodge FIR and undertake the investigation of the case against employees of the Cantonment Board and no special permission/consent is required from the State Government. State Government itself issued a letter dated 03.05.2019 and clarified that employees of the Cantonment Board are not under the control and supervision of the State

Government, and the Cantonment Board falls under the control of Central Government.

21. In respect of the submissions that earlier sanction for prosecution was refused by the Board on 15.11.2018 and on the very same material the sanction was granted vide resolution dated 29.05.2019, he has submitted that the Board has raised the issue of non-jurisdiction of the C.B.I. in the matter of Cantonment Board, Meerut and the Board therefore, passed a resolution dated 15.09.2018 itself and based on the views of the Members of the Board resolved by the majority of the vote, no sanction for the prosecution against petitioner-Mohd. M.A. Zafar was given to the C.B.I. and further resolved that departmental proceedings under the provisions of Cantonment Funds Service Rules, 1937 and CCS Rules be initiated against the charged employees in respect of allegations levelled against the accused but the accused failed to appear before the Board (Enquiry Member). Decision of the competent authority of refusing sanction and to take up a parallel investigation was not in line with law as in the opinion of the Board, CBI did not have jurisdiction over the employees of the Board. As mentioned above, when the entire material was again placed before the Board and the legal position got clarified, the Board reconsidered its view on the issue and accorded sanction for prosecution on 29.05.2019 against the petitioner.

22. It has also been submitted that trial court had taken cognizance under the Indian Penal Code, and not under the provisions of PC Act,1988 against petitioner- Mohd Ali Zafar and therefore, even otherwise the issue of sanction under section 19 of the PC Act before cognizance would not survive as sanction under Section 19 of the PC Act is in respect of the offences under the PC Act, 1988 and for any other penal offence. Employees of the Cantonment Board do not fall under the category of Government Servant who are removable by the Central/State Government, therefore, no prior sanction under Section 197 Cr.P.C. is required.

23. Facts are not much in dispute. The Cantonment Board is the local authority which performs municipal functions in the Cantonment area under the provisions of Cantonments Act, 2006. The State Government does not have any power, control and authority to supervise and regulate the functioning of the Cantonment Board or its employees or over the area under the jurisdiction and control of a Cantonment Board.

24. Section 38 of the Cantonment Act, 2006 provides "Every officer or employee, permanent or direct shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code and Section 2(c) of the PC Act." Service conditions of the employees of the Cantonment Board are governed under the Cantonment Board Employees Service Rules, 2021 which came into force with effect from 13.10.2021 after repealing the Cantonment Funds Service Rules, 1937.

25. The question which is primarily involved in these petitions is whether without consent of the State Government, the C.B.I. would be empowered to exercise powers and jurisdiction in respect of an area under the control of Cantonment Board.

26. Sections 5, 6 and 6A of the Delhi Special Police Establishment Act, 1946,

which are relevant for decision on issue in question, are extracted hereunder:-

"5. Extension of powers and jurisdiction of special police establishment to other areas.--

(1)The Central Government may by order extend to any area (including Railway areas), 1[in 2[a State, not being a Union territory]] the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under section 3.

(2)When by an order under sub-section (1) the powers and jurisdiction of members of the said police establishment are extended to any such area, a member thereof may, subject of any orders which the Central Government may make in this behalf, discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of a police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force. 3[(3) where any such order under sub-section (1) is made in relation to any area, then, without prejudice to the provisions of sub-section (2) any member of the Delhi Special Police Establishment of or above the rank of Sub-Inspector may subject to any orders which the Central Government may make in this behalf, exercise the powers of the officer in charge of a police station in that area and when so exercising such powers, shall be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station.]

6. Consent of State Government to exercise of powers and jurisdiction.-- Nothing contained in section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in 2[a State, not being a Union territory or railway area], without the consent of the Government of that State.]

6A. Approval of Central Government to conduct inquiry or investigation.--

(1)The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to--

(a) the employees of the Central Government of the Level of Joint Secretary and above; and

(b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.

(2)Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to section 7 of the Prevention of Corruption Act, 1988 (49 of 1988).]"

27. From perusal of the aforesaid provisions, it is evident that unless the State Government gives its consent, the C.B.I. would not have the power for investigation of an offence in any area of the State Government. Similarly, under Section 6A of the Delhi Special Police Establishment Act, 1946 without the previous approval of the Central Government, the C.B.I. would not have jurisdiction to investigate the

offence under the PC Act against the employees of the Central Government of the level of Joint Secretary and above and such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned and controlled by that Government.

28. There can be no dispute that an area falling under the Cantonment is not an area under the State Government and nor the petitioners are employees of the Central Government or appointed by the Central Government in the Cantonment Board. Thus, there is no applicability of Section 6 or 6A of the Delhi Special Police Establishment Act, 1946 in the present case. The petitioners are neither employees of the State Government nor Central Government nor the area of Cantonment Board, Meerut falls within the jurisdiction or control of the State Government.

29. The State Government has issued notification dated 15.6.1989 in pursuance of the provisions of Section 6 of the DPSE Act. The notification is extracted herein below :-

"Government of Uttar Pradesh
Home(Police) Section-1
No.3442/VIII-1-84/88
Lucknow, dated : June 15, 1989
Notification

In pursuance of the Provisions of Section 6 of the Delhi Special Police Establishment Act, 1946 (25 of 1946) the Governor of the State of Uttar Pradesh is pleased to accord consent to the extension of powers and jurisdiction of the members of the Delhi Special Police establishment in whole of the State of Uttar Pradesh, for investigation of offences punishable under the Prevention of Corruption Act, 1988 (49 of 1988), and attempts, abetments and conspiracies in relation to all or any of the offence or offences mentioned above and any other offence or offences committed in the course of the transaction and arising out of the same facts, subject however to the condition that no such investigation shall be taken up in cases relating to the public servants, under the control of the State Government except with the prior permission of the State Government.

BY ORDER IN THE NAME OF THE GOVERNOR.
Sd/-
(S.K. TRIPATHI)
HOME SECRETARY TO THE GOVT OF UTTAR PRADESH"

30. The State Government vide Government Order dated 03.05.2019 has clarified that there is no requirement of any consent in respect of employees of the Cantonment Board as they are not the employees of the State Government and the area of Cantonment does not fall within the area of jurisdiction of the State Government.

31. In view thereof, in respect of the investigation of the offences committed by an employee of the Cantonment Board or an offence committed within the area of Cantonment Board, no consent of the State Government or the Central Government is mandatory for undertaking the investigation by the C.B.I. I, therefore, I find no substance in the submissions of Sri Ashok Mehta, learned Senior Advocate that without prior consent of the State Government in respect of the offence committed under the PC Act,1988 by an employee of the Cantonment Board,

Meerut, investigation was without jurisdiction and charge-sheet filed was illegal being without jurisdiction.

32. So far as question of sanction accorded by cantonment Board vide order dated 29.05.2019 for prosecution of the petitioners is concerned, resolution dated 15.11.2018 had been resolved by majority of vote that no sanction for prosecution of Dr Aradhana Pathak and petitioner Mohd Ali Zafar to be given to the C.B.I. and departmental proceedings under the provisions of Cantonment Funds Service Rules, 1937 and CSS Rules be initiated against the charged employees for which a committee was constituted. However, after other material was placed before the Board, it has been resolved vide order dated 29.05.2019 to grant sanction for prosecution. The Supreme Court itself in its order dated 31.07.2019 has held that this Court may decline to examine the challenge to the sanction order on merit as it is a triable issue. The earlier resolution appears to have been granted in ignorance of correct legal position and when the correct legal position was brought to the notice of Board, it did grant sanction for prosecution. I find no illegality in sanction order for prosecution of the petitioner.

33. Valid sanction by the competent authority under Section 19 of the PC Act is sine qua non for taking cognizance of an offence against a public servant under PC Act, 1988. If the sanction is held to be invalid, entire proceedings undertaken by the trial court would be void. Section 19 of the PC Act forbids taking of cognizance by the court against a public servant for an offence except previous sanction of the competent authority. Competence of the Court tyring the accused depends upon the existence of a valid sanction. In case, the sanction is found to be invalid, the court can discharge the accused, relegating the parties to a stage where the competent authority may grant a fresh sanction for the prosecution in accordance with law. If the trial court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non est in the eyes of law and shall not forbid a second trial for the same offence upon grant of a valid sanction for such prosecution. Sanction order may be challenged on two grounds namely; sanction granted by an authority not competent to accord sanction. Such an order would be without jurisdiction and nullity. However, if there is an error, omission or irregularity in sanction order, the same would not be fatal unless it has resulted in violation of justice.

34. For taking cognizance under Section 19 of the PC Act, incriminating material should be placed before sanctioning authority in order to apply its mind and take a decision for grant of sanction. Whether there is an application of mind would depend on the facts and circumstances of each case. There is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. Former question can be entertained at the threshold but the latter is a question which has to be entertained during trial. It is not in dispute that in the present case there is a sanction for prosecution of the petitioners which has been granted by the Board vide order dated 29.05.2019. Whether there was the material and evidence placed before the authority to grant sanction which was refused earlier by the order dated 15.11.2018 is a question which can be decided by the trial court after leading evidence by the prosecution

and the defence. This court, therefore, does not find it appropriate to decide the said issue on affidavits in these proceedings.

35. In view thereof, these petitions being devoid of merit and substance are hereby dismissed.

(2023) 4 ILRA 382
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 13699 of 2016

Gyan Chandra & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Jay Babu Kesharwani, Sri Mohammad Mustafa, Mohammad Firoz Khan

Counsel for the Opp. Parties:
G.A., Sri Ajay Vikram Yadav, Sri Satya Prakash

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code,1860 - Sections 363, 366, 376(2)(H) & 504 - ¾ POCSO Act-Challenge to-rejection order u/s 311 Cr.PC for summoning the victim-victim could not be cross-examined by the accused persons who are facing the trial-Trial court closed the cross-examination without giving proper opportunity and equal protection of law to the defence side-Since the Victim PW-2 was the material witness, it was the duty of the trial court to provide full opportunity to cross-examine such witness-Thus, where for the some reason or the other, accused could not cross-examine the prosecution witnesses, the concerned court may re-call such witnesses for cross-examination exercising the power u/s 311 Cr.P.C.(Para 1 to 28)

The application is allowed. (E-6)

List of Cases cited:

1. Raja Ram Prasad Yadav Vs St. of Bih. & anr., (2013) AIR SC 3081

2. Natasha Singh Vs C.B.I. (St.) (2013) Cr.L.J. 3346 SC

3. Dalveer Singh Vs St. of Raj. (2013) Cr.L.J. 3064

4. Sankat Mohan Prasad Vs St. of U.P. (2004) ACC 933 (Alld.)

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

1. Heard Sri Mohammad Firoz Khan, learned counsel for the applicants, Sri Pankaj Kumar Tripathi, learned Additional Government Advocate for the State and perused the record.

2. This application u/s 482 Cr.P.C has been filed by all three accused persons Gyan Chandra, Deshraj and Gopi @ Ashok Kumar, for quashing the impugned order dated 28th January, 2016 passed by the Additional District & Sessions Judge / F.T.C, Kaushambi in S.T No. 07 of 2015 - State Vs. Gyan Chandra and others, under Sections 363, 366, 376 (2) (H), 504 I.P.C and ¾ POCSO Act, Police Station - Sarai Akil, Distrit Kaushambi, arising out Case Crime No. 257 of 2013, by which the Trial Court rejected the application under Section 311 Cr.P.C for summoning the victim P.W. 2 for cross-examination.

3. The brief facts of the case are that the first informant Smt. Rampati W/o Lavkush, lodged an F.I.R on 07.09.2013, regarding the incident dated 05.09.2013 that on the fateful day she had gone to the field for work leaving the victim (her

daughter) aged about 14 years, student of Class-VIII alone in her house and when she returned back she found that her daughter was not present and the household articles were disordered. Accused-applicant Gyan Chandra S/o Roshan Lal of the neighbourhood was also missing. Cash amount Rs.10,000/-, a golden chain, golden Mangalsutra, two silver anklet, and a bank A.T.M Card of her husband of Union Bank of India were also missing. She apprehended that accused- Gyan Chandra, Deshraj and Gopi @ Ashok Kumar have lured her daughter and have taken her away. A few days back there was a dispute with Gyan Chandra, who had threatened to look into it and to insult her in the society. She searched out her daughter but could not find, hence report/information was lodged.

4. Contrary to the allegations levelled in the F.I.R, it is averred by the applicants that applicant no. 1 and the victim were consenting party and had fallen in love to each other and in this way both passed about two months eleven days with each other, they also got married and had also prepared marriage agreement (Annexure No. 2) on 25.11.2012 at Kaushambi.

5. The I.O. has submitted charge-sheet wrongly. During the trial all the relevant witnesses have been examined, but the applicants were provided only a single date for cross-examination of the victim, on the said date due to illness of the counsel was not in a position to cross-examine, hence an adjournment application was moved, but the learned trial court without giving any opportunity for cross-examination, rejected the application on 03.02.2015. Certified copy of the relevant order-sheet since 13.01.2015 to 10.03.2016 is being annexed as ***Annexure no. 3*** to the affidavit.

6. An application under Section 311 Cr.P.C. was moved on 24.12.2015 before the trial court for providing opportunity to cross-examination of the victim P.W. 2, which is annexed as Annexure no. 4 to this affidavit, but it was rejected on 28th January, 2016 without considering the facts and circumstances of the case and without giving any weight to the application. The applicants are not willing to delay the trial, but as they are behind the bar and the co-accused applicant no. 3 was in Haryana Jail, since the victim P.W 2 is the main witness, hence her cross-examination is necessary for a fair trial and proper adjudication. Applicant no. 1 and victim are major and they have solemnized their marriage at their own sweet-will. After recovery and arrest the victim was sent to their parents and applicant no. 1 was sent to Jail. The order dated 28.01.2016 passed by the trial court is arbitrary and perverse and is liable to be quashed. Hence, the application be allowed and an opportunity be provided to cross examine the victim P.W. 2.

7. The State has filed counter affidavit no. 02 of 2016 and has alleged that the contents of the application are not correct, the victim was a minor girl aged about 15 years, hence no question arises to give consent to the applicant no. 1, he had abducted the victim minor daughter of opposite party no. 2 and committed the alleged offence. The I.O. has rightly submitted the charge-sheet. The Applicants were provided an opportunity to cross-examination, but they are continuously lingering on the trial and are also threatening to the O.P and the victim, they had surrendered/arrested by the police. On the direction of the Hon'ble Court on the application of O.P. no. 2 with regard to fair

investigation, the charge-sheet had been submitted.

8. Applicants have political background, two accused person are still absconding, the trial court has rightly rejected the application as the applicants were applying delay tactic to delay the trial inspite of specific direction of the Apex Court for speedy trial of an offence under Section 376 (2) (H) I.P.C, hence the application be rejected.

9. No rejoinder affidavit has been filed by the applicants, hence heard both the parties and perused the record.

10. From perusal of the record, it transpires that on 13th January, 2015 only accused Gyan Chandra and Deshraj were present, accused - Gopi @ Ashok Kumar was not present in the court, even then evidence of P.W 1 was recorded.

11. On 03rd February, 2015, only in presence of Gyan Chandra and Deshraj and in absence of accused Gopi @ Ashok Kumar, (languishing in Gurgaon Jail Haryana), examination-in-chief and evidence of the prosecutrix was recorded and when the adjournment application 29 - B was produced, the same was rejected by the then Presiding Officer. According to this Court in absence of one co-accused - Gopy @ Ashok Kumar and if no exemption application on his behalf was moved, the trial court was not competent enough to record the evidence of the prosecutrix. In the aforesaid circumstances, it was duty of the trial court to ensure the presence of all the three accused persons first and only in present of all the accused persons or in case if they are exempted through counsel, evidence of the prosecutrix or any other witness could be recorded, but the learned trial court besides applying the Rules of examination enumerated in Cr.P.C and the Indian Evidence Act, not only recorded the evidence of prosecutrix, but also closed her cross-examination.

12. From perusal of the order-sheet, it also reveals that when the witnesses were not present, the learned trial court adjourned the case easily without seeking any adjournment and on 21.04.2015, he recorded statements of P.W. Nos. 3 and 4 only in present of accused Gyan Chandra and Deshraj and in absence of co-accused Ashok Kumar.

13. This Court is of the view that the learned trial court has acted with manifest error in recording the evidence. Further on 16.06.2015, the learned trial court has recorded the statements of P.W 6 and 7 in absence of co-accused - Gopi @ Ashok Kumar. It was also improper exercise of the power by the trial court.

14. It transpires that on 16.06.2015 an application 36 - B was moved by the prosecution under Section 319 Cr.P.C, which would have been in respect of summoning of some so called left accused persons. On 09.7.2015, the application 36-B has been disposed of, but it is not known as to whether it was allowed or rejected, however on 05.11.2015 in presence of all the accused persons, the statement of P.W. 1 was again recorded (if there is no clerical mistake regarding number of witnesses). On 03.12.2015 when the accused persons moved 42-B application for recalling of witness P.W. 2, the prosecutrix, the same was rejected on 28th January, 2016, which has been challenged before this Court.

15. Statement of P.W. 2 is not before this Court, hence this Court does not know

as to whether the witness has supported the prosecution version or not. As per Chapter X of the Indian Evidence Act, 1872, if an examination-in-chief of the witnesses have been recorded, according to Section 138 so examined witnesses would be cross-examined (if the adverse party so desires) and the witnesses may be re-examined (if the party calling him, so desires).

16. From the above discussions, it is very much clear that the victim no. 2 could not be cross-examined by the accused persons, who are facing the trial. The application had been moved during the course of examination of the witnesses. It has already been pointed out that the learned trial court has illegally recorded the evidence of the witnesses in absence of co-accused - Gopi @ Ashok Kumar. It could not be established that on the said dates any exemption application on behalf of co-accused Gopy @ Ashok Kumar was produced and the same was allowed by the trial court. It is also observed that the trial of all the three accused persons were cumulatively going on and the case/file of accused - Gopi @ Ashok Kumar had not been separated.

17. The impugned order discloses the incorporation of rulings by the Presiding Officer of his choice, without considering that it was a matter of examination of the witnesses rather the matter of Section 311 Cr.P.C. It is crystal clear that the trial court has not provided proper opportunity and equal protection of law to the defence side while several dates have been given to the prosecution for examination of the witnesses without any adjournment, the learned trial court closed the cross-examination same day, rejecting the adjournment application of the defence, and did not bother that the evidence of victim P.W. 2 has been recorded in absence of co-accused Gopi @ Ashok Kumar. It is duty of the trial court to record the demenure of the victim and the accused, during the trial. This court is of the view that at the time of recording of the evidence of the prosecutrix the presence of the accused persons was very much necessary.

18. It is also duty of the public prosecutor to ensure as to whether the accused is present in the court or not during the examination of the witness. It appears that neither the trial judge nor the public prosecutor performed their duties well.

Learned trial judge could not understand the abstracts behind the section in which the accused persons had moved application to recall the witness for cross examination. He also could not consider that two accused persons were in District Jail and one accused Gopi @ Ashok Kumar was in Gurgaon Jail and for a accused, who is languishing in jail, it becomes very problematic and tedious job to prosecute or defend the case. Generally they are unable to pay fee and draw proper attention of the counsel and the Court.

19. When all the three accused persons gathered together, they moved re-call application during the course of trial and before the closer of the prosecution evidence. The trial court referring some rulings of his choice, rejected the application in the aforesaid circumstances for which he was responsible.

20. From the above discussion, it has been established that the trial court was not doing fair trial in accordance with the code of criminal procedure and the Indian Evidence Act.

Section 311 Cr.P.C, 1973, is as under : -

"Section 311 in The Code Of Criminal Procedure, 1973.

311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."

21. From the above, it is very much clear that there are two part of this Section. According to first part of the Section, the Court can exercise the power :-

(1) to summon any person as a witness, or.

(2) to examine any persons in attendance, though not summoned as a witness, or,

(3) to recall and re-examine any person already examined.

The second part, which is mandatory and imposes an obligation on the Court:-

(1) to summon and examine, or

(2) to recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case.

22. Since the victim P.W. 2 was the material witness, therefore to provide full opportunity to cross-examine such witness was the duty of the trial court.

23. In ***Raja Ram Prasad Yadav Vs. State of Bihar and Anr. A.I.R 2013 (SC) 3081***, it has been held that it is, therefore imperative that invocation of Section 311 Cr.P.C and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provisions, namely, for achieving a just decision of the case. The power vested under the said provisions is made available to any court at any stage in any inquiry or trial or other proceedings initiated under the code for the purpose of summoning any person as a witness or for examining any persons in attendance, even though not summoned as witnesses or to re-call or re-examine any person in attendance. In so far as recalling and re-examining of any person already examined, the court must necessarily consider and ensure that such re-call and re-examination of any person, appears in the view of the court to be essential for the just decision of the case.

24. In ***Natasha Singh Vs. C.B.I. (State) 2013 Cr.L.J. 3346 (SC)***, it has been held that fair trial entails the interest of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunity to the persons concerned. To adduce evidence in support of the defence is a valuable right. Denial of such right would amount to denial of a fair trial.

25. In ***Dalveer Singh Vs. State of Rajasthan 2013 Cr.L.J 3064***, it is held that where the counsel of the accused failed to cross-examine the prosecution witness, the accused could not be made to suffer because of mistake of his counsel in not cross examining the said witness, hence application for re-calling of the witnesses was allowed.

26. In ***Sankat Mohan Prasad Vs. State of U.P. 2004 ACC 933 (Alld.)*** this Court held that where for the some reason

or the other, counsel for the accused could not cross-examine the prosecution witnesses, the concerned court may re-call such witnesses for cross-examination exercising the power under Section 311 Cr.P.C.

27. On the basis of above discussions it is concluded that the accused persons have been illegally denied the opportunity of cross-examination by the then trial judge. It is the duty of the court to examine the essential material witness in due course of law. The cause of justice would only be served after examining the material witnesses in right perspective after giving due opportunity of cross-examination to the defence.

28. On the above discussion, this Court comes to the conclusion that the learned trial court had committed manifest error during the course of trial in recording the evidence and has proceeded with the case in harried manner in violation of the principles of natural justice and fair trial. The impugned order is not sustainable in the eye of law and deserves to be quashed.

O R D E R

(a) This Application U/s 482 Cr.P.C is **allowed.**

(b) The impugned order dated 28th January, 2016, passed by the concerned trial court is hereby **quashed.**

(c) The learned trial court is directed to re-call the victim P.W. 2 for her cross-examination on behalf of all the three accused persons.

(d) Let a certified copy of this order be sent to the concerned court for its compliance immediately.

(2023) 4 ILRA 387

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 16161 of 2022

Ajay Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Umesh Kumar

Counsel for the Opp. Parties:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973 - Section 482 - U.P. Excise Act,1910 -Sections 60, 63 & 72-Challenge to-rejection order regarding release of vehicle-applicant is the owner of vehicle and the three relatives had taken the applicant's vehicle on rent-When the applicant came to knowledge about the incident after two months he lodged FIR against his relative-When the release application and the revision against the rejection order of CJM were pending, the impugned vehicle was under the process of confiscation-Later confiscation proceeding has become final at the end of District Magistrate and the vehicle had been auctioned-In this case, since no corpus is into existence for release hence this application has also become infructuous-Thus, the impugned order passed by the learned CJM and revisional court is factually and legally correct-Section 72 of the Act does not contain any provision indicating that such seized property may be released by the magistrate in exercise of his power u/s 457 CrPC as sub section (1) to (4) of Section 72 clearly denudes the magistrate of his power to pass any order u/s 457 CrPC for release of anything seized in connection of an offence purporting to

have been confiscated under the Act.(Para 1 to 18)

The application is dismissed. (E-6)

List of cases cited:

1. Mustafa Vs St. of U.P. (2019) AIR SC 3949

2. Virendra Gupta Vs St. of U.P. (2019) 108 ACC 438

3. Sundar Bhai Ambalal Desai Vs St. of Guj. (2002) law suit SC 1346

4. Chandrapal Vs St. of U.P. (2021) 0 Supreme All 92

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

1. Heard Sri Umesh Kumar, learned counsel for the applicant and Sri Pankaj Kumar Tripathi, learned A.G.A. for the State and perused the material available on record.

2. This application has been made by the accused -applicant to quash the order dated 19.07.2021 passed by Chief Judicial Magistrate, Etah, in criminal case no. 781 of 2020 and order dated 16.10.2021 passed by Learned Sessions Judge in criminal revision no.76 of 2021 rejecting the application of applicant for releasing his vehicle no. (U.P 80 CT 3283), in case crime no. 594 of 2019, U/s 60, 63, 72 of UP. Excise Act, Police Station Kotwali, District Etah.

3. In brief, facts of the case are that an FIR was lodged in case crime no. 594 of 2019, at Police Station Kotwali Dehat, U/s 60, 63, 72 of Excise Act, District Etah. A copy of the FIR dated 21.12.2019 has been filed as annexure no.1 to the affidavit. The applicant is not involved in the said crime and he never gave consent for the purpose of the alleged illegal work. The relatives use the vehicle of the applicant for own purposes.

4. The applicant filed an application for the release of his vehicle no. UP 80 CT 3283 on 4.8.2020 before the C.J.M, Etah which is in the custody of police station Kotwali Dehat, u/s 60, 63, 72 of Excise Act, District Etah. The application dated 4.8.2020 is annexure no.2 to the affidavit.

5. The learned C.J.M rejected the applicant's application without considering the fact on 19.7.2021, the certified copy of the order has been filed herewith as annexure no. 3. The applicant filed criminal revision on 16.10.2021 in which he had disclosed the entire facts but the same was also rejected by Learned District and Sessions Judge on the same day.

6. The FIR was not lodged against the applicant Ajay Kumar but against Surendra Singh, Satish Chandra and Devendra Singh in case crime no. 367 of 2020, at police station Iglas, u/s 406, 452, 323, 504 of IPC., District Aligarh which is annexure no. 5 to the affidavit.

7. Devendra Singh, Surendra Singh and Satish Chand had taken the applicant's vehicle on rent in the month of august 2019. The vehicle was run by the aforesaid persons till the incident and when the applicant inquired after two months from the aforesaid persons/relatives regarding the vehicle, then matter came into the knowledge that the vehicle is being kept in police station Kotwali Dehat, Etah. Since the aforesaid persons are relatives of the applicant, no suspicion arose and when the matter came into the knowledge of the applicant, he started his effort to release the vehicle. The vehicle was not used by the

applicant in the alleged crime and has no concern with the alleged persons. The applicant has also lodged an FIR against his relatives because they were not giving information about the vehicle. The aforesaid relatives cheated to the applicant and used the applicants vehicle in the said crime that was not in the knowledge of the applicant. The applicant is not involved in the aforesaid crime and the vehicle is in the name of the applicant and he is owner of the vehicle. The applicant was ready to pay the security before the learned court imposed by the court at the time of the release of vehicle. The applicant has completed all the legal formalities regarding the vehicle through the documents which is annexure no. 6 to the affidavit.

8. The learned court did not consider the facts and circumstances available on records and passed the impugned order in a routine manner without applying judicial mind. The vehicle of the applicant is confined since 21.12.2019 and is standing in worst position as such if it is not released, he will suffer irreparable loss and injury. The trial court ignoring all the facts and circumstances of the case, rejected the release application which is bad in the eyes of law. The learned court has passed the impugned order in mechanical way without perusing the record. Hence, the application be allowed and order of the CJM and the revisional Court be set aside.

9. All the relevant papers referred in the application have been annexed with the affidavit..

10. From the side of State opposite party no. 1 Ashwini Kumar SI, PS Kotwali Etah has filed counter affidavit and has deposed that the order of rejection passed by the CJM and the learned revisional court are legal, perfect and the same are always sustainable in the eyes of law. The impugned vehicle has been auctioned for a sum of RS 98500/-.

11. The applicant has filed rejoinder affidavit in which a simple prayer has been made to allow the petition and no avernments have been made against Para 11 of the Counter Affidavit and the same has not been denied which discloses that in furtherance of confiscation, the impugned vehicle has been auctioned. From the perusal of both the impugned order it transpires that when the release application and the revision against the rejection order of CJM were pending, the impugned vehicle was under the process of confiscation. Learned CJM relying on ***Mustafa Vs. State of UP AIR 2019 SC 3949 and Virendra Gupta Vs. State of UP 2019 (108) ACC 438*** rejected the release application observing that when any proceeding for confiscation of a vehicle u/s 72 (2) of the UP Excise Act is pending, the district magistrate would only be entitled to deal with such vehicle and in that case the concerned judicial magistrate would not be competent to release the vehicle or to entertain the release application u/s 451, 452 and 457 of Cr.P.C.

12. It would be appropriate to mention Section 72 of the U.P. Excise Act, which reads as follows:

Section 72. What things are liable to confiscation

(1) Whenever an offence punishable under this Act has been committed --

(a) every [intoxicant] in respect of which such offence has been committed;

(b) every still, utensil, implement or apparatus and all materials by means of which such offence has been committed;

(c) every [intoxicant] lawfully imported, transported,

manufactured, held in possession or sold along with or in addition to any [intoxicant] liable to confiscation under clause (a) ;

(d) every receptacle, package and covering in which any [intoxicant] as aforesaid or any materials, still, utensil, implement or apparatus is or are found, together with the other contents (if any) of such receptacle or package ;and

(e) every animal, cart, vessel or other conveyance used in carrying such receptacle or package; shall be liable to confiscation.

(2) Where anything or animal is seized under any provision of this Act, the officer seizing and detaining such property shall, within three working days from the date of such seizure and detention ; produce a detailed report for confiscation along with such seized property, seizure memo and other relevant documents before the Collector. The Collector shall, upon receiving the said report along with seizure memo and seized property, immediately order for safe custody and storage of goods as he may deem fit. The Collector, if satisfied for reasons to be recorded that an offence has been committed due to which such thing or animal has become liable to confiscation under sub-section (1), he may order confiscation of such thing or animal whether or not a prosecution for such offence has been instituted ;

Provided that in the case of anything (except an intoxicant) or animal referred to in sub-section (1), the owner thereof shall be given an option to pay in lieu of its confiscation such fine as the Collector thinks adequate, not exceeding its market value on the date of its seizure.

(3) Where the Collector on receiving report of seizure or on inspection of the seized thing, including any animal, cart, vessel or other conveyance, is of the opinion that any such thing or animal is subject to speedy wear and tear or natural decay or it is otherwise expedient in the public interest so to do he may order such thing (except an intoxicant) or animal to be sold at the market price by auction or otherwise.

(4) Where any such thing or animal is sold as aforesaid, and--

(a) no order of confiscation is ultimately passed or maintained by the Collector under sub-section (2) or on review under sub-section(6) ; or

(b) an order passed on appeal under sub-section (7) so requires;or

(c) in the case of a prosecution being instituted for the offence in respect of which the thing or the animal is seized, the order of the Court so requires ; the sale proceeds after deducting the expenses of the sale shall be paid to the person found entitles thereto.

(5) (a) No order of confiscation under this section shall be made unless the owner thereof or the person from whom it is seized is given--

(i) a notice in writing informing him of the grounds on which such confiscation is proposed; (ii) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice; and (iii) a reasonable opportunity of being heard in the matter.

(b) Without prejudice to the provisions of clause (a), no order confiscating any animal, cart, vessel, or other conveyance shall be made if the owner thereof proves to the satisfaction of the Collector that it was used in carrying the contraband goods without the knowledge or connivance of the owner, his agent, if any, and the person in-charge of the animal cart, vessel or other conveyance and that each of them had

taken all reasonable and necessary precautions against such use.

(6) Where on an application in that behalf being made to the Collector within one month from any order of confiscation made under sub-section (2), or as the case may be, after issuing notice on his own motion within one month from the order under the sub-section refusing confiscation to the owner of the thing or animal seized or to the person from whose possession it was seized, to show cause why the order should not be reviewed, and after giving him a reasonable opportunity of being heard, the Collector is satisfied that the order suffers from a mistake apparent on the face of the record including anymistake of law, he may pass such order on review as he thinks fit.

(7) Any person aggrieved by an order of the confiscation under sub-section (2) or sub-section (6) may, within one month from the date of the communication to him of such order, appeal to such judicial authority as the State Government may appoint in this behalf and the judicial authority shall, after giving an opportunity to the appellant to be heard pass such order as it may think fit, confirming, modifying or annulling the order appealed against.

(8) Where a prosecution is instituted for the offence in relation to which such confis*cation was ordered the thing or animal shall subject to the provisions of sub-section (4) be disposed of in accordance the order of the Court.*

(9) No order of confiscation made by the Collector under this section shall prevent the infliction of any punishment to which the person affected thereby may be liable under this Act."

13. Learned revisional court has quoted Section 72 of U.P. Excise Act and has also analysed the judgment Virendra Gupta (supra) and has concluded that in Virendra Gupta (supra) the case of Govt. of NCT of Delhi vs. Narendra (2014) 13 SCC 100 has been considered according to which in case of confiscation, the seized property shall be dealt with by section 72 of the Act which does not contain any provision indicating that such seized property may be released by the magistrate in the exercise of his power u/s 457 CrPC as sub section (1) to (4) of Section 72 clearly denudes the magistrate of his power to pass any order u/s 457 Cr.P.C for release of anything sized in connection of an offense purporting to have been confiscated under the Act.

14. The District Magistrate, Etah had informed CJM vide report dated 5.9.2020 that the confiscation proceedings regarding the impugned vehicle is pending before him. It appears that later on the confiscation proceeding has become final at the end of District Magistrate, Etah hence, the impugned vehicle had been auctioned for a consideration of Rs 98,500/-.

15. Learned counsel for the applicant has relied on ***Sundar Bhai Ambalal Desai Vs. State of Gujarat 2002 lawsuit (SC) 1346*** which is in respect of 451 Cr.P.C and is inapplicable about the vehicle which are subject to the confisccation and not the subject matter of general law, hence Chapter XXXIV of the Cr.P.C has no applicability.

16. Learned counsel for the applicant has further relied upon ***Chandrapal Vs. State of UP 2021 0 Supreme All 92*** in which the application u/s 482 Cr.P.C was allowed and the matters were remitted back to the concerned magistrate to decide first as to whether the Civil Court had jurisdiction or not. In this case since no

corpus is into existence for release hence this application has also become infructuous. Now the only remedy remains available to the applicant is to challenge the validity of confiscation proceeding conducted by the District Magistrate, Etah.

17. On the basis of above discussion this court is of conclusion that the impugned order passed by the learned CJM and learned revisional court is factually and legally correct. When the impugned vehicle was under the confiscation proceeding before the district magistrate Etah, it was open to the applicant to appear and contest there.

18. In view of the above judgments and Section 72 of the UP Excise Act both the courts at district level were not competent to entertain and allow the release application. At present there is no property remains as subject matter for decision by the civil court or the High Court. Hence this application deserves to be dismissed.

ORDER

This application is, accordingly, **dismissed.**

(2023) 4 ILRA 392
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 19835 of 2019

Nazim & Ors. ...Applicants
Versus
State of U.P. & Anr ...Opp. Parties

Counsel for the Applicants:
Sri Devendra Dahma, Sri Sanjay Mishra

Counsel for the Opp. Parties:
G.A., Sri Ravi Prakash Singh

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 147, 323, 324, 504, 506 & 326 - If an stick is used in causing hurt or grievous hurt on the ear of a victim - Section 326 I.P.C would not be attracted - if such injury would have been caused by knife, or by other means mentioned in Section 326 I.P.C - such injury would be covered under Section 326 I.P.C - provided there is hundred percent loss of hearing capacity of the concerned ear , Power of taking cognizance - Magistrates have limited power to add or alter sections, considering case diary and charge-sheet - if left by the I.O. - they can add or alter sections during charge framing, but not during cognizance.(Para - 29,32,)

Opposition party lodged N.C.R - against applicants 2 to 5 - later converted into F.I.R. - Medical examination was conducted - supplementary reports prepared - Evidence recorded - charge-sheet submitted - both parties have lodged F.I.R against each other - during investigation dispute over addition of Section 326 I.P.C. - opposite party 2 failed to appear for re-medical examination - conclusion of trial and Revisional Courts - victim's right ear drum injury was considered grievous hurt under Section 320 I.P.C. (Para -3,14,16,19)

HELD:-Victim's right ear stick injury is not a grievous hurt, as there is no medical report of permanent hearing loss and is not covered under Section 326 I.P.C.. Lower court failed to appreciate facts, medical reports, and law, leading to incorrect conclusions about grievous hurt and punishable under Section 326 I.P.C. . Taking cognizance and summoning accused applicants under Section 326 I.P.C bad in law. Revisional court's judgment incorrect.(Para – 30,31,33)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:

1. Dhanai Mahto & anr. Vs St. of Bihar , 2000 AIR SCW 3966-1

2. Joseph Vs St. of Kerala , 1995 SCC (Cri) 165

3. Phool Chand Yadav Vs St. of U.P. , 2022 (4) ALJ 56

4. Ram Singh & ors. Vs St. of M.P., Gwalior Branch , MCRR No 5920 of 2018

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

1. Heard Sri Sanjay Mishra, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned A.G.A for the State as none appeared for opposite party no. 2 and perused the material available on record.

2. This application under Section 482 Cr.P.C has been moved by the applicant-accused persons to quash the order dated 26th July, 2018 passed by A.C.J.M Ist, Aligarh in Criminal Case no. 1021 of 2018 arising out of Criminal Case No. 222 of 2017 and order dated 16.04.2019 passed by the learned Sessions Judge, Aligarh in Criminal Revision No. 331 of 2018 - Shahnawaz and others Vs. State of U.P. under Section 147, 323, 324, 504, 506 and 326 I.P.C, Police Station Kotwali City, District Aligarh, pending in the Court of A.C.J.M Ist, Aligarh, by which both the courts below have passed the order against the applicant and the learned A.C.J.M Ist, Aligarh took the cognizance under the aforesaid Sections and the learned Sessions Judge dismissed the criminal revision against such order on 16.04.2019.

3. In brief, facts of the case are that opposite party no. 2 lodged N.C.R No. 58 of 2017, under Sections 323 and 506 I.P.C on 15.05.2017 at 11:40 p.m. against the applicant nos. 2 to 5, later on, which was converted into F.I.R on 26.05.2017 under Sections 323, 324 and 506 I.P.C as Crime No. 222 of 2017 against them. The opposite party No. 2 was medically examined on 16.05.2017 and supplementary medical report was prepared on 09.06.2017. Evidences were recorded under Section 161 Cr.P.C and a charge-sheet no. 194 of 2018 dated 29.06.2018 under Sections 147, 323, 324, 326, 504 & 506 I.P.C was submitted in the Court of A.C.J.M Ist Aligarh, who took cognizance by the order dated 26th July, 2018.

4. The petitioner no. 1 was married with opposite party no. 2 as per Muslim rites and ritual on 22.04.2014 and she left her matrimonial house without any sufficient cause and started living separately with her parents whereupon applicant no. 1 filed a petition for restitution of conjugal rights being case no. 873 of 2014 - Naazim Vs. Smt. Rukhsana in the Court of Principle Judge Family Court, Aligarh, but opposite party no. 2 did not appear and the petition was later on dismissed as withdrawn. The divorce petition between the petitioner no. 1 and opposite party no. 2 took place on 13.06.2017 and the petitioner no. 1 was again married on 11.05.2017 with Allia D/o Shamshad as per Muslim rites and rituals.

5. It appears that the opposite party no. 2 got annoyed after hearing the news of second marriage of the petitioner with Allia and therefore lodged a false report. The petitioner no. 1 is the husband of opposite party no. 2 (as per para 8 of the affidavit, she was divorced on 13.06.2017). The petitioner nos. 2 and 3 are Dewar, petitioner no. 4 is mother-in-law and petitioner no. 5 is sister-in-law (nanad) of opposite party no. 2. The petitioner no. 1

lodged a report against opposite party no. 2, Ayyub and Kaisar sons of Saeed, Parvez and Belal sons of Abrar Ahmad on 15.05.2017 in Case Crime No. 207 of 2017 under Sections 147, 148, 307, 452 and 504 I.P.C at P.S Kotwali Nagar, Aligarh. In the aforesaid incident Sharfaraz petitioner no. 2 sustained grievous injury and was medically examined on 15th May, 2017 and an x-ray report was also prepared on 16.05.2017.

6. The J.M Ist, Aligarh, summoned the accused persons including opposite party no. 2 by order dated 09.04.2018 as well as one Sultan for facing trial in the aforesaid Sections and rejected the final report no. 13 of 2017 dated 20th November, 2017. The opposite party no. 2 and other accused persons filed criminal revision no. 230 of 2018 - Rukhsana and others Vs. State of U.P and others which was dismissed on 17.09.2018.

7. Opposite party no. 2 and three others filed criminal misc. application no. 37751 of 2018 in the High Court, challenging both the above orders passed by A.C.J.M. Ist and the Revisional Court and further proceedings of the aforesaid case has been stayed vide order dated 22.10.2018.

8. The petitioner preferred criminal revision no. 331 of 2018 - Shahnawaz Vs. State of U.P in the Court of Sessions Judge, Aligarh, challenging the order dated 26.07.2018, passed by the learned Magistrate, and the dismissal order passed by the revisional court / Sessions Judge, Aligarh, vide order dated 16th April, 2019. Both the orders are illegal, arbitrary, without jurisdiction and are the abuse of process of the court and deserve to be quashed to secure the ends of justice.

9. The medical and supplementary report of opposite party no. 2 do not make out any offence under Section 326 I.P.C, therefore, the orders passed by the learned Magistrate and the revisional court are wholly illegal, arbitrary and are liable to be quashed.

10. The opposite party no. 2 did not appear for re-medical examination before the Medical Board despite the order dated 23.04.2018 of the S.S.P. Aligarh. The C.M.O, Aligarh by letter dated 04.05.2018 informed the S.S.P. regarding her non-appearance before the medical board for re-examination to ascertain the gravity and nature of injury sustained by her and lastly the C.M.O. by letter dated 21.05.2018 informed the S.S.P, Aligarh, that no useful purpose would be served by re-medical examination of opposite party no. 2 after a lapse of more than a year from the date of sustaining the alleged injury by her. The District Magistrate, by letter dated 30.05.2018 forwarded the aforesaid report of C.M.O to the S.S.P. Aligarh, therefore, nature of injury sustained by the opposite party no. 2 does not come within the purview of grievous injury under Sections 320 I.P.C and therefore, no offence is made out under Section 326 I.P.C.

11. Otherwise also entire proceeding initiated against the petitioners are malicious and is counterblast to the F.I.R. and summoning of opposite party nos. 2 and 3 and others on the basis of report lodged by the applicant no. 1. The petitioners are peace loving and law abiding person and have no criminal history to their credit. They are apprehending their arrest in pursuance of N.B.Ws issued against them in the present case, therefore, it is prayed that further proceedings of the present case lodged by

the opposite party no. 2 described above and N.B.Ws be stayed.

12. The opposite party no. 2 has filed counter affidaivt (though it is not available on record), denying the contentions and allegations of the petition, and has said that the F.I.R lodged by her is true and correct and it is not a counterblast to the report lodged by the applicant and has said that a correct F.I.R has been lodged by the applicants and the impugned order passed by A.C.J.M. Ist and the learned Sessions Judge in revisional capacity are not liable to be quashed and the proceedings of the present case is not liable to be quashed.

13. Contrary to that the petitioners have filed rejoinder affidavit denying the para-wise contents of the counter affidavit and have reiterated the facts already mentioned in the petition. Heard and perused the record.

14. It transpires that both the parties have lodged the F.I.R against each other.

15 The F.I.R lodged by the applicant no. 1 against the opposite party no. 2 and others for an offence alleged to be committed on 15.05.2017 as per Crime No. 207 of 2017, under Sections 147, 148, 307, 452 & 504 I.P.C, P.S. Kotwali Nagar, Aligarh, has been stayed by this Court vide order dated 22.10.2018 passed in Criminal Application Nos. 37751 and 377 of 2018 under Section 482 Cr.P.C - Smt. Rukhsana and three others vs. State of U.P and another.

16. It also transpires that a N.C.R No. 58 of 2017 under Sections 323 and 506 I.P.C, has also been lodged for an offence alleged to be committed on 15.05.2017 against the applicants, which was later on converted into F.I.R as Crime No. 245 of 2017, considering the medical report of opposite party no. 2 and after investigation a charge-sheet under Sections 147, 323, 324, 325, 506 and 506 I.P.C had been submitted against the applicants of the present petition. It also transpires that there was discussion and dispute about the addition / non-addition of Section 326 I.P.C. during the investigation. Since the opposite party no. 2 did not appear for her re-medical examination as required by the C.M.O, District Magistrate, and the S.S.P, the I.O. had not submitted the charge-sheet under Section 326 I.P.C.

17. At the time of taking cognizance an exhaustive order has been passed by the learned A.C.J.M, Ist, Aligarh on 26.07.2018, concluding that there was hole in the drum of the left ear of the injured opposite party no. 2 Smt. Rukhsana, hence, it is also a case of Section 326 I.P.C and accordingly took cognizance against the applicants adding Section 326 I.PC alongwith rest of the Sections under which the charge-sheet had been submitted. This order had been challenged by the applicants through criminal revision no. 331 of 2018 - Shahnawaz & 4 Ors. Vs. State of U.P. in which the first informant had not been arrayed as opposite party. According to this Court, the opposite party no. 2 was the necessary party to the aforesaid revision and an opportunity of hearing was required to be provided to her also. However, the learned Sessions Judge dismissed the criminal revision affirming the order passed by A.C.J.M Ist Aligarh, on 16.04.2019 and concluded that it was not necessary for the Magistrate to be in consonance with the result of the I.O. The Magistrate has discretion to see as to which offence is made out against the accused persons at the time of taking cognizance and when the

learned A.C.J.M Ist came to the conclusion that on the basis of material available on record, the accused should also be summoned under Section 326 I.P.C, he took cognizance against the accused persons under Section 326 I.P.C also, which cannot be said to be bad in the eye of law.

18. Being aggrieved, this petition has been preferred by the accused-applicants on the grounds that firstly, it is counter blast case lodged by the applicants against the opposite party no. 2 and other accused persons. Secondly, the medical report and the supplementary medical report of opposite party no. 2 did not make out any offence under Section 326 I.P.C as opposite party no. 2 did not appear for her re-medical examination before the medical board despite the order of the S.S.P and C.M.O, for the ascertainment of the nature of injury, therefore, the C.M.O Aligarh, informed the S.S.P. that after a lapse of more than a year from the date of occurrence if the injured is re-examined by the medical board, no useful purposes would be served. It has also been contended by the learned counsel for the applicants that the learned A.C.J.M Ist, Aligarh, was not competent enough to take the cognizance under Section 326 I.P.C, when no charge-sheet had been submitted under this Section. The learned counsel for the applicants contended that such an addition or alteration can be made only at the time of framing of charges and not at the stage of taking cognizance. The learned A.C.J.M. Ist has discussed Section 320 and Section 326 I.P.C and was of the opinion that the right ear injury sustained by the opposite party no. 2 falls under the category of grievous hurt under the third ingredient of Section 320 I.P.C according to which if there is permanent privation of hearing of either ear, the injury would be called to be grievous hurt.

19. The trial Court and the Revisional Court concluded that the victim's injury in the drum of the right ear as a hole would be caused to be grievous hurt under Section 320 I.P.C and according to Section 325 I.P.C if grievous hurt is caused voluntarily by means of any instrument for shooting, stabbing or cutting, or any instrument, which used as a weapon of offence is likely cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance, which it is deleterious to the human body to inhale, to swallow, or to receive into blood, or by means by any animal, shall be punishable with imprisonment for life, or with imprisonment of either description for a term, which may extend to ten years and shall also be liable to be fine and would be punishable under Section 326 I.P.C.

20. As per the F.I.R dated 15.05.2017 at about 5:30 p.m when opposite party no. 2 went to her matrimonial house, her relatives did not permit her to enter into the house and Dewar Sarfaraz, mother-in-law Anisha, and sister-in-law Farha beat her by their legs and fists and Dewar Shahnawaz attacked with knife, due to which she received injuries.

21. The last I.O. Dinesh Kumar, concluded that since no injury had been caused by any dangerous weapon in the drum of the right ear of the victim (opposite party no.2) and there is no loss of complete hearing capacity of her right ear, hence, Section 326 I.P.C would not be attracted and accordingly added Section 325 I.P.C.

22. Learned A.C.J.M Ist discussed Sections 320 and 326 I.P.C, pointed out the statements of the Doctor and opined that the injuries caused to the victim is grievous in nature and in the opinion of E.N.T Surgeon there was a hole in the **right ear drum**, hence, it was a grievous hurt. In respect of Section 326 I.P.C, the learned A.C.J.M.Ist was of the opinion that by the attack of stick and *lathi*, grievous fetal injury may be caused, but this Court is not inconsonance to the finding recorded by the learned A.C.J.M.Ist because in several other cases, it has been held by the Apex Court and the High Courts that stick and lathi are not the deadly weapons and it is nowhere mentioned, under Section 326 I.P.C that if any injury has been caused by stick or *lathi*, it would be covered under Section 326 I.P.C.

23. In paras 3 & 4 of the judgment passed in case of ***Dhanai Mahto and Anr. Vs. State of Bihar 2000 AIR SCW 3966-1***, the Apex Court has held that bamboo-stick and lathies are not lethal or deadly weapons.

24. In para 3 of the judgment passed in the case of ***Joseph Vs. State of Kerala 1995 SCC (Cri) 165***, it has been held that lathi is not a deadly weapon.

25. In paras 10 & 11 of the judgment passed in the case of ***Phool Chand Yadav Vs. State of U.P. 2022 (4) ALJ 56,*** it has been held that stick or lathi is not a deadly weapons.

26. In para 13 of the judgment passed in the case of ***Ram Singh and other Vs. State of Madhya Pradesh, Gwalior Branch***, MCRR No 5920 of 2018 Section 320 and Section 326 I.P.C have been discussed, in which it has been held that lathi is not a dangerous weapons and if any injuries has been caused by lathi, it would not be covered under Sections 320 and 326 I.P.C.

27. According to this Court, only an injury in the nature of a hole in the right ear drum of opposite party no. 2 is not covered under Section 320 (thirdly) I.P.C. as there is no medical evidence to establish that there was a permanent privation of hearing of the right ear. It has been seen that if a hole has been made in the **ear drum**, there would not be permanent privation of the hearing capacity of the ear. In that case, certainly there would be some loss in hearing capacity, but it cannot be said that there would be complete loss of hearing capacity. If there is hundred percent loss of hearing capacity on account of such hole injury, certainly Section 320 I.P.C would attract and if any dangerous weapon or means mentioned under Section 326 I.P.C has been used in commission of crime only in that case, Section 326 I.P.C would apply.

28. Opposite party no. 2 Rukhsana has stated to the I.O under Section 161 Cr.P.C that Naazim hit on her right ear due to which blood started flowing from the ear.

29. This Court is of the considered view that if an stick is used in causing hurt or grievous hurt on the ear of a victim, Section 326 I.P.C would not be attracted, if such injury would have been caused by knife, or by other means mentioned in Section 326 I.P.C, such injury would be covered under Section 326 I.P.C provided there is hundred percent loss of hearing capacity of the concerned ear.

30. On the basis of above discussions, this Court is of the considered view that the

injuries caused by stick in the right ear of the victim by Naazim can not be said to be a grievous hurt as there is no medical report that there has been permanent loss of hearing capacity of her right ear and also it can not be said that such injury is covered under Section 326 I.P.C.

31. From the above discussions, this Court is of the considered view that the learned A.C.J.M. Ist Aligarh and the then learned Sessions Judge, have been failed in appreciating the facts, the medical reports and the law in right perspective and have wrongly concluded that there was a grievous hurt defined under Section 320 (3) I.P.C to the opposite party no. 2, and punishable under Section 326 I.P.C.

32. The power of taking cognizance regarding taking cognizance has been considered by the Apex Court and the High Courts, and it has been concluded that at the time of taking cognizance, the concerned Magistrate has limited power and at this stage the learned Magistrate or the concerned Court can not add or alter Section(s), considering the case diary and the charge-sheet. If the concerned Magistrate or the Sessions Judge are of the view that some Section(s) have been left by the I.O, it has power to add or alter the Section(s) at the time of framing the charge, but not at the stage of taking cognizance.

33. On the basis of above, discussion this Court is of the considered view that taking cognizance and summoning the accused applicants under Section 326 I.P.C is bad in the eye of law and the judgment of the Revisional court is also not the correct preposition of law. Hence this application succeeds and is liable to be **allowed**.

O R D E R

This application under Section 482 Cr.P.C, is allowed with regard to taking cognizance and summoning t he applicants under Section 326 I.P.C by the learned A.C.J.M Ist, Aligarh, affirmed by the Revisional Court are accordingly **quashed.**

(2023) 4 ILRA 398
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 23506 of 2022

Vijay Gupta ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Sandeep Kumar Dubey

Counsel for the Opp. Parties:
A.S.G.I., G.A., Sri Rahul Anand Gaur

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code,1860 - Sections 325, 323, & 504-Cross-case-In the present case the applicant seeks passport to pursue his studies within India-In both the cases, the police filed charge-sheet but till date charges have not been framed-The police has submitted wrong and contradictory report but the Passport Authority even without going through the report has refused to issue passport to the applicant for pursuing his educational course within India-Hence, the impugned order passed by ACJM that he has no jurisdiction to give 'No Objection Certificate' is against the law-Directions given.(Para 1 to 18)

The application is disposed of. (E-6)

List of Cases cited:

Ravindra Nath Bhargav Vs St. of U.P. (2019) 0 Supreme (All) 194

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

1. Heard Shri Sandeep Kumar Dubey, learned counsel for the applicant, Shri Rahul Anand Gaur, learned counsel for opposite party no.1 as well as learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been filed with the prayer to direct the opposite party no.3 to issue a passport to the applicant to pursue his Technical Course (Seafarer Course) in Maritime Training Institute (MTI), Howrah. Further prayer to quash the order dated 30.5.2022 passed by Additional Chief Judicial Magistrate, Bhadohi in Case No. 7253 of 2021 (State Vs. Guddu and Others) and to issue a 'No Objection Certificate' for issuing a passport to the applicant for pursuing the aforesaid course.

3. In brief, facts of the case are that one Pappu Gupta lodged an F.I.R. on 17..2021 at P.S.- Aurai, under Section 325, 323, 504 I.P.C. against the applicant and his two brothers. The father of the applicant has also filed a criminal case against the informant Pappu Gupta and his sons. In both the cases, the police filed a charge-sheet but till date charges have not been framed. After submission of the charge-sheet the trial Court has taken cognizance and the applicant was granted bail as the offences are bailable and triable by the Magistrate. Presently, the applicant is a student of B.Com IIIrd year. The MTI conducts seafarer training which is approved by the Director General of Shipping, Government of India, Mumbai which is for a period of six months and is held twice a year. The applicant applied for the said course. Under clause 9.1.(1) certain conditions for registration for admission in Maritime Training School have been prescribed. One of the conditions is 'The candidate must have a valid passport'. The copy of the brochure issued by MTI has been annexed as Annexure No. 2 to the petition. Since the applicant was not having passport, therefore, he applied for the same before opposite party no.3 and the application is annexed as Annexure No.3. On the application of the applicant, the opposite party no. 3 called for a police verification report and it appears that the police submitted report that the applicant is accused in Case No. 7253 of 2021 (State Vs. Guddu and Others) pending in the Court of Additional Chief Judicial Magistrate, Bhadohi at Gyanpur. The applicant having no alternative moved an application duly supported by affidavit in the aforesaid case before the Additional Chief Judicial Magistrate, Bhadohi for issuance of 'No Objection Certificate' for the purpose of issuing passport in favour of the applicant, copy of the application dated 27.4.2022 is annexed as Annexure No. 4. The learned Magistrate vide order dated 30.5.2022 held that the issue is not within his jurisdiction and hence 'No Objection Certificate' can not be issued in favour of the applicant and the application was disposed of. It is stated that the issue of passport is governed by Passports Act, 1967 and it comes under the jurisdiction of opposite party nos. 1 and 3. Under the Passports Act certain conditions have been prescribed under which the Passport Authority can refuse to issue the passport. The applicant has applied for the passport as the same is condition precedent for admission in MTI. The Hon'ble Supreme Court has held that under Article 19(1)(d) of Constitution of India the applicant is entitled to go throughout territory of India.

Further, non-issuance of Passport to the applicant to pursue his studies within India is an unreasonable restriction which is violative of Article 14, 19(1) (d) and 21 of the Constitution of India. In the case of Ravindra Nath Bhargava Vs. State of U.P. this Court had elaborately dealt with the circumstances under which the passport can be issued. In the present case the applicant seeks passport to pursue his studies within India due to the condition imposed by the government of India and, therefore, the opposite parties can not refuse to issue passport to the applicant.

4. A counter affidavit has been filed on behalf of opposite party no.3-Regional Passport Officer, Passport Office, Varanasi, alongwith affidavit of Kanishk Sharma, Regional Passport Officer, Lucknow, with the averments that on the adverse police verification report received on 14.12.2021, the passport facilities have been denied by the Authority.

5. The applicant has filed rejoinder affidavit with the averments that the police has submitted wrong and contradictory remark/report in which column no. 3 specifically provides that where the applicant has been convicted in any crime during the preceding 5 years and sentenced to imprisonment for 2 years or more than 2 years. However, respondent no. 3 even without going through the report has refused to issue passport to the applicant for pursuing his educational course within India.

6. The applicant has filed relevant papers as annexures with the petition. From the perusal of the papers, it is revealed that the applicant has passed High School in year 2016 and Intermediate in the Year 2018, he has also annexed mark-sheet of B.Com IInd year. The applicant has filed brochure as annexure no. 2 wherein as per clause 9.1. the first condition is that the candidate must have a valid passport. The applicant has filed application form as annexure no. 3. Copies of application and affidavit moved before the trial Court for issuance of 'No Objection Certificate' and order passed thereon have also been filed. The learned Magistrate has rejected the application on the ground that the issuance of 'No Objection Certificate' is not within his jurisdiction.

7. Certainly under Article 19(1)(d) and Article 21 of the Constitution of India, the citizens of the country are entitled for passport. In Maneka Gandhi Vs. Union of India (1978) AIR SC 597 the Apex Court has held that having passport is a fundamental right of the citizen of India and a citizen can not be deprived of such fundamental right. From the perusal of brochure it is established that having a valid passport is a condition precedent for admission in MTI. A citizen has right to education in India provided that they qualify for the admission in the concerned course.

8. For issuance of passport there is a declaration form in which at serial no. 5 following declaration has to be made by the applicant which is as under:

"I have not been charged with criminal proceedings nor is there any arrest warrant or summon pending before any Court of Law in India against me."

9. This condition is also in respect of criminal proceeding according to which a declaration has to be made that the applicant has not been convicted by any Court of Law in India for any criminal

offence and has not been sentenced to imprisonment for two years or more than two years.

10. Learned A.G.A. concedes that the applicant is not convicted in any case by any Court of Law in India but certainly the impugned criminal case is pending against him.

11. The question arises as to whether the declaration at serial no. 5 regarding pendency of criminal proceeding is mandatory or directory in nature.

12. In this respect some relevant notifications issued by Ministry of External Affairs of Government of India are noted herein below:

"Ministry of External Affairs, Noti. No. G.S.R. 570(E), dated August 25, 1993, published in the Gazette of India, Extra., Part II, Section 3(i), dated 25th August, 1993, pp. 2-3, Sl. No. 289 [No. VI/401/37/79]

In exercise of the powers conferred by clause (a) of Section 22 of the Passports Act, 1967 (15 of 1967) and in suppression of the notification of the Government of India in the Ministry of External Affairs No. G.S.R. 298(E), dated the 14th April, 1976, the Central Government, being of the opinion that it is necessary in public interest to do so, hereby exempts citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and who produce orders from the court concerned permitting them to depart from India, from the operation of the provisions of clause (f) of sub-section (2) of Section 6 of the said Act, subject to the following conditions, namely :-

(a) the passport to be issued to every such citizen shall be issued -

(i) for the period specified in order of the court referred to above, if the court specified a period for which the passport has to be issued; or

(ii) if no period either for the issue of the passport for the travel abroad is specified in such order, the passport shall be issued for a period of one year;

(iii) if such order gives permission to travel abroad for a period less than one year, but does not specify the period of validity of the passport, the passport shall be issued for one year; or

(iv) if such order gives permission to travel abroad for a period exceeding one year, and does not specify the validity of the passport, then the passport shall be issued for the period of travel abroad specified in the order;

(b) any passport issued in terms of (a)(ii) and (a)(iii) above can be further renewed fr one year at a time, provided the applicant has not travelled abroad for the period sanctioned by the court; and provided further that, in the meantime, the order of the court is not cancelled or modified.

(c) any passport issued in terms of (a)(i) above can be further renewed only on the basis f a fresh court order specifying a further period of validity of the passport or specifying a period for travel abroad;

(d) the said citizen shall give an undertaking in writing to the passport-issuing authority that he shall, if required by the court concerned, appear before it at any time during the continuance in force of the passport so issued."

13. From the aforesaid notifications the Central Government has exempted those citizens against whom any criminal proceedings is pending in any Court of law

in India on the pre condition that if the Court permits them to deport from India, the passport should be issued. It is noteworthy that in this case the applicant is not seeking issuance of passport for going abroad.

14. In ***Ravindra Nath Bhargav Vs. State of U.P. 2019 0 Supreme (All) 194***, a coordinate Bench of this Court has held that :

"15. A careful reading of aforesaid provisions of the Passport Act and notification dated 25.08.1993 in the light of it's legislative backgrounds as mentioned above, it is clear that passport or travel document of a person, who is facing trial can be refused by the authority concerned during pendency of his criminal case, but there is no statutory bar for giving no objection by the court concerned. No hard and fast straight jacket formula can be laid down regarding issuance of permission or giving no objection by the court concerned. It is always discretion of the court concerned and depend upon the facts and circumstances of each case, act and conduct of the accused as well as nature of alleged offence committed by him and stage of trial, etc. Some time on account of enmity or ill will one party enmesh the other party in a frivolous criminal case to settle his personal score, therefore, in the interest of justice, it is necessary to consider all aspects of the matter and surrounding circumstances while granting or refusing the no objection for renewal or reissue of passport or travel documents by the court concerned."

15. In this case, the allegations against the applicant are not heinous in nature and are not triable by the Court of Sessions. A cross-case has also been lodged by the father of the applicant against the informant. The applicant does not seek the issuance of passport for visiting abroad but for admission in MTI which would help in building his personality. The purpose of obtaining passport is not for pleasure or picnic.

16. The applicant has been enlarged on bail on the execution of personal surety bonds. In case, he remains occupied in his training the proceeding of the case may go on through counsel. From the perusal of records it transpires that there is no need of the applicant for identification during trial as both the parties are well known to each other.

17. Considering the facts and circumstances of the case, the impugned order dated 30.5.2022 passed by learned Additional Chief Judicial Magistrate, Bhadohi, that he has no jurisdiction to give 'No Objection Certificate' is against the law and the same is liable to be **quashed.**

18. Accordingly, the application is **disposed of** with the following directions :-

(i) Applicant shall submit his undertaking along with his affidavit within a period of one month from the date of this order before the trial court concerned clearly mentioning that he will not leave India during pendency of his trial without prior permission of the trial court and he shall appear on each dates in the trial before the trial court.

(ii) In case the aforesaid undertaking is filed by the applicant as directed above, the trial court on demand by the applicant shall issue certified copy of undertaking given by the applicant within a week to him.

(iii) The applicant shall move a fresh application along with certified copy of this

order and his aforesaid undertaking before the Passport Officer/authority concerned for renewal or reissue of his passport, as the case may be.

(iv) In case such application is moved by the applicant, the Passport Officer/authority concerned considering the case of the applicant afresh in the light of observation made by this Court in this order as well as contents of undertaking of the applicant, shall decide the application of the applicant in accordance with law within three weeks from the date of moving application by the applicant before him.

(2023) 4 ILRA 403
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 29856 of 2022

Riyazuddin & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Shams Tabrez Alam Ansari

Counsel for the Opp. Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973- Section 482 - Indian Penal Code, 1860- Sections 498-A, 323, 504, 506 & ¾ D.P. Act-Challenge to-cognizance as well as summoning order-marriage performed 18 years before the alleged incident-no medical report in support of the prosecution version no date, time and place of the alleged incident has been given by the opposite party and the witnesses-no specific role has been assigned-no allegation of additional dowry-Learned Magistrate has not assigned the reason regarding not taking the cognizance under the impugned all sections-While taking cognizance only file was provided to the concerned Stenographer and he transcribed the order and thereafter without applying judicial mind, it was signed by the Judicial Magistrate-the learned Magistrate has not even thought to follow the relevant judicial precedents while passing the order-No prima facie case is made out-the impugned order is liable to be set aside.(Para 1 to 20)

The application is allowed. (E-6)

List of Cases cited:

1. Kahkashan Kausar @ Sonam & ors. Vs St. of Bih. & ors. (2022) 0 Supreme (SC) 117

2. Lalita Kumari Vs St. of U.P. & ors. (2014) 2 SCC 1

3. Social Action forum for Manav Adhikar & anr. Vs UOI, Ministry of Law & Justice & ors. (2018) 10 SCC 443

4. Rajesh Sharma & ors. Vs St. of U.P. & anr.(2018) 10 SCC 472

5. Arnesh Kumar Vs St. of Bih. & anr. (2014) 8 SCC 273

6. Preeti Gupta & anr. Vs St. of Jharkhand & anr. (2010) 7 SCC 667

7. Geeta Mehrotra & anr. Vs St. of U.P. & anr. (2012) 10 SCC 741

8. K. Subba Rao Vs St. of Telangana (2018) 14 SCC 452

9. St. of Guj. Vs Girish Radhakrishnan Varde (2014) 1 JIC 595 SC

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

1. Heard Shri Shams Tabrez Alam Ansari, learned counsel for the applicants

and Shri Pankaj Kumar Tripathi, learned A.G.A for the State- opposite parties.

2. This application has been filed to quash the proceeding of Criminal Case No. 5150 of 2022 arising out of Crime No. 86 of 2021 under Sections 498-A, 323, 504, 506 I.P.C and Section ¾ Dowry Prohibition Act and Section ¾ of Muslim Women (Protection of Rights on Marriage) Act, 2020, Police Station Dohari-Ghat, District Mau, and the charge sheet dated 11.05.2019 as well as cognizance and summoning order dated 18.04.2022 passed by Judicial Magistrate F.T.C (Crime against Women), District Mau.

3. In brief, fact of the case are that the applicants lodged the aforesaid F.I.R in P.S. Madhuban, District- Mau, in which after investigation a charge-sheet has been submitted in the aforementioned Sections against the applicants upon which on 18.04.2022 cognizance has been taken and applicants are summoned as accused.

4. In the application and the affidavit the applicant has averred that the marriage of the applicant no. 1 and the opposite party no. 2 was solemnized on 03.03.2019 as per Muslim Rites & Rituals. The I.O had given notice under Section 41-A of the Cr.P.C to the applicants, they appeared and their statements were recorded by the I.O but he did not arrest them as they fully cooperated with the investigation.

5. From perusal of the F.I.R and the statements of the witnesses, no prima-facie offences under the aforesaid Sections are made out. There is no evidence to prosecute them. The marriage between the applicant nos. 5 and 6 (both are the wife and husband) was performed 18 years before the alleged incident; they are living in Village : Banzari, P.S. Ghosi, District Mau. There is 40 k.m. distance between both the village. The applicant no. 4 is also a married woman and lives in her matrimonial house with her husband, whereas applicant nos. 2 and 3 unmarried brother and sister are living with applicant no. 1, hence they had been falsely implicated in the present case.

6. The I.O. recorded the statement of Head Muharrir and added Section ¾ of Muslim Women (Protection of Rights of Marriage) Act, 2020. There is no medical report in support of the prosecution version no date, time and place of the alleged incident has been given by the Opposite party no. 2 and the witnesses, no specific role has been assigned except general role against all the applicants. There is no allegation of additional demand of dowry, learned Magistrate neither perused the charge-sheet nor applied his judicial mind and has taken cognizance under Sections 498-A, 323, 504 & 506, I.P.C and Section 4 of D.P. Act; while the charge-sheet was submitted under aforesaid Sections and also under Section ¾ D.P. Act and ¾ Muslim Women (Protection of Rights on Marriage) Act, 2020. The learned Magistrate has not assigned the reason regarding not taking the cognizance under the impugned all Sections.

7. Prior to the F.I.R, the opposite party had also filed a petition under Section 13 of the Hindu Marriage Act, which was rejected by the concerned Court, thereafter, she filed an application under Section 125 Cr.P.C, which has also been rejected thereafter she filed second application under Section 125 Cr.P.C, which is still pending.

8. The applicants are wholly innocent and they have falsely been implicated in the

present case. Opposite party no. 2 wanted to live separately, therefore the disputes arose with her husband, who refused her request thereafter she went to her parental house and never came back.

9. Learned counsel has annexed all the referred documents as annexures to the application; notice was personally served upon opposite party no. 2, but she did not turn up. However, the State has filed counter affidavit no. 1/22, in which State has denied all the allegations leveled in the application.

10. The applicants have filed rejoinder affidavit against the counter affidavit on 09.12.2022 and has reiterated and reaffirmed all the facts already narrated in the petition, denying the facts averred in the counter affidavit, but could not deny the allegation regarding triple Talak.

11. Heard and perused the record.

12. As per F.I.R, when the opposite party no. 2 refused to lift the case, the applicant no. 1 - Riyazuddin given her triple Talak on telephone at about 3:50 p.m on 04th January, 2021, thereafter she visited the house of Riyazuddin then he abused her and said that without Halala she cannot live/reside in the house. All the accused persons threatened to kill her if she comes again. Any untoward incident may occur at any time. This fact has also been affirmed by the informant in her statement. The informant's father Badruddin and mother Jolekha have also given similar statements in support of this allegations (regarding allegation of triple Talaak); the Head Constable Nasim Farukhi has stated that by mistake Section ¾ the Muslim Women (Protection of Rights on Marriage), Act, 2020 had been left, thereafter according to his statement Section ¾ Muslim Women (Protection of Rights on Marriage) Act, 2020 was also added; this fact has also been mentioned in the application moved under Section 125 Cr.P.C.

13. Learned counsel for the applicants has relied on the judgment ***Kahkashan Kaussar @ Sonam and Ors. Vs. State of Bihar & Ors. 2022 0 Supreme (SC) 117***, in which, niece, mother-in-law, sister-in-law and brother-in-law were made accused and general allegations were levelled against them.

14. Earlier, the informant had also lodged F.I.R on 11.12.2017; the present F.I.R was lodged on 01.04.2019; seven accused persons including the husband were implicated, however, only five accused persons had challenged the F.I.R; the Apex Court has also relied on the citation ***Lalita Kumari Vs State of U.P. & Ors. (2014) 2 SCC 1 and Social Action Forum for Manav Adhikar & Another Vs. Union of India, Ministry of Law & Justice and Ors. (2018) 10 SCC 443***.

15. The Apex Court held that now-a-days, a tendency is increased to apply provisions such as Section 498-A I.P.C as instrument to settle personal spores against the husband and his relatives. The Apex Court cited the previous judgment of ***Rajesh Sharma and others vs. State of U.P. & Anr. (2018) 10 SCC 472; Arnesh Kumar Vs. State of Bihar & Anr. (2014) 8 SCC 273, Preeti Gupta & Anr. Vs. State of Jharkhand & Anr., (2010) 7 SCC 667, Geeta Mehrotra & Anr. Vs. State of U.P & Anr. (2012) 10 SCC 741 and K. Subba Rao Vs. State of Telengana, (2018) 14 SCC 452*** and observed that false implication by way of ***General and***

Ominibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of process of law. Therefore, this Court by way of this judgment has warned the courts from proceedings against the relatives and in-laws of the husband if no prima-facie case is made out against them.

16. The Apex Court found that no specific and distinct allegations have been made against either of appellants herein. They have not been attributed any specific role in the cited case; the order of High Court Patna and the F.I.R was set aside.

17. Learned counsel for the applicants has relied on the Precedence ***State of Gujrat Vs. Girish Radhakrishnan Varde 2014 (1) J.I.C 595 (Supreme Court).*** In paragraph 13 of the judgment, it is held that the Magistrate cannot hold inquiry if any F.I.R is registered by the Police and charge-sheet has been submitted. The Magistrate cannot exclude or include any Section or any charge after submission of the charge-sheet.

18. In this case, the F.I.R had been lodged in the aforementioned Sections and the Charge-sheet has also been submitted under the same Sections, but while taking cognizance without assigning any reason only noting that there is sufficient ground for taking cognizance, the accused persons have been summoned under Sections 498-A, 323, 504, 506 I.P.C and Section 4 of the D.P. Act, why the cognizance was not taken under Section 3 D.P. Act, and under Section 3/4 the Muslim Women (Protection of Rights on Marriage), Act, 2020, no reason has been assigned. Even in the first para of the order, it is not written that the charge-sheet has been submitted under Section 3/4 D.P. Act and Section ¾ of the Muslim Women (Protection of Rights on Marriage), Act, 2020. It clearly shows and establishes that at the time of taking cognizance only file was provided to the concerned Stenographer that let the order be transcribed and thereafter without applying judicial mind, it was signed by the Judicial Magistrate F.T.C (Offence against Women), District Mau. It is matter of concern that when the officer is specially deputed for trial for offence against women, he did not pay attention as to why he was not taking cognizance under Section 3 D.P. Act and Section ¾ of the Muslim Women (Protection of Rights on Marriage), Act, 2020; so far as the applicability of the principles laid down in ***Kahkashan Kausar @ Sonam (supra)*** concerned, the learned Magistrate has not even thought to follow the relevant judicial precedents while passing the order.

19. In the aforesaid circumstances, this Court is of the view that to prevent the abuse of process of the Court and to secure the ends of justice there is no any alternative remedy except to exercise the inherent power under Section 482 Cr.P.C.

20. On the basis of the above discussions, the impugned order regarding cognizance is liable to be set aside.

O R D E R

21. In view of above, this application under Section 482 Cr.P.C is **allowed**.

22. The impinged order dated 18.04.2022, regarding taking cognizance by Judicial Magistrate F.T.C (Crime against Women), District Mau. is hereby set aside.

23. The learned Judicial Magistrate F.T.C (Offence against Women), District

Mau, is directed to go through the Case Diary and the Charge-sheet and thereafter pass afresh order in light of the observations made above.

24. The District Judge Mau, is directed to guide the concerned Judicial Officer.

(2023) 4 ILRA 407
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 32841 of 2008

Harish Chandra & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Brijendra Kumar Ojha, Sri B.D. Sharma, Sri P.K. Dubey, Sri Suresh Dhar Dwivedi

Counsel for the Opp. Parties:
G.A., Sri Anupam Tripathi

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 & 311 - Indian Penal Code, 1860 - Sections 304, 323 & 504-Challenge to-Summoning order u/s 311 Cr.P.C-allowed-injured eye witnesses were medically examined and the original injury reports had been taken by the police-Police did not made them witness under the connivance of the accused persons while the proposed witnesses had received injuries with the deceased at the time of incident-Inspite of getting their medical report, their statement had not been recorded by the IO nor the same has not been annexed with the charge sheet-Mentioning the name of all witnesses in FIR or in statements u/s 161 Cr.P.C. is not a requirement of law-Such witnesses can also be examined by prosecution with the permission of the court-Non-mentioning of the name of any witness in the FIR would not justify rejection of evidence of eye-witnesses-Thus, the trial court rightly allowed the application.(Para 1 to 20)

B. The object underlying Section 311 CrPC is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. It is, however, to be borne in mind that the discretionary power conferred u/s 311 Cr.PC has to be exercised judiciously.(Para 16)

The application is dismissed. (E-6)

List of Cases cited:

1. Raja Ram Prasad Yadav Vs St. of Bih. & anr., (2013) AIR SC 3081

2. R.B. Mithani Vs St. of Mah. (1971) AIR SC1630

3. St. of Har. Vs Ram Prasad (2006) Cr.L.J. 1001

4. Shailendra Kumar Vs St. of Bih. (2002) SC 270

5. Ramasami Vs Sriniwasan (1987) 3 Crimes 89 Madras

6. Rama Paswan Vs St. of Jharkhand (2007) Crl. L.J. 2750

7. Popat Lal & ors. Vs St. of Mah. (2002) Crl L.J. 794

8. V.N. Patil Vs Niranjan Kumar & ors. (2021) 3 SCC 661

9. Bhagwan Singh Vs St. of M.P. (2002) 44 ACC 1112 SC

10. Raj Kishor Jha Vs St. of Bih. (2003) 47 ACC 1068 SC

11. Chittarlal Vs St. of Raj. (2003) 6 SCC 397

12. Shri Bhagwan Vs St. of Raj. (2001) 6 SCC 296

13. Satnam Singh Vs St. of Raj. (2000) 1 SCC 662

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

1. This application has been made by the accused applicant to quash the order dated 31/10/2008 passed by Additional Sessions Judge, Court No. 02, Shahjanpur in S.T. No. 799 of 2007 - State Vs. Harish Chandra and others, under Sections 304, 323 and 504 IPC. Police Station Pobayan, District Shahjahanpur, by which the learned Trial Court allowed the Application 13-B U/s 311 Cr.PC and summoned Maina Devi and Usha Devi as witnesses.

2. Heard Sri Pawan Kumar Dubey, learned counsel for the applicants, Sri Pankaj Kumar Tripathi, learned A.G.A for the State and perused the record.

3. In brief, facts of the case are that complainant Ramesh Chandra lodged NCR No. 62 of 2007; against Harish Chandra, Matadeen, Sangam and ram Kumar and after death of injured Pankaj, the NCR was converted into FIR U/s 304, 323 and 504 IPC. IO recorded the statements of the informant and so called eye witness Babu Ram and after investigation submitted Charge sheet against the applicant under the aforesaid sections on 05/05/2007. from the bare perusal of the charge sheet it is crystal clear that the statement of the Maina Devi and Smt Usha Devi were neither recorded U/S 161 Cr.P.C nor a single word is mentioned in the case diary regarding their presence at the alleged place of incident that's why their name have not been mentioned in the list of witnesses. During the trial statements of PW1 Ramesh Chandra, PW-2 Babu Ram and PW-3 Sukhlal have been recorded.

4. On 06/05/2008 both the proposed witnesses moved an application U/s 311 Cr.PC before ASJ Court no. 02 Shahjahanpur with the prayer that on 02/04/2007 at the time of the incident they were with Pankaj and they received injuries during the course of saving the deceased, they are the injured eye witnesses and were medically examined on 05/04/2007 in PHC. Original injury reports had been taken by the police. They are annexing its photocopies. Police did not made them (injured) witness under the connivance of the accused persons. Accused are influential persons who have got all the witnesses hostile. Therefore for the just decision of the case the applicants be summoned as witness.

5. An objection was invited and considered and thereafter by the impugned order, application 13-B has been allowed by the trial court concluding that there is injury report in support of the application under section 311 CrPC. For just decision of the case any witness can be examined or re-examined at any stage U/s 311 CrPC and any person can be summoned for evidence.

6. Learned ASJ has wrongly and illegally allowed the application and summoned them as witness which is highly unjust, improper and against the correct provision of the law. Hence, the application be allowed and the impugned order be quashed.

7. For Connivance section 311 CrPC is produced as under :-

"Section 311 in The Code Of Criminal Procedure, 1973.

311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."

8. From the above, it is very much clear that there are two part of this Section. According to first part of the Section, the Court can exercise the power :-

(1) to summon any person as a witness, or.

(2) to examine any persons in attendance, though not summoned as a witness, or,

(3) to recall and re-examine any person already examined.

The second part, which is mandatory and imposes an obligation on the Court:-

(1) to summon and examine, or

(2) to recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case.

9. In ***Raja Ram Prasad Yadav Vs. State of Bihar and Anr. A.I.R 2013 (SC) 3081***, it has been held that it is, therefore imperative that invocation of Section 311 Cr.P.C and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provisions, namely, for achieving a just decision of the case. The power vested under the said provisions is made available to any court at any stage in any inquiry or trial or other proceedings initiated under the code for the purpose of summoning any person as a witness or for examining any persons in attendance, even though not summoned as witnesses or to re-call or re-examine any person in attendance. In so far as recalling and re-examining of any person already examined, the court must necessarily consider and ensure that such re-call and re-examination of any person, appears in the view of the court to be essential for the just decision of the case.

10. In ***R.B. Mithani Vs. State of Maharashtra, A.I.R. 1971, Supreme Court 1630***, the Hon'ble Supreme Court has held that additional evidence summoned must be necessary not because, it would be impossible to pronounce judgement but also because there would be failure of justice without it. Though the power must be exercised sparingly and only in suitable case but once such action is justified, there is no restriction on the kinds of evidence, which may be received. It may be formal or substantial in nature.

11. In ***State of Haryana Vs. Ram Prasad 2006 Cr.L.J. 1001, the Punjab & Haryana*** High Court held that where the examination and re-examination of the witness is essential for the just decision of the case, it is obligatory of the Court to summon such a witness.

12. In ***Shailendra Kumar Vs. State of Bihar, A.I.R 2002 (Supreme Court) 270***, it is held that if there is any negligence, latches or mistake by not examining material witness, the Courts function to render just decision by examining such witness at any stage is not, in any way impaired.

13. In ***Ramasami Vs. Sriniwasan 1987 (3) Crimes 89 Madras***, it is held that the criminal court is not just umpire to deal only the material brought by the parties before it. The court has to play an active

role in the administration of criminal jurisprudence. Though, it is not normal duty of the court to collect evidence, in cases where justice requires, the Court has power to further inquire into the matter in order to ascertain the truth.

14. In ***Rama Paswan Vs. State of Jhharkhand, 2007 Crl. L.J. 2750***, the Hon'ble Supreme Court has held that it would not be improper, the exercise of the power of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The Section is a general Section, which applies to all proceedings, inquiries and trials under the Court and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or inquiry.

15. The applicant-accused is of the view that by allowing the application under Section 311 Cr.P.C and by summoning the witnesses and keeping the documentary evidence on record, the accused-applicant have been prejudiced. In this respect in ***Popat Lal & Ors. Vs. State of Maharashtra, 2002, Crl.L.J. 794***, the Bombay High Court has held that Section 311 Cr.P.C. is not granted only for the benefit of the accused and it will not be improper exercise of power of the Court, if the Court summons a witness only because the evidence will support the prosecution case and not the defence case.

16. In averment of para 14 to 17 in ***V.N Patil Vs. Niranjan Kumar and others, (2021) 3 SCC 661***; are relevant hence they are reproduced as under :-

"14. The object underlying Section 311 CrPC is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".

15. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar v. State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240 : (SCC p. 141, para 17)

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. This principle has been further reiterated in Mannan Shaikh v. State of W.B., (2014) 13 SCC 59 : (2014) 5 SCC (Cri) 547 and thereafter in Ratanlal v. Prahlad Jat, (2017) 9 SCC 340 : (2017) 3

SCC (Cri) 729 and Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839 . The relevant paragraphs of Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839 are as under: Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839, SCC p. 331, paras 10-11)

"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine, or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

In the aforesaid case, the appeal was allowed by the apex court and the order of High Court was set aside and order of the trial court regarding summoning of the witnesses and production of document was restored.

17. Mentioning the name of all witnesses in FIR or in statements u/s 161 CrPC is not a requirement of law. Such witnesses can also be examined by prosecution with the permission of the court. Non-mentioning of the name of any witness in the FIR would not justify rejection of evidence of the eye-witness. In para 13 of ***Bhagwan Singh Vs. State of M.P, 2002 (44) ACC 1112 (SC)*** it was held that that there is no requirement of law for mentioning the names of all the witnesses in the FIR, the object of which is only to set the criminal law in motion. In the cited case Kiran (PW 7) herself was injured and being the niece of Hari Ram (deceased), had no reason to involve innocent persons in the commission of the crime.

Instead of the above citation in ***Raj Kishor Jha Vs. State of Bihar, 2003 (47) ACC 1068 (SC), Chittarlal Vs. State of Rajasthan, (2003) 6 SCC 397, Shri Bhagwan Vs. State of Rajasthan, (2001) 6 SCC 296, Satnam Singh Vs. State of Rajasthan, (2000) 1 SCC 662***, the apex court has held similar principles of law.

18. The trial court has ample power to summon any person as witness for the just decision of the case. In this case when according to the proposed witnesses they

had received injuries with the deceased on and at the time of the incident and they had also been medically examined even then their statements had not been recorded by the IO and in spite of getting their medical report, the same has not been annexed with the charge sheet and when there is serious allegation against the IO that he was under the connivance with the accused persons that's why they (the alleged injured eye witnesses) had not been mentioned as witnesses to weaken the prosecution case, this court is of the view that in the aforesaid circumstances it was bounden duty of the court to summon and examine the aforesaid witnesses. In the aforesaid circumstances the trail court has rightly allowed the application and ordered to examine the applicants for just decision of the case.

19. Thus, it cannot be said that by passing such order the trial court is trying to fill up the lacuna of the prosecution. The impugned order is based on sound and cogent reason. The applicants could not establish any ground on which basis this court may exercise its inherent jurisdiction as the impugned order is not the abuse of the process of the court. Hence the application is liable to be rejected.

O R D E R

20. The application u/s 482 Cr.P.C is accordingly dismissed.

Let the copy of this judgement be sent to the court concerned.

(2023) 4 ILRA 412
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 34664 of 2022

Saurabh ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Ms. Manju Pandey

Counsel for the Opp. Parties:
G.A., Sri M.P.S. Chauhan

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code,1860 - Sections 363, 366& 376 & ¾ POCSO Act, 2012-Quashing of Chargesheet as well as Cognizance order-victim being minor girl cannot give her consent with regard to conversion of her religion-if a physical relation is established with or without consent of girl below the age of 18 years, it would not be a valid consent-More so, there is no record of the proceedings of Habeas Corpus Writ Petition to strengthen the version of the applicant that the victim had stated in favour of the applicant in High Court-Therefore, it may be said that such person had been kidnapped from her lawful guardianship-Hence, the ongoing criminal proceedings cannot be concluded the abuse of process of court.(Para 1 to 16)

The application is rejected. (E-6)

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

1. Learned A.G.A has filed counter affidavit in Court, which is taken on record.

2. No rejoinder affidavit has been filed by the applicant.

3. Heard Ms. Manju Pandey, learned counsel for the applicant, Sri M.P.S. Chauhan, learned counsel for opposite party no. 2 and Sri Pankaj Kumar Tripathi,

learned A.G.A for the State and perused the record.

4. Opposite party no. 2 is personally served, but he has not came forward to oppose the applicant and has also not filed any objection/counter affidavit, but on the date of hearing Sri M.P.S. Chauhan, learned counsel for the opposite party no. 2. is present.

5. The present application under Section 482 Cr.P.C has been instituted by the applicant to quash the Charge-Sheet No. 93 of 2022 date 16.05.2022 as well as cognizance order dated 02.06.2022 passed by Additional District Judge / Special Judge (POCSO Act), Bulandshahr, in Case No. 2488 of 2022 - State Vs. Saurabh, arising out of Crime No. 82 of 2022 under Sections 363, 366, 376 I.P.C and ¾ POCSO Act, Police Station Araniya, District Bulandshahr, pending in the aforesaid court.

6. In brief, the facts of the case are that opposite party no. 2, lodged F.I.R on 12.03.2022 against the applicant stating therein that on 11.03.2022 applicant's minor daughter Nargis aged about 17 years had gone to the filed from the house to preserve the wheat crops from the Neel Gai (Boselaphus Tragocamelus) (blue bull). After some time his wife Sabnam and nephew Liyaquat reached there and saw that neighbour Saurav S/o Devi Lal was taking away his minor daughter alluring on a black motorcycle on the road to village Ghatal. They returned the home and informed him, they search them but could not find, hence his F.I.R be lodged and necessary action be taken. After investigation the charge-sheet has been submitted in the aforesaid Sections against the applicant and a charge-sheet has also been submitted against accused Waris S/o Nanhey Khan, under Sections 363 and 366 I.P.C.

7. The applicant has taken ground that the I.O. has submitted the charge-sheet without proper investigation, virtually the applicant and the informant's daughter loved each other and solemnized marriage on 15.03.2022 in Naini Arya Samaj Mandir. Copy of the marriage certificate has been annexed as Annexure no. 3 to the affidavit. Since the daughter of opposite party no. 2 was Muslim by religion, therefore before the marriage she converted herself as Hindu and changed her name from Nargis to Soni Arya and thereafter she approached the Hon'ble High Court by way of Habeas Corpus Writ Petition No. 604 of 2022, which is Annexure No. 4 to the affidavit. During the course of hearing, the Hon'ble High Court summoned his wife with opposite party no. 2. The victim (daughter of the informant) expressed her wish in the Court to go with the applicant at her freewill and without any pressure. Therefore, the allegations against the applicant are baseless and fabricated.

8. There is no criminal history of the applicant and there is no likelihood of his abscondance, hence the application be allowed and the aforesaid criminal proceeding and cognizance order be quashed.

9. The applicant has filed a supplementary affidavit to the effect that at the time of incident, the applicant's daughter was 17 years and eight months of age and she has stated in her statement to the I.O. that at the time of the incident she was 18 years old, she was in love with Suresh, she wanted to with marry him. When she was produced for medical

examination, she denied internal and external examination and also stated that she married with the applicant on 10th March, 2022 at her own will and wish and wanted to live with him. Even, in the statement under Section 164 Cr.P.C. the victim has stated to the concerned Magistrate that her age was 18 years, she had gone with the applicant at her own will and wishes. She wanted to marry and live with the applicant without any pressure. The applicant has not committed any illegal act with her. Due to evil intention the informant obtained age certificate from the concerned Nagar Nigam, in which the age of the victim has wrongly been mentioned as 14th July, 2004 only to harass the applicant. She has also stated in the Hon'ble Court that the applicant has not committed any illegal act with her.

10. Opposite party no. 2 has filed counter affidavit dated 29th January, 2023, that no cause of action has arisen to the applicant to file the present application. The I.O. has submitted charge-sheet after proper investigation and the concerned Judge has taken cognizance on the basis of the facts and evidences available on record. At the time of commission of crime the victim was a minor girl and her date of birth was 14th July, 2004, therefore, at the time of incident she was 17th years and 07 months and 27 days old. There is no relevancy of marriage certificate issued by *Aarya Samaj Krishna Nagar, Prayagraj*. The victim had neither converted her religion, nor she went with the accused at her sweet will. The victim never married the applicant, she never wished to go with the applicant, virtually she refused to go with the applicant and their habeas corpus writ petition was dismissed by the Hon'ble Court. *prima-facie* a case under Sections 363, 366, 376 I.P.C and 3/4 POCSO Act is made out against the applicant.

11. The applicant could not make any *prima-facie* case for interference by this Hon'ble Court for exercising jurisdiction under Section 482 Cr.P.C. The victim has given statement under Section 161 Cr.P.C under the pressure of the applicant and the Police. Under the Police pressure she refused to conduct the medical examination. She has given statement under Section 164 Cr.P.C in present of Police. At the time of incidence and alleged conversion she was minor, therefore there is no relevancy of the aforesaid conversion certificate. Therefore the application be rejected on heavy cost.

12. Heard and perused the record.

13. According to the applicant, at the time of alleged occurrence, the victim was a major girl and she was able to contact physical relation/cohabitation with the accused. She was also able to convert her religion. She was in love with the accused and after converting her religion, she married with the applicant in *Arya Samaj Temple, Naini, Allahabad*. She also admitted the above facts in High Court in Habeas Corpus Writ Petition No. 604 of 2022. She was neither kidnapped nor abducted nor she was raped. She was not below the age of 18 years, hence there is no applicability of Sections 363, 366, 376 I.P.C and ¾ POCSO Act. Hence the entire proceedings be quashed.

14. Contrary to that from perusal of record, it transpires that as per school leaving certificate of Class-IV, the date of birth of the victim is 14.07.2004, hence, she

was below the age of 18 years at the time of alleged commission of crime. It is common principle of law that a person below the age of 18 years cannot give consent with regard to conversion of his or her religion and such person cannot give consent with regard to Section 376 I.P.C as Section 375 I.P.C provides that if a physical relation is being established with or without consent of a lady below 18 years of age, it would not be a valid consent and in that case physical relation with such minor girl would be deemed to be raped under the definition of Section 375 I.P.C. There is no record of the proceedings of Habeas Corpus Writ Petition No. 604 of 2022 to strengthen the version of the applicant that the victim had stated in favour of the applicant in High Court. There is no proof that father of the victim had changed her actual date of birth. If a person is below the age of 18 years and he/she is taken away from his/her lawful guardianship, it may be said that such person had been kidnapped. After due investigation a charge-sheet has been submitted against the accused under Section 363, 366, 376 I.P.C and ¾ POCSO Act, hence, on the basis of evidence on record, it cannot be concluded that ongoing criminal proceeding is the abuse of process of Court and to prevent such abuse or to secure the ends of justice, this Court should exercise its inherent jurisdiction to quash the entire criminal proceeding in question .

15. Hence, the proceedings under Section 482 Cr.P.C is not tenable and is liable to be **rejected.**

O R D E R

16. The application under Section 482 Cr.P.C is accordingly rejected.

(2023) 4 ILRA 415

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 35720 of 2022

Sudesh Pal ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Ayank Mishra

Counsel for the Opp. Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code,1860-Sections 498-A, 504, 304-B, 306 & ¾ D.P. Act-demand of dowry-unnatural death-wife committed suicide after institution of divorce petition by the applicant/husband-chargesheet was filed against the accused/applicant u/s 304B, 306 alongwith Section 498-As per the postmortem report, the cause of death was shock and haemorrhage as a result of anti-mortem injury-The evidence is not clear that she committed suicide or she was killed-At the stage of charge, benefit of doubt cannot be given to the accused and in such cases alternative charge u/s 304B and 302 IPC could be framed along with charge u/s 498-A IPC-When a charge is framed u/s 302 IPC, it does not mean that the trial court is determined to convict the accused u/s 302 IPC-It is only as a matter of abundant caution and to give respect to the directions given in this respect by Apex Court, charge u/s 302 IPC is only alternative-Sections 304B and 306 IPC are two different sections, which cannot sail together-An alternative charge may be framed u/s 302 IPC, but no alternative charge should be framed u/s 306 IPC-Thus, the trial court has wrongly framed

an alternative charge u/s 306 IPC.(Para 1 to 13)

The application is partly allowed. (E-6)

List of Cases cited:

1. K. Prema S. Rao Vs Yadla Srinivas Rao, (2003) AIR SC 11

2. Balool Vs St. of Raj. (2003) Cr.L.J. 3286

3. Rajbir Vs St. of Har. (2011) AIR SC 568

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

1. Heard Sri Ayank Mishra, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned A.G.A for the State and perused the record.

2. The applicant has filed the present Application U/s 482 Cr.P.C to quash the entire proceeding under Sections 498-A, 504, 304-B, 306 I.P.C and Section ¾ Dowry Prohibition Act, arising out of Crime No. 45 of 2021, Police Station Daurala, District Meerut, pending in the Court of C.J.M. Meerut on the ground that the daughter of the informant opposite party no. 2, who was the wife of the applicant committed suicide after institution of divorce petition by the applicant. According to the F.I.R, the marriage of the daughter of opposite party no. 2 was solemnized with the applicant on 19.11.2018. The family members were not satisfied with the dowry and they were pressurising the deceased (Mohini) for providing a car in dowry, which could not be fulfilled, hence she was ousted from her matrimonial house on 04.06.2020 and when she came to know about the divorce petition, she committed suicide. According to the applicant, the F.I.R has been lodged after a lapse of a week without any explanation for the delay in lodging the F.I.R, thereafter the I.O. started investigation and recorded the statement of the informant and prepared site plan. As per the postmortem report, the cause of death was shock and haemorrhage as a result of anti-mortem injury. In the F.I.R, the complainant has specifically averred that his daughter has committed suicide. The I.O. recorded the statement of the witnesses - Kushal Pal, Sattya Pal and Shyamveer. From the version of the prosecution story, only Section 306 I.P.C is attracted. But after the investigation, the I.O. submitted the charge-sheet under Sections 498-A, 323, 504, 506, 304-B I.PC and ¾ Dowry Prohibition Act.

3. The I.O has overlooked the guidelines issued by the Apex Court in several judgments, wherein the implication of the entire family had been forbidden. The I.O. has investigated the case in a very casual manner. Sections 306 and 304-B I.P.C are two different Sections, which cannot sail together.

4. The present case is the best example of misuse of the procedure. The Sessions Court has framed an alternative charge under Section 306 I.P.C alongwith Section 304-B I.P.C. From the bare perusal of the F.I.R, no offence under the aforesaid Sections are made out. The applicant is wholly innocent and has been falsely implicated in the aforesaid case. He did not demand any dowry and did not commit any cruelty or assault against the deceased. The prosecution is based on malicious intentions and is not sustainable in the eye of law. The applicant has good moral character and has no criminal history, if the present proceeding is not quashed, he

would suffer irreparable loss and injury, hence the proceeding of the S.T NO 105 of 2022 mentioned above be set aside.

5. The applicant has annexed all the relevant papers with the application.

6. Heard and perused the record.

7. During the argument, the learned counsel for the applicant did not argue on all of the aspects and facts mentioned in the application, but has argued only on the point that if a charge is framed under Section 304-B I.P.C, then no alternative charge under Section 306 I.P.C could be framed.

8. This Court is of the view that if the charge-sheet has submitted under Section 304-B of the I.P.C an alternative charge under Section 302 I.P.C alongwith the main charge under Section 304-B I.P.C, shall be framed but no alternative charge should be framed under Section 306 I.P.C. The reason behind this is that if in a criminal case a charge under Section 304-B I.P.C is being framed and the prosecution succeeds in proving the case beyond reasonable doubt, the accused may be convicted under Section 304-B and if the trial court comes to the conclusion that it is a case of abatement to commit suicide, the court can very well punish the accused under Section 306 I.P.C even in the absence of charge under Section 306 I.P.C as the punishment under Section 306 I.P.C is lesser than the punishment provided under Section 304-B I.P.C. In ***K. Prema S. Rao Vs. Yadla Srinivas Rao, A.I.R 2003 S.C 11*** and in ***Balool Vs. State of Rajasthan (2003) Cr.L.J. 3286***, it is held that the accused persons charged under Sections 498-A, 304-B and 120-B I.P.C, can be convicted under Section 306 I.P.C, if evidence proves the same, even if no charge under Section 306 I.P.C has been framed.

9. The Apex Court has held in ***Rajbir Vs. State of Haryana, AIR 2011 SC 568*** that if a charge-sheet has been submitted under Section 304-B I.P.C, an alternative charge under Section 302 should be framed; and if the court comes to the conclusion that the accused is guilty under Section 302 I.P.C, in that case the accused may be convicted and punished under Section 302 I.P.C because the sentence provided under Section 302 I.P.C is more severe than the punishment provided under Section 304-B I.P.C. The Apex Court in ***Rajbir (supra)*** has directed all the trial courts in India to ordinarily add Section 302 I.P.C to the charge of Section 304-B I.P.C. In this regard Registrar Generals of all the High Courts have been directed to circulate this judgment to all the trial courts in India.

10. Thus this Court is of the considered view that an alternative charge may be framed under Section 302 I.P.C, but no alternative charge should be framed under Section 306 I.P.C.

11. So far as the innocence or guilt of the accused is concerned, at the very outset a charge-sheet under Section 304-B I.P.C. has been filed and there is an unnatural death of the deceased during the subsistence of the marital relation between the applicant and the deceased and there was a matrimonial dispute between the wife and the husband and a divorce petition was also filed by the applicant. This Court is not competent to decide the fact and evaluate the evidence under Section 482 Cr.P.C, therefore no case is made out to quash the entire proceeding of the concerned sessions trial.

12. On the basis the aforesaid discussions, the Court comes to the conclusion that the trial court has wrongly framed an alternative Charge under Section 306 I.P.C, therefore this Application U/s 482 Cr.P.C is liable to be **allowed** partly.

O R D E R

13. The application is partly **allowed** in respect of framing of alternative charge under Section 306 I.P.C on 01.08.2022 and the alternative charge framed under Section 306 I.P.C is **set aside**. The learned trial court is directed to frame the charge afresh. The charges so framed may also be altered exercising the power conferred under Section 216 Cr.P.C. instead of framing the fresh charges.

A copy of this order be sent to the concerned court for compliance. O

(2023) 4 ILRA 418
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 35979 of 2022

Nadeem Salmani ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri A.C. Srivastava

Counsel for the Opp. Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860-Sections 392, & 413/34-Quashing of Non-bailable Warrant-I-Phone mobile was looted and 20 mobile phones were recovered from the possession of accused persons-In the present case, the applicant having full knowledge that he was wanted in this case as accused, neither made him available for interrogation to the I.O. nor moved any form of bail application-the Impugned order was passed by the custody of the I.O. for the aid in investigation-There is no bar for issuance of non-bailable against any accused during the investigation in order to bring the accused before the Magistrate within twenty four hours from the time of his arrest, After arrest he may be sent either to judicial or the police custody as the case may be-Therefore the order passed by the concerned Magistrate being in accordance with law is not liable to be set aside.(Para 1 to 21)

The application is dismissed. (E-6)

List of Cases cited:

1. Ekta @ Bulbul Vs St. of U.P. & anr. Appl. u/s 482 No. 30391 of 2016

2. St. thru CBI Vs Dawood Ibrahim Kaskar & ors. (1997) AIR SC 2494

3. D.K. Basu Vs St. of W.B. (1997) 1 SCC 416

4. Harendra Vs St. of U.P. & ors., CRLR No. 3468 of 2013

5. Smt. Pragati Chaudhary @ Pragati Singhal Vs St. of U.P. & anr.,Appl. u/s 482 No. 2994 of 2018

6. Manoj @ Ase & ors. Vs St. of U.P., CRLR No. 2827 of 2010

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

1. Heard Sri A.C. Srivastava, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned A.G.A for the State, and perused the material available on record.

2. This Criminal Misc. Application has been moved by the applicant under Section 482 Cr.P.C against the order dated 02.09.2022 passed by the Special Chief Judicial Magistrate, Meerut in Case Crime No. 303 of 2021 under Sections 392, 413/34 I.P.C Police Station Delhi Gate, district Meerut, by which non-bailable warrant was issued against the accused-applicant on the application of Investigating Officer of the case.

3. In brief, facts of the case are that one Ramesh Katiyar, R/o Lucknow had come to Meerut to attend the Samajwaadi Rally on 07.12.2021 and had been stayed in Meerut. On 08.12.2021 when he was going towards Ghantaghar and was talking with someone familiar near the ladies hospital, an unknown person fled away taking his red colour Apple I phone mobile at about 5:00 p.m. towards Chhatripeer.

4. On 08.12.2021 five accused persons were arrested near the Town Hall at Gandhi Park and four accused persons succeeded in fleeing. Total 20 mobiles were recovered from their possession. On asking, they informed that the red colour I Phone mobile was also looted by them, they informed that accused Irfan and Sharad Goswami had succeeded in fleeing. They also informed that their gang leader is Inaam the and the Boss is Sharad Goswami and two others are Irfan and Mahfooz, who had succeeded in escaping, it appears that during the course of investigation the name of the applicant also came into picture and the I.O. came to the conclusion that the informant Nadeem Saqulani is also one of the gang member and the accused. It appears that when the accused could not be arrested, an application was moved by the I.O. Mahendra Singh on 01.09.2022 submitted by the competent authority upon which the Special Chief Judicial Magistrate, Meerut called for a report from the office, who reported that the applicant accused Nadeem Saqulani has not moved any application in the concerned crime no. 303 of 2021 under Sections 392, 413/34 I.P.C. After investigation a charge-sheet under Section 392/34 I.P.C was submitted against the accused persons in which cognizance has been taken by the concerned Court.

5. On 01.09.2022 an application was submitted by the I.O. Gajendra Singh, S.I, Police Station Delhi Gate, Meerut that the wanted accused-applicant Nadeem Salmani is absconding and hiding his identity and is in the process of disbursing his immovable property, therefore a non bailable warrant was issued against him by the Special Chief Judicial Magistrate, Meerut on 02.09.2022. The application and the impugned order are as under:-

"रिपोर्ट थाना देहलीगेट जनपद मेरठ।

सेवा में,

माननीय न्यायालय श्रीमान स्पेशल सीजे०एम महोदय

जनपद मेरठ।

विषयः- मु०अ०सं० 303/21 धारा 392/413/34 भादवि में प्रकाश में आये वांछित अभियुक्त नदीम सलमानी पुत्र सलीम सलमानी निवासी 242 कुएं वाली गली कोटला थाना देहलीगेट मेरठ के गैर जमानती वारण्ट जारी करने के सम्बन्ध में।

महोदय,

सादर निवेदन है कि मु०अ०सं० 303/21 धारा 392/413/34 भादवि में प्रकाश में आये वांछित अभियुक्त नदीम सलमानी पुत्र सलीम सलमानी निवासी 242 कुएं वाली गली कोटला थाना देहलीगेट मेरठ के विरुद्ध गिरफ्तारी के सम्बन्ध में काफी प्रयास किये गये है किन्तु अभियुक्त नदीम सलमानी उपरोक्त अपने मसकन से फरार है और अपनी पहचान छिपाये हुये है तथा चोरी छिपे अपनी अचल सम्पत्ति को खुर्द बुर्द कर फरार होने की फिराक में है। माननीय न्यायालय से अनुरोध है कि अभियुक्त नदीम सलमानी उपरोक्त के विरुद्ध गैर जमानती वारण्ट जारी करने की कृपा करें।

रिपोर्ट सादर सेवा मे प्रेषित है।

(गजेन्द्र सिंह)

उ०नि०

थाना देहलीगेट मेरठ।"

x x x

"न्यायालय विशेष मुख्य न्यायिक मजिस्ट्रेट, मेरठ।

मु०अ०सं० 303/2021

धारा 392,413,34 भा०द०सं०,

थाना देहली गेट, जिला मेरठ।

02.09.2022-

मु०अ०सं० 303/2021, धारा 392,413,34 भा०द०सं० थाना देहली गेट, जिला मेरठ के अभियोग में विवेचक गजेन्द्र सिंह के द्वारा अभियुक्त नदीम सलमानी पुत्र सलीम सलमानी, निवासी 242 कुए वाली गली, कोटला, मेरठ के विरुद्ध गैर जमानती वारन्ट निर्गत किये जाने हेतु प्रस्तुत किया गया है।

विवेचक द्वारा अपने प्रार्थना पत्र में कहा गया है कि अभियुक्त की गिरफ्तारी हेतु कई बार दबिश दी गयी, परन्तु वे फरार चल रहे हैं।

अभियोजन प्रपत्रों का अवलोकन किया। विवेचक के अनुसार अभियुक्त की गिरफ्तारी हेतु कई बार दबिश दी गयी, परन्तु वह फरार चल रहा है।

कार्यालय रिपोर्ट के अनुसार अभियुक्त उपरोक्त की ओर से कोई आत्म समर्पण प्रार्थना पत्र न्यायालय में लम्बित नहीं है और न ही माननीय उच्च न्यायालय का कोई स्थगन आदेश प्राप्त है। चूंकि अभियुक्त उपरोक्त मामले में वांछित है और उसके निकट भविष्य में न्यायालय में उपस्थित होने की सम्भावना नहीं है। अतः विवेचक की तरफ से प्रस्तुत प्रार्थना पत्र स्वीकार किये जाने योग्य है।

आ दे श

विवेचक की तरफ से प्रस्तुत प्रार्थना पत्र स्वीकार किया जाता है । अभियुक्त नदीम सलमानी पुत्र सलीम सलमानी, निवासी 242 कुए वाली गली, कोटला, मेरठ के विरुद्ध गैर जमानती वारन्ट दिनांक 03.10.2022 के लिए जारी हो।

विशेष मुख्य न्यायिक मजि०

मेरठ।"

6 . The accused applicant- Nadeem Salmani has challenged the order on the basis of judicial pronouncements in the cases of ***Ekta @ Bulbul Vs. State of U.P. and another, pronounced in Application U/s 482 No. 30931 of 2016 dated 17.11.2016, order passed in Criminal Revision No. 3468 of 2013 dated 12.12.2013 passed by Court No. 22 of this Court, Application U/s 482 No. 29924 of 2018 dated 29.08.2018 passed by Court No. 53, Criminal Revision No. 2827 of 2010 dated 27.07.2010 passed by Court No. 50 - (Manoj @ Ase & Others Vs. State of U.P.) and in State through C.B.I Vs. Dawood Ibrahim Kaskar & Ors. 1997 (4) Supreme 490*** and argued that on the basis of aforesaid pronouncements a court of Magistrate cannot issue N.B.W against the accused-applicant to facilitate the Investigating Officer during the investigation.

7. Learned A.G.A opposed the application, but he is not willing to file counter affidavit as all the materials have already been produced by the applicant, hence heard learned counsel for the parties and perused the material available on record.

8. According to Section **73 Cr.P.C**, a Magistrate is empowered to issue a warrant for the arrest of any escaped convict, proclaimed offender or any person who is accused of a non-bailable offence and is evading arrest. Such warrant may be given to any person to execute the same under Section 73 (3), it has also been mentioned that when the wanted accused is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before the Magistrate having jurisdiction in the case, unless security is taken under Section 71.

9. The applicant has filed a copy of the charge-sheet, submitted against the accused persons namely Inam, Anas, Arshad Gaddi, Naazim Shaikh and Mehtab.

Mahfuz, Irfaan and Sharad Goswami are shown as absconder.

10. Learned counsel for the applicant relied on the judgment of ***State through C.B.I Vs. Dawood Ibrahim Kaskar & Ors. A.I.R 1997 SC 2494***, in which the scope of Section 73 Cr.P.C has been discussed. In the cited case the accused was wanted for commission of various offences punishable under the I.P.C and under the TADA Act, 1987, Arms Act 1959, Explosive Substance Act, 1908 and other Acts. This case is known as BBC No. 1/93 (Bomb-blast case). Learned counsel for the applicant is solely relying on this case, therefore it would be proper to quote the relevant paras of this judgement, which are is as under:-

"6. From the impugned order we find that before the Designated Court it was submitted on behalf of CBI that since it was making further investigation into the offences in respect of which chargesheet has earlier been submitted and since the presence of the respondents, who were absconding, was absolutely necessary for ascertainment of their roles, if any, in commission of the offences, it was felt necessary to file the applications. It was further submitted that only after warrants and/or proclamations as prayed for were issued, that it (CBI) would be able to take further coercive measure to compel them to appear before the Investigating Agency for the purpose of intended further investigation. According to CBI under Section 78 of the Code and Section (3)(a) of TADA the Designated Court was fully empowered to issue warrants of arrest and proclamations. In rejecting the above contention the Designated Court held that after cognizance was taken in respect of an offence process could be issued to the persons accused thereof only to compel them to face the trial but no such process could be issued by the Court in aid of investigation under Section 73 of the Code. According to the Designated Court, though under code further investigation was not barred there was no provision therein which entitled the Investigating Agency to seek for and obtain aid from the Court for the same. Since the above findings were recorded by the Designated Court relying solely upon the judgment of the Bombay High Court in Mohammad Yasin Mansuri vs. State of Maharastra. (1994) Crl.L.J. 1854, it will be necessary to refer to the same in some details. In that case investigation into an offence of murder and other related offences was taken up initially by the Officer-in-Charge of Byculla Police Station and thereafter by a Deputy Commissioner of Police (DCP) of CID. During the investigation the Designated Court, on the prayer of the DCP, issued non-bailable warrants for apprehension of some of the accused involved in those offences. Thereafter a charge-sheet came to be filed against several accused, some of whom were before the Court and some other including Mansuri (the petitioner before the High Court) were shown as absconding. In the very day the charge-sheet was filed Designated Court took cognizance of the offences mentioned therein. Few months later Mansuri came to be arrested by the CBI, Delhi in connection with some other offence. On receipt of that information the DCP filed an application before the Designated Court for warrants of arrest and production of Mansuri before it. The prayer was allowed and in due course Mansuri was brought to Bombay and handed over to DCP. On the following day Mansuri was produced before the Designated Court; and on such production the prosecution prayed for remand of Mansuri to police custody. The prayer was

allowed and the Designated Court remanded him to police custody, but kept the order in abeyance for a few days to enable Mansuri to challenge the same in a superior court. Assailing the above order of the Designated Court, Mansuri moved the Bombay High Court. Before the High Court it was submitted on behalf of Mansuri that once investigation into an offence was complete and a charge-sheet was filed, the provisions of Section 309 of the Code came into operation and sub-section (2) of the said Section left no discretion to a Court. The only course open to the Court then was to remand the accused to judicial custody. It was further submitted that whereas Section 167 conferred a discretion upon the Court of authorising detention of an accused either in judicial custody or police custody such discretion was completely absent in Section 309 of the Code. Accordingly, it was submitted that the order passed by the Designated Court granting Mansuri to Police custody was without jurisdiction and liable to be set aside. In accepting the above contention and quashing the impugned order the High Court firstly observed:

"It would, therefore, follow that the warrants which were issued by the Designated Court for production of the petitioner could not have been in aid of investigation but could only have been by way of process issued under Section 204 of the Code of Criminal Procedure. Issue of warrants after cognizance of an offence is taken would be a process contemplated under Section 204(1)(b) of the Code, i.e. it would be a process to face trial. Indeed. We do not find any provision contained in the Code for issue of warrants of arrest and custody of accused for the purpose of, or in aid of, investigation. The process contemplated is a process to face trial."

(emphasis supplied)

8. In view of the provision of Chapter XII and those of Section 309(2) of the Code we are constrained to say that the above quoted observations have been made too sweepingly. Chapter XII relates to information to the police and their powers to investigate. Under Section 154 thereof whenever an Officer-in-Charge of a police station receives and information relating to the commission of a cognizable offence he is required to reduce the same in writing and enter the substance thereof in a prescribed book. Section 156 invests the Officer-in-Charge of a police station with the power to investigate into cognizable offences without the order of a Magistrate and Section 157 lays down the procedure for such investigation. In respect of an information given of the commission of a non-cognizable offence, the Office-in-charge required under Section 155(1) to enter the substance thereof in the book so prescribed but he has no power to investigate into the same without an order of the competent Magistrate. Armed with such an order the Officer-in-charge can however exercise all the power of investigation he has in respect of a cognizable offence except that he cannot arrested during investigation has to be dealt with by the investigation Agency, and by the Magistrate on his production before him, is provided in Section 167 of the Code. The said Section contemplates that when the investigation cannot be completed within 24 hours fixed by Section 57 and there are grounds to believe that the charge levelled against the person arrested is well founded it is obligatory on the part of the Investigation Officer to produce the accused before the nearest Magistrate. On such production the Magistrate may authorise the detention of the accused initially for a term not exceeding 15 days either in police custody, or in judicial

custody. On expiry of the said period of 15 days the Magistrate may also authorise his further detention otherwise than in police custody if he is satisfied that adequate grounds exist for such detention. However, the total period of detention during investigation cannot be more than 90 days or 60 days, depending upon the nature of offences mentioned in the said Section. Under Sub-section (1) of Section 173 the Officer-in-charge is to complete the investigation without unnecessary delay and as soon as it is completed to forward, under Sub-section (2) thereof, to the competent Magistrate a report in the form prescribed setting forth the names of the parties, the nature of the information and the names of the persons who appears to be acquainted with the circumstances of the case. Sub-Section (8) entitles the Officer-in-Charges to made further investigation and it reads as under:

"Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub- section (2) has been forward to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report to the report regarding such evidence in the form prescribed, and the provisions of sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2)."

10. Though under the old Code there was no express provision - like sub-section (8) of Section 173 of the Code - statutorily empowering in Police to further investigate into an offence in respect of which a charge-sheet has already been filed and cognizance taken under Section 190(1)(b), such a power was recognised by this Court in Ram Lal Narang vs. State [AIR 1979 SC 1791]. In exemplifying the situation which may prevail upon the police to take up further investigation and the procedure the Court may have to follow on receipt of the supplemental report of such investigation, this Court observed:

"It is easy to visualise a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate? After all the investigating agency has greater resources at its command than a private individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other persons. In either case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry of not proceeded with the enquiry of trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused, in a single enquiry of trial. If the case of which he has already proceeded to some extent, he may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with the case as a separate case. What action a Magistrate is to take in accordance with the provisions of the Code of Criminal Procedure in such situations is

a matter best left to the discretion of the Magistrate."

12. There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since, however, even after cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation. If Section 309(2) is to be interpreted - as has been interpreted by the Bombay High Court in Mansuri (supra) - to mean that after the Court takes cognizance of an offence it cannot exercise its power of detention in police custody under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. We are therefore of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. So far as the accused in the first category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who comes under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which had taken cognizance of the offence may exercise its power to detain him in police custody, subject to the fulfilment of the requirements and the limitation of Section 167.

13. The moot question that now requires to be answered is whether a Court can issue a warrant to apprehend a person during investigation for his production before police in aid of the Investigating Agency. While Mr. Ashok Desai, the learned Attorney General who appeared on behalf of CBI, submitted that Section 73 coupled with Section 167 of the Code bestowed upon the Court such power, Mr. Kapil Sibal, who appeared as amicus curie (the respondents did not appear inspite of publication of notice in newspaper) submitted that Court has no such power. To appreciate the steps of reasoning of the learned counsel for their respective stands it will be necessary to refer to the relevant provision of the Code and TADA relating to issuance of processes.

14. Chapter VI of the Code which is captioned as `processes to compel appearance' consists of four parts part A relates to Summons; part B to warrant of arrest; part C to proclamation and attachment and part D to other rules regarding processes. Part B, with which we are primarily concerned in these appeals, has in its fold Section 70 to 81. Section 70 speaks of the form in which the warrant to arrest a person is to be issued by the Court and of its durational validity. Section 71 empowers the Court issuing the warrant to direct the officer who is to execute the warrant, to release that person on terms and condition as provided therein. Section 72 provides that a warrant shall ordinarily

be directed to one or more police officers but if its immediate execution in necessary and no police officer is immediate available it may be directed to any other person for execution. Section 73 which is required to be interpreted in these appeals, read as under:

"73(1) The Chief Judicial Magistrate of a Magistrate of the first class may direct a warrant to an person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest.

(2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enter on, any land or other property under his charge."

x x x

20. At this stage it is pertinent to mention that under the old Code the corresponding provision was Section 78; and while recommending its amendment the Law Commission in its 41st report stated, inter alia:

"6.8 Section 78 at present confers a power on the District Magistrate or Sub-Divisional Magistrate to issue a special type of "warrant to a land-holder, farmer or manager of land within the district of sub-division for the arrest of an escaped convict, proclaimed offender or person who has been accused of a non-bailable offence and who has eluded pursuit". Although the power is infrequently exercised, there appear to be no objection to conferring it on all Magistrates of the first class and all...

(emphasis supplied)

21. Apart from the above observations of the Law Commission, from a bare perusal of the Section (quoted earlier) it is manifest that it confers a power upon the class of Magistrates mentioned therein to issue warrant for arrest of three classes of person, namely, i) escaped convict, ii) a proclaimed offender and iii) a person who is accused of a non-bailable offence and is evading arrest. If the contention of Mr. Sibal that Section 204 of the Code is the sole repository of the Magistrate's power to issue warrant and the various Sections of part `B' of Chapter VI including Section 73 only lay down the mode and manner of execution of such warrant a Magistrate referred to under Section 73 could not - and would not - have been empowered to issue warrant of arrest for apprehension of an escaped convict, for such a person can not come within the purview of Section 204 as it relates to the initiation of the proceeding and not to a stage after a person has been convicted on conclusion thereof.

23. Another factor which clearly indicates that Section 73 of the Code gives a power to the Magistrate to issue warrant of arrest and that too during investigation is evident from the provisions of part `C' of Chapter VI of the Code, which we have earlier adverted to. Needless to say the provisions of proclamation and attachment as envisaged therein is to compel the appearance of a person who is evading arrest. Now, the power of issuing a proclamation under Section 82 (quoted earlier) can be exercised by a Court only in respect of a person `against whom a warrant has been issued by it'. In other words, unless the Court issues a warrant the provisions of Section 82, and the other Sections that follow in that part, cannot be invoked in a situation where inspite of its best effects the police cannot arrest a person under Section 41. Resultantly, if it has to take the coercive measures for the apprehension of such a person it has to approach the Court to issue warrant of arrest under Section 73; and if need be to

invoke the provisions of part `C' of Chapter VI. (Section 8 (3) in case the person is accused of an offence under TADA)."

11. From the perusal of the aforesaid judgment, it is very much clear that under Section 73 of the Code, the Magistrate is empowered to issue warrant of arrest even during the investigation, if such power is withdrawn, the procedure under Sections 82 & 83 Cr.P.C which are essential to ensure the attendance of the accused would be redundant and of no use. In the cited case the Apex Court has averred that a non-bailable warrant may be issued by the Magistrate even during the investigation. Issuance of non-bailable warrant during the investigation by the Court is not forbidden.

12. In the case of ***D.K. Basu Vs. State of West Bengal 1997 (1) SCC 416*** riders and guidelines have been laid down by the Apex Court, that when an accused is arrested he shall be produced in the court within 24 hours and thereafter the concerned Magistrate may send him either in judicial custody or in Police Custody for a period not exceeding fifteen days on the application of the I.O.

13. In this case application moved by the I.O was allowed and N.B.W was issued by the concerned Magistrate to produce the accused in the Court on 03.10.2022. Generally in cognizable and non-bailable cases as precautionary measure, I.O. move application for issuance of non-bailable warrant against the accused and when they are arrested, they are generally produced within twenty four hours before the concerned Magistrate as per the mandate of Section 57 of the Cr.P.C. and Article 22 (2) of the Constitution of India. Even if the courts hours are over, they are produced before the concerned Magistrate at their houses or before the Remand Magistrate.

14. From the perusal of the application moved by the I.O. and the impugned order, it transpires that the applicant is wanted as accused in the concerned case and the I.O. raided at his residence several times but he was found absconding. The learned Special Chief Judicial Magistrate has also mentioned this fact that since the accused is wanted in the concerned case and there is no likelihood of his appearance in the Court, he allowed the application and issued non-bailable warrant for his production on 03.10.2022. From the impugned order it is very much clear that the non-bailable warrant was issued for production of the accused in the Court. It has already been mentioned by the Apex Court that there is no bar regarding issuance of non-bailable warrant during the course of investigation. The Apex Court has clearly observed that the provisions of proclamation and attachment as envisaged therein is to compel the appearance of a person, who is evading arrest. The power of issuing a proclamation and attachment under Sections 82 and 83 can be exercised by a court only in respect of a person against whom a warrant has been issued by it. Therefore, the I.O. has to approach the court to issue warrant of arrest under Section 73.

15. In para 20, the Apex Court has again opined that Section 73 of the Code is of general obligation and that in the course of investigation a court can issue a warrant in exercise of power thereunder to present, inter-alias a person, who is accused of a non-bailable offence and is evading arrest. The Apex Court has put only a rider that such warrant cannot be issued for

production of the accused before the court in aid of investigation.

16. The Apex Court has made it clear that even a Non Bailable Warrant can be issued against the accused on the application of I.O or the police, but if he is arrested, he shall be brought before the Magistrate and after perusing the case diary, if he finds sufficient material to remand the accused he shall send the accused either in judicial custody or on in police custody on the application of the I.O.

17. Learned counsel for the applicant Sri A.C. Srivastava has filed several orders of this Court, in which the matters relating to Districts Meerut, Ghaziabad and Gautam Budh Nagar, have been stayed from the Court, which are as under:-

(A). In Application U/s 482 No. 30931 of 2016 - ***Ekta @ Bulbul Vs. State of U.P. & Ors.*** Court No. 24, of this Court on 17.11.2016, has passed an order not to take coercive action against the accused in a Case under Sections 302, 201 I.P.C, Police Station Pallavpuram, District Meerut.

(B). In Criminal Revision No. 3468 of 2013 ***Harendra Vs. State of U.P. & Ors.*** Court No. 22 of this Court on 12.12.2013, in a case under Section 302 / 34 and 120-B I.P.C granted relief that till the next date of listing no coercive steps shall be taken against the revisionist.

(C). In Application U/s 482 No. 2994 of 2018 - ***Smt. Pragati Chaudhary @ Pragati Singhal Vs. State of U.P. & Anothe***r, Court No. 52 of this Court granted relief on 29.08.2018 that until the date of next listing, operation of the impugned order issuing the non-bailable warrant passed by the C.J.M Ghaziabad, in Case Crime No. 1439 of 2014, under Section 468 I.P.C, P.s. Kavi Nagar, District Ghaziabad, shall remain stayed.

(D). In Criminal Revision No. 2827 of 2010 - ***Manoj @ Ase & Ors. Vs. State of U.P***, in which Court No. 50 of this Court on 27.07.2010, has passed an order not to take coercive steps against the revisionist in Case Crime No. 211 of 2010, in pursuance of the order passed under Section 73 Cr.P.C. but also added that however the investigation shall go on.

(E). In Application U/s 482 No. 36036 of 2022 - the present accused ***(Nadeem Salmani Vs. State of U.P. and another***) the Court No. 64 has set aside the N.B.W order dated 02.09.2022, but directed that applicant shall remain available at the address disclosed in the present application and cooperation would be provided to the I.O in the pending proceedings and in the event of failure to cooperate, he may be dealt with in accordance with law.

18. This Court has some what different opinion as there is no bar for issuance of non-bailable against any accused during the investigation, if such non-bailable warrant has been issued, for bringing the accused before the concerned Magistrate/Judge within twenty four hours from the time of his/her arrest. After arrest he/she may be sent either to judicial or the police custody as the case may be or he may be enlarged on bail and the I.O is at liberty to obtain a permission regarding recording of his/her evidence from the court visiting the jail or if he/she has made any disclosure statement regarding recovery of any incriminating material, on the application of the I.O. accused may be remanded to the police custody remained for a limited period for the purpose of investigation.

19. It is noteworthy that in this case the applicant having full knowledge that he was wanted in this case as accused, neither made him available for interrogation to the I.O nor moved any form of bail application. In another similar matter he had approached this Court taking shelter of the verdict ***State through C.B.I.*** (supra) and has been granted some relief.

20. In this case, it does not appear that the application was moved by the I.O or the the impugned order was passed by the concerned Magistrate / Judge to provide the accused in the custody of the I.O for the aid in investigation. The Magistrate has issued the non-bailable warrant for presentation of the accused in the Court for 03.10.2022, therefore the order passed by the concerned Magistrate being in accordance with law is not liable to be set aside. According to this Court, the impugned order is correct in the eye of law and the application is liable to be rejected.

O R D E R

21. The Application U/s 482 is **dismissed** accordingly.

22. A copy of this order be sent to learned Special Chief Judicial Magistrate, Meerut for information and necessary action.

(2023) 4 ILRA 428
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 37387 of 2022

Azeem Husain ...Applicant

Versus

State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Manoj Kumar Gupta

Counsel for the Opp. Parties:
G.A.

A. Criminal Law-Code of Criminal Procedure, 1973- Section 482 - Narcotics Drugs & Substance Act,1985 -Sections 8-C/20-b - 8-A/28-Quashing of-rejection order passed by Trial Court to release the truck-3 quintal 96 kg. Ganja was recovered from the truck-a report for confiscation had been forwarded by the S.H.O. to D.M. but till date DM has not started the proceedings of confiscation, even after a lapse of one year- In absence of initiation of any confiscation proceeding or order, it is open to the concerned Court to exercise its jurisdiction under Chapter XXXIV of the Code of Criminal Procedure,1973-Thus, the impugned order is liable to be quashed.(Para 1 to 16)

The application is allowed. (E-6)

List of Cases cited:

Manak Lal Vs Central Bureau of Narcotics (2019) JCC Online M.P. 2031

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

1. Heard Sri Manoj Kumar Gupta, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned A.G.A for the State and perused the material available on record.

2. This application under Section 482 Cr.P.C has been moved on behalf of the applicant to quash the order dated 08.09.2022 passed by Special Judge (N.D.P.S Act) / A.S.J. F.T.C (Crime Against Women) in Case Crime No. 163 of 2022 - State Vs. Zubair and Others, under Section

8-C/20-b (ii) (e) and 8-A/28 of N.D.P.S. Act, Police Station Ujhani, District Budaun, by which the release application of Truck No. U.P.22-T-3585 has been rejected and also for prayer to direct the Trial Court to release the aforesaid truck.

3. In brief, facts of the case are that the applicant is the recorded owner of the impugned vehicle insured by the O.I.C, which was searched and captured by the Police on 26.03.2022 and three quintal 96 K.G. Ganja was recovered in 198 packets and hence the vehicle was ceased under Section 207 M.V. Act and was also taken to the Police Station. The applicant moved an application for release of the impugned vehicle, which was rejected by the learned Trial Judge, on the ground that a report has been forwarded by the concerned Police Station for confiscation of the impugned vehicle in favour of the State.

4. Being aggrieved, this application under Section 482 Cr.P.C has been filed by the applicant.

5. On behalf of the State, S.I. Harpal Singh has filed counter affidavit that the aforesaid Truck was used in illegal trafficking of contraband narcotic substances and for confiscation of the same, a report dated **20.04.2022** has been sent to the District Magistrate, Budaun. The learned Trial Court has rightly rejected the release application. The application is not maintainable, hence the same be rejected.

6. A rejoinder affidavit has been filed by the applicant, denying the contends of the counter affidavit with contention that applicant is the owner of the vehicle and if any contraband is received/recovered from the vehicle, the truck driver will be responsible as it is not possible for the applicant to monitor the transportation of his vehicle all the time.

7. The condition of the vehicle is deteriorating day-by-day. The applicant is ready to give undertaking that he will produce the vehicle as and when it would be required or ordered by the court. Though, a report has been sent for confiscation of the vehicle on 22.04.2022, but till date no notice with regard to the proceeding of confiscation of the vehicle has been received. Even an application under the Right to Information Act was moved by the applicant on 14.10.2022, but there is no reply to that as to whether any proceeding was initiated in pursuant to the report dated 20.4.2022 or not. The applicant was neither present when the vehicle was taken into possession by the police nor he was accused as per F.I.R and it is the driver, who is responsible and who has been released on bail. The applicant is not a person of criminal in nature, he is a businessman and does business very fairly. It is the first time when his vehicle has been ceased by the Police with contraband substances. Hence the application be allowed and the impugned truck be released in favour of the applicant during the pendency of the trial.

8. Learned counsel of either of the parties has relied on ***Manak Lal Vs. Central Bureau of Narcotics, 2019 JCC Online M.P. 2031***, without showing name of the party which has no relevancy in the matter.

9. It would be proper to reproduce Section 60 of the N.D.P.S Act, which is as under : -

"60. Liability of illicit drugs, substances, plants, articles and conveyances to confiscation.

(1). Whenever any offence punishable under this Act has been committed, the narcotic drug, psychotropic substance, controlled substance, opium poppy, coca plant, cannabis plant, materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation.

(2). Any narcotic drug or psychotropic substance 2[or controlled substances] lawfully produced, imported inter-State, exported inter-State, imported into India, transported, manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance 2[or controlled substances] which is liable to confiscation under sub-section (1) and there receptacles, packages and coverings in which any narcotic drug or psychotropic substance 2[or controlled substances], materials, apparatus or utensils liable to confiscation under sub-section (1) is found, and the other contents, if any, of such receptacles or packages shall likewise be liable to confiscation.

(3). Any animal or conveyance used in carrying any narcotic drug or psychotropic substance 2[or controlled substance], or any article liable to confiscation under sub-section (1) or sub-section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use."

10. According to the Sub Section (1), if any offence has been committed under the N.D.P.S Act, the Plants Articles and Conveyances shall be liable for confiscation. As per Sub Section (3), any animal or conveyance used in carrying any narcotic and drug or psychotropic substance or controlled substance or any article liable to be confiscated under Sub-Section (1) or Sub Section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge of the owner himself, his agent, if any, and the person in-charge of animal or conveyance and the each of them had taken all reasonable precaution against such use.

11. In this case, it is the case of the applicant that he was a businessman and he cannot supervise all time his vehicle. No F.I.R. has been lodged against him. He was not present on the spot or with the vehicle. It was not in his knowledge that the driver is carrying the contraband narcotics substances. Therefore, an opportunity is available to the applicant to prove that this case is covered under the later part of Sub Section (3).

12. So far as the confiscation proceeding is concerned, it is very much clear from the evidence on record that though a report for confiscation had been forwarded by the S.H.O. to D.M. Budaun, on 20.04.2022, but till date the District Magistrate, Budaun has not started the proceedings of confiscation with regard to the impugned vehicle. If the vehicle has not been confiscated and no proceeding of confiscation could be started, even after a laps of one year, it is open to the concerned Court to exercise its jurisdiction under Chapter XXXIV of the Code of Criminal Procedure.

13. This Court is of the considered view that in such a situation the concerned court has right to dispose of the aforesaid release application considering all the facts and circumstances of the case and also as to whether the applicant has been able to establish the circumstances and grounds enumerated in the later part of the Sub Section (3) of Section 60 of the N.D.P.S Act or not.

14. There is also a reference of Section 207 of the M.V. Act that the vehicle has been ceased under Section 207 of the M.V. Act, for which the reports may be obtained and a release application may be moved before the concerned court or before the concerned R.T.O and the fine amount imposed (if any) under Section 207 of the M.V. Act, may be deposited. So far as the release of this vehicle as case property of the related criminal case is concerned, in absence of initiation of any confiscation proceeding or order, the release application can be dealt with under Chapter XXXIV of the Code of Criminal Procedure.

15. On the basis of the above discussion, this court is of the considered view that the impugned order is liable to be quashed.

O R D E R

16. This application under Section 482 Cr.P.C is **allowed** and the impugned order dated 08.08.2022 is hereby quashed. The learned Special Judge / A.S.J. (F.T.C) / Special Judge (N.D.P.S Act) (Crime against women), Budaun, is directed to decide the release application moved by the applicant earlier, afresh.

17. In view of this judgment, the learned trial Court shall receive a recent report as to whether any confiscation proceeding has been started by the District Magistrate, Budaun, or not or any order in this regard has been passed or not. In case, a report is submitted to the learned trial court that a confiscation proceeding has been started or any order with regard to confiscation has been passed by the District Magistrate, Budaun, this order for deciding the release application afresh would not be effective, otherwise the learned trial Court shall decide the release application exercising its power under Chapter XXXIV of the Code of Criminal Procedure.

(2023) 4 ILRA 431
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 39616 of 2022

Sanjeev Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Atharva Dixit, Sri Pranav Tiwary

Counsel for the Opp. Parties:
G.A.

A. Criminal Law - Indian Penal Code, 1860-Sections 498A, 304B, & 302 - Dowry Prohibition Act, 1961-Section ¾-homicidal death-applicant no. 3 is in hospital and due to this reason the applicants were unable to lead defence evidence-application moved to provide an opportunity to lead the evidence was rejected-the burden lies on the accused-applicants to discharge their duty that they have not committed dowry death, therefore, the production of defence evidence is must and essential-Therefore, only on this ground that the defence has

taken few dates for adducing the evidence, it would not be appropriate to close the defence evidence-Learned trial court started directing the defence to make haste while there were some compelling circumstances due to which the accused persons could not produce the defence evidence-Hence, there is no reason to bypass the provisions of Ss. 232 and 233 Cr.PC and conviction recorded in violation of this procedure renders the conviction illegal.(Para 1 to 22)

The application is allowed. (E-6)

List of Cases cited:

1. Sivamani @ Sivan Vs St. of Ker. (1993) CrLJ 23 DB

2. Parameswara Kurup Janardhanan Pillai Vs St. of Ker. (1982) CrLJ 899 Ker-DB

3. N. Pishak Singh Vs St. of Manipur (2006) CrLJ NOC 197

4. Manoj Kumar Swami Vs St. of U.P. (2006) CrLJ 1781 (1782)

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

1. Heard Shri Atharva Dixit, learned counsel for the applicants and Shri Pankaj Kumar Tripathi, learned A.GA. for the State. Perused the material available on record.

2. By this application, the applicants have challenged the order dated 21.11.2022 passed in Session Trial No. 392 of 2009 (Stae Vs. Sanjeef Kumar and others) arising out of Case Crime No. 142 of 2009 under Section 498A, 304 B I.P.C. and Section 3/4 of the D.P. Act, with an alternative charge under Section 302 IPC Police Station-Lanka, District- Varanasi and grant an opportunity to the applicants to lead their defence evidence.

3. In brief facts of the case are that the aforesaid trial is going on in the Court of Additional District Judge/ FTC Court No. 14th Finance Commission, Varanasi, on the allegations that the daughter of the first informant had solemnized her marriage with the applicant no. 1 on 18.4.2006. The applicants demanded dowry and administered poison to her due to which she was hospitalised and ultimately died on 27.3.2009. After submission of charge-sheet, the charges were framed and the trial commenced. It is contended that seeing the deteriorating condition of applicant no.3 Kusum Devi, she was kept under medical observation and had been hospitalized for treatment on 10.11.2022 and since then she is in hospital and due to this reason the applicants were unable to lead defence evidence. The matter was lastly listed on 15.11.2022 for the defence evidence but due to ill health of the applicant's counsel an adjournment application before the Court below was moved.

4. On 21.11.2022 an application was moved to provide an opportunity to lead the evidence of examining the defence witness. However, the said application was rejected in a mechanical and arbitrary manner by order dated 21.11.2022 which is under challenge before this Court on the ground that the order has been passed in a very perfunctory and malafide manner which is against the principles of natural justice and the right to fair trial. The trial is pending since 2009 and the prosecution has completed its evidence only in the year 2022. The prosecution has led its evidence in a period of over 13 years. It is a case under Section 304 B I.P.C. where statutory presumption under Section 113B of the Indian Evidence Act exists against the accused persons which is rebuttable in nature and it can be rebutted only by

leading defence evidence. In absence of any opportunity to lead the defence witnesses, the defence would be deprived of its right to rebut such presumption. The learned Court below under undue haste is not granting opportunity of defence and is adopting two different parameters with respect to the prosecution and the defence. It has already been upheld in various cases by the Apex court as well as different High Courts that any person can be summoned or recalled as a witness for examination at any stage of the proceedings where it is essential. All the applicants are on bail pending trial, therefore, impugned order be set-aside and an opportunity be granted to the applicants to lead their defence evidence.

5. The copy of the impugned order and relevant papers have been annexed with the petition.

6. By way of supplementary affidavit dated 28.11.2022, the applicants have produced the certified copy of the chick FIR and the impugned order. By way of supplementary affidavit no. 1/2022 copy of the order-sheet and the questionnaire have been filed.

7. Heard learned counsel for the applicants and learned A.G.A. Perused the record.

8. From perusal of the order-sheet it transpires that the prosecution could not conclude its evidence for a decade but after recording statement under Section 313 Cr.PC., the case was fixed for production of defence evidence. The learned Trial Court started taking defence evidence. On 15.10.2022 and 19.10.2022, the learned Trial Court awarded Rs. 500/- cost on the adjournment of the accused-applicants and granted opportunity to produce the defence evidence on 5.11.2022 and 8.11.2022 and lastly on 15.11.2022, he closed the defence evidence and when recall application was moved, the same was rejected on 21.11.2022.

9. The learned counsel for the applicants contends that under Section 113 B of the Evidence, the burden lies on the accused-applicants to discharge their duty that they have not committed the dowry death, therefore, the production of defence evidence is must and essential for ends of justice.

Section 233 Cr.PC. is as under:

233. *Entering upon defence. (1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof. (2) If the accused puts in any written statement, the Judge shall file it with the record.*

10. In Several judicial precedence, it has been held that proper opportunity for adducing defence evidence must be provided by the Court. The word 'shall' has been used everywhere in section 233 Cr.P.C.

11. In ***Sivamani alias Sivan V. State of Kerala, 1993 CrLJ 23 (DB)***, *it has been held that "there is no reason to bypass the provisions of Ss. 232 and 233 Cr.P.C. and conviction recorded in violation of this procedure renders the conviction illegal."*

12. In ***Parameswara Kurup Janardhanan Pillai V. State of Kerala, 1982 CrLJ 899 (Ker-DB),*** it has been held that "*an accused who was not acquitted under S. 232 and not called upon to enter*

upon his defence under this section, the trial is in violation of the latter part of the mandatory provision and is liable to be set aside."

13. In ***N. Pishak Singh V. State of Manipur, 2006 CrLJ (NOC) 197***, it has been held that "*where the accused had defence to make and wanted to examine defence witness, failure on the part of the Court to call upon the accused to enter upon the defence caused prejudice to him in his defence, his conviction on the charge of murder was set aside."*

14. As per the (Sub-sec. (3) of the aforesaid Section, the accused may apply for issue of process to compel attendance of witnesses or production of documents or things and the Judge, unless he considers the application to be vexatious or made for the purpose of delay or defeating the ends of justice, shall issue such process. The Judge should record his reasons for refusal.

15. In this case, the trial Judge has not concluded that the defence evidence is not necessary or without adducing the defence witnesses, the accused persons would be in capacity to rebut the presumption under Section 113 (b) of the Evidence Act. Therefore, only on this ground that the defence has taken few dates for adducing the evidence, it would not be appropriate to close the defence evidence. At least proper opportunity must be provided to the accused persons to adduce the evidence in their defence.

16. In ***Manoj Kumar Swami V. State of U.P., 2006 CrLJ 1781 (1782),*** it has been held that "At the stage of defence the accused has a right to summon any evidence which may be relevant for proper appreciation of the prosecution evidence and to substantiate his defence".

17. From the perusal of impugned order it appears that the learned trial Court has passed the order in hurried manner. The defence should have been provided at least sufficient opportunity without counting the dates. It is further revealed that the Trial Judge had also taken note that the prosecution was not taking the case seriously otherwise it would have not taken twelve years at the stage of prosecution evidence.

18. On 11.10.2022 the statement of the accused persons have been recorded under Section 313 Cr.PC and from 15.10.2022 to 15.11.2022 the opportunity to produce the defence evidence was provided and just within a month the defence evidence has been closed. If we compare the time given to the prosecution and the defence, the picture is very much clear that just after recording the statement under Section 313 Cr.P.C., the learned trial Court started directing the defence to make haste. From the perusal of grounds taken in the recall application and in the present application, it transpires that certainly there were some compelling circumstances due to which the accused persons could not produce the defence evidence.

19. In the judicial precedents referred to above, where the trial Court passed the orders in a haste manner and did not provide proper opportunity to adduce the evidence in defence and convicted the accused persons, such orders of conviction have been set aside.

20. Considering the overall circumstances of the case and time consumed by the prosecution this Court

concludes that the trial Court ought to have adopted more liberal view towards defence and they should have been provided sufficient time for production of defence evidence.

21. On the basis of above discussion this Court is of the view that to prevent the abuse of process and to secure the ends to justice it is imperative for this Court to intervene with the impugned order and to allow the application.

Order

22. The application under Section 482 Cr.P.C. is **allowed** and the order dated 21.11.2022 passed in S.T. No. 392 of 2009 (State Vs. Sanjeet Kumar and Others) arising out of Case Crime No. 142 of 2009 under Section 498A, 304 B I.P.C. and Section D.P. Act, with an alternative charge under Section 302 I.P.C. Police Station- Lanka, District- Varanasi, is hereby set aside. The learned Trial Court is directed to provide sufficient opportunity to adduce the defence evidence to the accused-applicants for which this Court thinks proper to provide at least 5 dates for production of prosecution evidence. It is further directed that the applicants shall not move any unnecessary adjournments. Further, if any application for summoning of the record or witnesses is moved, the same shall be considered in view of the above observations.

23. A copy of this order be sent to the trial Court for compliance.

(2023) 4 ILRA 435
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.03.2023

BEFORE

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

Application u/s 482 No. 42663 of 2022

Shiv Kumar Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Omar Zamin, Sri Rohit Nandan Pandey

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Sections 202 & 482 - Inherent power - The Negotiable Instruments Act, 1881 - Section 118 - Presumptions as to negotiable instruments - Section 138 - Dishonor of cheque for insufficiency, etc., of funds in the accounts - Section 139 - Presumption in favour of holder , The general clauses act, 1897 - section 27 - meaning of service by post - service of notice has been effected when it is sent to the correct address by registered post, Indian Evidence Act, 1872 - Section 114 - Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee - when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed. (Para - 15, 16)

Complaint filed under Section 138 N.I. Act - against applicant - alleging a demand for Rs. 1,25,000 for a partnership - opposite party provided the same amount - but applicant showed profit in 2014-15 - returned balance - opposite party refused to pay - legal notice through registered post – alleged to be not accepted by applicant - applicant did not return amount - Magistrate summoned - Cheque was issued by applicant - towards payments of debt or liability from an account -

blocked - complainant was not aware.**(Para -2, 19)**

HELD:- Only a prima facie case is to be seen, and the factum of disputed notice requires adjudication based on evidence, which can only be done by trial court. All are disputed questions of fact. When the facts have to be established by way of evidence, Court while exercising the powers under section 482 of Cr.P.C., cannot interfere with such proceedings. No grounds made out for quashing of the proceedings under section 138 of the Negotiable Instruments Act.**(Para -20, 21)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:

1. Rajesh Meena Vs St. of Har. & ors.. , CRM - M- 14537 - 2018

2. M/s Ceasefire Industries Ltd. Vs St. & ors.. , Crl L.P. 51/2017

3. C.C. Alavi Haji Vs Palapetty Muhammed & anr. , (2007) 6 SCC 555

4. Jagdish Singh Vs Natthu Singh, (1992) 1 SCC 647 : AIR 1992 SC 1604

5. St. of M.P. Vs Hiralal , (1996) 7 SCC 523

6. V. Raja Kumari Vs P. Subbarama Naidu , (2004) 8 SCC 774 : 2005 SCC (Cri) 393

7. Bhaskaran case, (1999) 7 SCC 510 : 1999 SCC (Cri) 1284

8. Ajeet Seeds Ltd. Vs K. Gopala Krishnaiah , (2014) 12 SCC 685

9. C.C. Alavi Haji Vs Palapetty Muhammed , (2007) 6 SCC 555 , (2007) 3 SCC (Cri) 236

10. D.Vinod Shivappa Vs Nanda Belliappa , (2006) 6 SCC 456 : (2006) 3 SCC (Cri) 114

11. Bharat Barrel & Drum Manufacturing Company Vs Amin Chand Pyarelal , (1999) 3 SCC 35

12. Basalingappa Vs Mudibasappa, (2019) 5 SCC 418

13. Kishan Rao Vs Shankargouda , (2018) 8 SCC 165: (2018) 4 SCC (Civ) 685 : (2018) 3 SCC (Civ) 544

14. Kishan Rao Vs Shankargouda , (2018) 8 SCC 165: (2018) 4 SCC (Civ) 37 : (2018) 3 SCC (Cri) 544

15. Ranjit Vs St. of U.P. & anr., (2020)03 - 05ILR A1752 : Application U/S 482 No. 47282 of 2019,

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

1. By means of instant application the applicant has approached this Court challenging the proceedings of Complaint Case No. 2233 of 20211, under Section 138 of the Negotiable Instruments Act, 18812, Police Station Phase-2, District Gautam Buddh Nagar and summoning order dated 05.04.2022 passed by Additional Chief Judicial Magistrate-III, Gautam Buddh Nagar.

2. Brief facts of the case are; a complaint under Section 138 of the N.I. Act was filed against the applicant with the allegation that the applicant having good relations with opposite party no. 2 demanded an amount of Rs. 1,25,00,000/- requesting him to become a partner in his business, which was being run by him since 2013. The opposite party no. 2, on the assurance of the applicant, gave an amount of Rs. 1,25,00,000/-. It has further been alleged that the applicant, having the intention of cheating, showed profit in the Firm for the year 2014-15 and returned an amount of Rs. 8,00,000/- to the opposite party no. 2. On being asked to return the balance amount, the applicant gave Cheque No. 097414 dated 24.03.2021 of Rs.

20,00,000/-. The said cheque was presented by the complainant in the Bank on 05.04.2021 which was returned with the remark "Bank Blocked". Thereafter, the opposite party no. 2 approached the applicant informing him about return of the cheque by the Bank with the aforesaid remark and requested him to pay the amount as was taken by him, on which the applicant misbehaved with the opposite party no. 2 and used abusive language, threatening for dire consequences and abruptly refused to return the amount. Thus, a legal notice dated 17.04.2021 was given by the opposite party no. 2 through registered post, however, the same was alleged to be not accepted by the applicant. The applicant did not return the amount nor submitted reply to the legal notice given by opposite party no. 2, therefore, the present complaint was filed on 27.07.2021. Subsequently, the learned Magistrate, after recording statements under Section 202 Cr.P.C. summoned the applicant vide order dated 05.04.2022 under Section 138 of the N.I. Act.

3. On earlier occasion i.e. 15.02.2023 Sri Omar Zamin, learned Advocate argued the matter at length, however, to respond some specific queries, the case was posted for 21.03.2023 for further hearing, though this Court had expressed its view of not being convinced to grant any relief in favour of the applicant. To utter surprise, on the next date, Sri Rohit Nandan Pandey, learned Advocate stepped in by filing his memo of appearance on behalf of the applicant, whereas he was not in a position to assist the Court even to a tad bit as he appeared to be in oblivion state regarding the facts of the case as also incognizant of the exhaustive and strenuous arguments advanced by Mr. Omar on the previous date. On being insisted to render assistance, Mr. Pandey summed up his arguments in very cavalier and unvirtuous manner. Such practice not only impedes early conclusion of a case but also disparages the profession and is execrated as infelicitous.

4. Appearance of a subsequent counsel at the concluding stage of arguments, that too, after disclosure of the view by the Court towards its result, emanates an undesired situation inimical to highly dignified profession of Advocacy regarded by all stratums of society. An advocate is considered as an Officer of the Court, thus, he or she is expected to adhere to the canon and criterion of etiquettes towards professionalism. Advocate is expected to perform his functions amenable to honored and dignified profession as also he or she is duty bound to maintain decorum of the court discharging his or her functions properly not only with colleagues but even with his opponents.

5. Conduct of accepting the brief by a subsequent counsel at the stage of conclusion of arguments by previous counsel and that too before the very date of pronouncement of the judgement, permeates unsolicited impression and does not fetch appreciation rather it spots a stigmatic mole over the person who being a lawyer is believed to follow the traditional decorum in the field of legal profession. Mr. Pandey who carries respectful position for his professional etiquettes is advised to refrain himself from being introduced as a subsequent engagement in a case where arguments have already been concluded by some other previous counsel, so as to secure faith and regard to his credit. The Court always commends the fairness and never thinks of subverting or demolition of professional principles and ethics at the end of a lawyer. In case of ineluctable request

of the client, nevertheless Sri Pandey should have been conversant with the status of arguments advanced by Mr. Omar Zamin before accepting the brief.

6. Emergence of present incident constrains me to request the luminaries of the Bar Council as well as Bar Association, namely, (i) Chairman, Bar Council of Uttar Pradesh, Allahabad; (ii) President, High Court Bar Association, Allahabad and (iii) Secretary, High Court Bar Association, Allahabad to assign space for consideration of such inappropriate situations, in a joint meeting which may cast a stone to the frequently rising wretched conditions affecting the noble profession of Advocacy, which resultantly becomes one of the reasons for delayed justice and jolts the faith of a litigant over the system.

Arguments advanced by Sri Omar Zamin, earlier learned Counsel appeared for the applicant

7. Earlier learned counsel for the applicant Mr. Omar Zamin had argued that the applicant lodged a first information report dated 04.09.2017, wherein he complained about an incident that his bag was stolen from his car wherein signed and unsigned documents were placed. It appears that the aforesaid cheque came in the hands of opposite party no. 2, after using which the present complaint has been filed hence the complaint against the applicant is not maintainable on this ground.

8. Learned counsel for the applicant next submitted that as per Section 138 of the N.I. Act, the cheque issued, should be drawn by a person "for discharge, in whole or in part, of any debt or other liability" that is to say, the cheque should have been drawn for the discharge of any debt or other liability of a drawer towards the payee. In the present case, it cannot be presumed in any way that the cheque has been issued for a debt or liability. He further submits that the cheque drawn by a person should be from an account maintained by him with a banker for payment of any amount of money to another person out of that account for discharge of his debt or liability. In the present case, the applicant had already lodged a first information report dated 04.09.2017 alleging therein about an incident where his bag containing signed and unsigned documents along with other cheques, was lost. It appears that the aforesaid cheque came in the hands of opposite party no. 2, after using which the present complaint has been filed hence the complaint is not maintainable on this ground itself.

9. The learned counsel had further contended that financial irregularities by office bearers is of Mahamedha Urban Cooperative Bank Ltd.3 as well as regarding misappropriation of money, a first information report was lodged, which led to cancellation of licence of the aforesaid Bank and hence the accounts there were blocked in the year 2017 itself. Thus, the accounts from which the cheque was issued was not in operation and was not being maintained by the applicant, thus, the complaint under Section 138 of the N.I. Act could not be lodged in such a case where a cheque for payment of liability or debt is being issued from the account which is not being maintained at the relevant point of time. Relying on a judgement of Punjab and Haryana High Court in the case of **Rajesh Meena v. State of Haryana and others**4, learned counsel for the applicant submitted that on the date when the cheque was dishonored, the account holder was not

maintaining the said account, therefore, in the absence of this material condition it cannot be said that the offence punishable under Section 138 of the N.I. Act is made out as is one of the necessary ingredients required for lodging of complaint under the relevant Act.

10. Learned counsel for the applicant further relied upon a judgement of Delhi High Court in the case of **M/s Ceasefire Industries Ltd. v. State & Ors.**5. He submitted that as the accounts had been frozen in terms of the first information report lodged against the Bank and accordingly the licence has been cancelled, therefore, the accounts had been blocked and the Bank which returned the cheques unpaid had done the same by making a remark of "Bank Block', thus, the reason for return of cheque unpaid being in contravention with the provisions of Section 138 of the N.I. Act, the complaint thus is not maintainable.

Arguments of State

11. Per contra, Mr. K.P. Pathak, learned AGA for the State, has submitted that the summoning order passed by the concerned Magistrate is legal and just in the eyes of the law and at this stage, only a prima facie case is to be seen and the complaint cannot be thrown at the threshold. He further submits that lodging of FIR with regard to missing of bag containing signed and unsigned documents including cheques, the check issued is not mentioned in FIR, therefore, the arguments as placed by learned counsel for the applicant cannot be accepted. Regarding other submissions of maintainability of complaint, it is clear that it was well known to the applicant that the Bank account was blocked in the year 2017 itself and he issued the cheque on 24.03.2021 having knowledge that the account was not being maintained by the applicant, thus he cannot turn around and take a stand that the reasons for return of cheque "unpaid' is not in consonance with the provisions of Section 138 of the N.I. Act, for the complaint to be maintainable.

12. I have heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

13. It is apposite to quote the provisions of Section 138 of the Act, which read as under:

"138. Dishonor of cheque for insufficiency, etc., of funds in the accounts:- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

PROVIDED that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability."

14. Section 138 deals with a cheque drawn by a person "for the discharge, in whole or in part, of any debt or other liability." The section does not say that the cheque should have been drawn for the discharge of any debt or other liability of the drawer towards the payee. Thus in complaint under Section 138 of N.I. Act, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability, is on the accused. The applicant being holder of cheque and the signature appended on the cheque having not been denied by the Bank, presumption shall be drawn that cheque was issued for the discharge of any debt or other liability. The presumption under Section 139 is a rebuttable presumption. Before this Court refers to various judgments of the Apex Court considering Sections 118 and 139, it is relevant to notice the general principles pertaining to burden of proof on an accused especially in a case where some statutory presumption regarding guilt of the accused has to be drawn.

15. A Three Judges' Bench of the Hon'ble Apex Court in the case of **C.C. Alavi Haji v. Palapetty Muhammed and Another**6 has held as under:-

"14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed. (Vide Jagdish Singh Vs. Natthu Singh7; State of M.P. v. Hiralal8, and V. Raja Kumari v. P. Subbarama Naidu9. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

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17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law,

where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case10, if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

16. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, the service of notice is deemed to have been effected at the time, at which the letter would have been delivered in the ordinary course of business. In the case of **Ajeet Seeds Ltd. vs. K. Gopala Krishnaiah**11, the Apex Court has held that absence of averments in the complaint about service of notice upon the accused is the matter of evidence. The paragraph nos. 10 and 11 of the said judgement are reproduced herein below:-

"10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.

11. Applying the above conclusions to the facts of this case, it must be held that the High Court clearly erred in quashing the complaint on the ground that there was no recital in the complaint that the notice under Section 138 of the NI Act was served upon the accused. The High Court also erred in quashing the complaint on the ground that there was no proof either that the notice was served or it was returned unserved/unclaimed. That is a matter of evidence. We must mention that in C.C. Alavi Haji12, this Court did not deviate from the view taken in Vinod Shivappa13, but reiterated the view expressed therein with certain clarification. We have already quoted the relevant paragraphs from Vinod Shivappa where this Court has held that service of notice is a matter of evidence and proof and it would be premature at the stage of issuance of process to move the

High Court for quashing of the proceeding under Section 482 of the Cr.P.C. These observations are squarely attracted to the present case. The High Court's reliance on an order passed by a two-Judge Bench in Shakti Travel & Tours is misplaced. The order in Shakti Travel & Tours does not give any idea about the factual matrix of that case. It does not advert to rival submissions. It cannot be said therefore that it lays down any law. In any case in C.C. Alavi Haji, to which we have made a reference, the three-Judge Bench has conclusively decided the issue. In our opinion, the judgment of the two-Judge Bench in Shakti Travel & Tours does not hold the field any more."

17. Further the Apex Court in the matter of **Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal**14, had considered Section 118(a) of the Act and held that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable and defendant can prove the non-existence of a consideration by raising a probable defence. In paragraph No.12 following has been laid down:-

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

18. In its recent judgment, the Apex Court in the matter of **Basalingappa v. Mudibasappa**15 specifically in paragraph nos. 23 and 24 has noticed as follows:-

"23. We may now notice the judgement relied on by the learned counsel for the complainant i.e. judgment of this Court in *Kishan Rao v. Shankargouda*16. This Court in the above case has examined Section 139 of the Act. In the above case, the only defence which was taken by the accused was that cheque was stolen by the appellant. The said defence was rejected by the trial court. In paras 21 to 23, the following was laid down: (SCC pp. 173-74)

21. ....

22. ....

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof."

23. No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High Court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence of PW 1, himself has not been explained by the High Court.

24. The above Kishan Rao17 case was a case where this Court did not find the defence raised by the accused probable. The only defence raised was that cheque was stolen having been rejected by the trial court and no contrary opinion having been expressed by the High Court, this Court reversed the judgment of the High Court restoring the conviction. The respondent cannot take any benefit of the said judgment, which was on its own facts."

(Emphasis added)

19. The matter regarding stolen cheque has been elaborately dealt with by this Court in the case of **Ranjit v. State of U.P. and another**18, wherein the plea taken on behalf of the applicant regarding non-maintainability of the complaint on the ground of stolen of cheques has been rejected. As regards the judgements placed on by learned counsel for the applicant are not applicable in the facts of the present case as the applicant was well aware of the fact that he is issuing a cheque towards payments of debt or liability from an account, which is blocked, of which the complainant was not aware.

20. In view of the settled legal position, as noticed above, it is clear that at this stage, only a prima facie case is to be seen and the complaint cannot be thrown at the threshold and the factum of disputed service of notice requires adjudication on the basis of evidence and the same can only be done and appreciated by the trial court.

21. All the submissions made by learned counsel for the applicant are disputed questions of fact. Therefore, when the facts have to be established by way of

evidence, this Court while exercising the powers under section 482 of Cr.P.C., cannot interfere with such proceedings. Hence, no grounds are made out for quashing of the proceedings under section 138 of the Negotiable Instruments Act.

22. On the basis of discussions made herein above, this Court finds that there is no illegality or infirmity in the summoning order dated 05.04.2022 passed by the concerned court below. Therefore, no interference is required at this stage.

23. In view of the aforesaid, the application is, accordingly, dismissed.

24. The Registrar General of this Court shall communicate this order to the Chairman, Bar Council of Uttar Prdesh, Allahabad; President, High Court Bar Association, Allahabad and Secretary, High Court Bar Association, Allahabad, apprising them of the suggestions expressed in paragraph nos. 3 to 6 of this order.

(2023) 4 ILRA 444
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2023

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. Bail Application No. 833 of 2023

Rajendra Agarwal urf Bablu ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Vijit Saxena, Sri Rakesh Kumar Pandey

Counsel for the Respondent:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 354, 376(D)(B), 323, 328, 506, 366A & 120B , The Protection of Children From Sexual Offences Act, 2012 - Section 5/6, The Code of criminal procedure, 1973 - Sections 161 and 164 - The Juvenile Justice (Care And Protection Of Children) Act, 2000 - "Child in Need of Care and Protection" - Section 29, 30, 31 , The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 27 , Section 110(1) , Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2019 - Rules 16 , 17 & 35 .

Serious allegations against applicant (father of victim) - betrayed a pious relationship of father and daughter (victim, minor girl) - Victim's narration of prosecution story exaggerated - Victim's facts were consistent in FIR and statements - unable to point out a single place of occurrence and date/month of occurrence - Victim's mother's failure to protest or lodge FIR suggests improbability - Co-accuseds granted bail for serious rape allegation. (Para - 11,12,13)

HELD:-All the co-accused granted bail against whom very serious allegation of rape was levelled. Court inclined to grant bail to applicant also. **(Para -13)**

Bail application allowed. (E-7)

List of Cases cited:

1. Manoj Kumar Khokhar Vs St. of Raj. & anr. , (2022)3 SCC 501

2. Brijmani Devi Vs Pappu Kumar , (2022) 4 SCC 497

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Applicant-Rajendra Agarwal alias Bablu has approached this Court by way of filing present bail application seeking enlargement on bail in Case Crime No. 860 of 2021, under Sections 354, 376(D)(B), 323, 328, 506, 366A, 120B IPC and 5/6

POCSO Act, Police Station Kotwali Lalitpur, District Lalitpur, after rejection of his bail application vide order dated 07.01.2022 passed by Additional Sessions/Special Judge (POCSO Act), Lalitpur.

2. In the present case an FIR was lodged by victim, a minor girl, aged about 17 years. She has narrated how she suffered sexual ordeal for many years which was commenced, when she was a student of Class-VI. First perpetrator who ravished her was her father (applicant), who not only thereafter repeatedly raped her, but put her in a prostitution racket also.

3. In the FIR, victim has narrated how her father himself presented her before other men, who raped her. Victim also described that even her relatives (uncles) also raped her and women of her family helped them in committing act of rape. Victim and her mother were subjected to sedatives. In all victim, has named 25 accused persons including her father, close relatives, her family friends and other persons and women of her family, who helped in crime. She was not able to disclose earlier about above referred offences since there were repeated threats to cause harm to her mother, younger brother and sister.

4. Sri Vijit Saxena, learned counsel for applicant, submitted that story of victim, on the face of it, appears to be not only concocted but improbable also. It would be beyond imagination that victim was repeatedly raped by her father, her close relatives and applicant has put her in prostitution and it continued for many years. Victim has never raised any alarm or called police or reported matter before police authorities. Learned counsel further submitted that contents of FIR remained consistent in the statements of victim recorded under Sections 161 and 164 Cr.P.C. as well as statement made before Medical Officer and Members of Child Welfare Committee, however, she has not mentioned a single date in her statements though she was allegedly subjected to rape repeatedly on many days during long duration of atleast 6-7 years.

5. Learned counsel further submitted that except applicant, this Court has granted bail to all other co-accused by different Coordinate Benches. Medical examination has not supported case of victim. Applicant was falsely implicated and reason for false implication is that the mother of victim is interested in family property. Learned counsel further submitted that some of accused persons have approached this Court challenging charge sheet, cognizance order and summoning order by filing respective applications under Section 482 Cr.P.C. and this Court has granted interim protection that no coercive measures shall be taken against applicants therein.

6. Learned counsel also submitted that subsequently mother of victim has lodged an FIR against applicant (her husband) that many years ago she was kidnapped and forced to marry him.

7. Above submissions are opposed by Sri Paritosh Malviya, learned AGA appearing for State. He submitted that a minor girl was subjected to sexual assault by many persons for several years. A conspiracy was hatched to put victim in prostitution. For a minor girl, who has gone through such a traumatic ordeal, it is possible that she may not be able to narrate the date and time of offence but this will not dilute the seriousness of crime. There

are other factors also that she was always given sedatives and threat was also given to her that in case of any report damage would be caused to her mother, younger brother and sister. Learned AGA, however, has not disputed that other co-accused have been granted bail however he has submitted that the reasons given in bail orders are not in terms of judgements passed by Supreme Court in **Manoj Kumar Khokhar vs. State of Rajasthan and Anr. (2022)3 SCC 501** and **Brijmani Devi vs. Pappu Kumar (2022) 4 SCC 497.**

8. During hearing of this case, Court has called Chairperson, Child Welfare Committee, Lalitpur, to get first hand information about victim. Sri Raj Kumar Jain, Chairperson, Child Welfare Committee, Lalitpur has appeared before this Court and stated that victim was given an option for psychological counselling, however, she refused as well as she has refused for support persons also though her statement was recorded. She was provided financial assistance also and presently she is a student of Graduation.

9. Aforesaid exercise was done with the object that on the basis of above referred allegations, which are very serious, victim must have suffered mental trauma for number of years and for that she requires a proper counselling. In the present case it was provided but she has not accepted the request of support person. The documents submitted by Child Welfare Committee include a statement given by victim before Child Welfare Committee, wherein allegations made in FIR, statements recorded under Sections 161 and 164 Cr.P.C. were completely supported, therefore, Court proceed to consider this bail application on premise that victim's version still remain same, despite she now being a major girl.

10. It is not in dispute that number of co-accused have been granted bail and some of accused persons have also approached this Court for quashing of criminal proceedings, wherein interim protection qua to applicants therein have been granted. I have also perused the bail orders passed by Coordinate Benches of this Court whereby co-accused have been granted bail. Though some of the orders appear to be very detail however no reason, as required by judgments passed by Supreme Court in **Manoj Kumar Khokhar (supra)** and **Brijmani Devi (supra)**, has been given. Therefore, plea of parity cannot be accepted and Court proceed to consider this bail application on its own merit.

11. Applicant's relationship with victim is not in dispute that he is the father of victim. According to statement of victim, which remained consistent in FIR and statements under Sections 161 and 164 Cr.P.C., the first alleged perpetrator was her father (applicant), when she was a student of Class VI and she repeated the offence thereafter also and further that he allegedly put victim to have physical relationship with other persons. The co-accused have allegedly raped her with consent of her father and even she was raped by her close relatives and other persons also. The allegations, therefore, are very serious against applicant as allegedly he has betrayed a pious relationship of father and daughter.

12. Still there is merit in the argument of learned counsel for applicant that narration of prosecution story by victim appears to be exaggerated. Victim has

narrated number of incidents of rape by number of persons during a period of many years. However, she was not able to point out a single place of occurrence as well as a single date or month of occurrence. Court is conscious that narration of facts of victim remained consistent in FIR lodged by her and in her statements recorded under Sections 161 and 164 Cr.P.C., however, a factor of improbability also comes into picture, when conduct of victim's mother is considered that she has not make any attempt to protest or lodge any FIR despite she was aware that her daughter was undergoing sexual assault for several years.

13. In addition to above, there is another factor which requires consideration that all the co-accused have been granted bail by this Court against whom very serious allegation of rape was levelled. In these circumstances, Court is inclined to grant bail to applicant also.

14. However, applicant is directed to remain present on each and every date as and when required by Trial Court during trial and in case any application for exemption on vague ground is filed, the same shall be a ground for Trial Court to cancel bail immediately.

15. Let the applicant-**Rajendra Agarwal alias Bablu** be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the Court concerned with the following conditions which are being imposed in the interest of justice:-

(i) The applicant will not tamper with prosecution evidence and will not harm or harass the victim/complainant in any manner whatsoever.

(ii) The applicant shall file an undertaking to the effect that he shall not seek any adjournment or exemption from appearance on the date fixed in trial. In case of default of this condition, it shall be open for the Trial Court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(iii) The applicant will not misuse the liberty of bail in any manner whatsoever. In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C., may be issued and if applicant fails to appear before the Court on the date fixed in such proclamation, then, the Trial Court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.

(iv) The Trial Court may make all possible efforts/endeavour and try to conclude the trial expeditiously, preferably within a period of six months after release of applicant, if there is no other legal impediment.

(v) The applicant will not enter in the area of District Lalitpur for a period of six months from today, except for the purpose of present case with prior information to Trial Court and meanwhile, Trial Court is directed to record statement of victim.

16. The identity, status and residential proof of sureties will be verified by Court concerned and in case of breach of any of the conditions mentioned above, Court concerned will be at liberty to cancel the bail and send the applicant to prison.

17. The bail application is allowed.

18. It is made clear that the observations made hereinabove are only for the purpose of adjudicating the present bail application.

19. Before parting with this judgment, I propose to deal with the duties, responsibilities and statutory status of Child Welfare Committee.

20. Under Chapter III of the Juvenile Justice (Care and Protection of Children) Act, 2000 (*hereinafter referred to as "JJ Act, 2000"*) under the heading of "Child in Need of Care and Protection", concept of Child Welfare Committee was introduced.

21. Section 29 of JJ Act, 2000 describes formation of Child Welfare Committee. Section 30 provides procedure etc. in relation to Committee. Section 31 provides powers of Committee that Committee shall have the final authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children as well as to provide for their basic needs and protection of human rights. These provisions are almost reiterated in Juvenile Justice (Care and Protection of Children) Act, 2015 (*hereinafter referred to as "JJ Act, 2015"*) under Chapter V from Section 27 onwards.

22. In exercise of powers conferred by proviso to sub-section (1) of Section 110 of JJ Act, 2015 State of U.P. has framed Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2019 (*hereinafter referred to as "JJ Rules, 2019"*) with conforms to Model Rules made by Government of India.

23. Rules with regard to Child Welfare Committee are mentioned in Chapter IV of JJ Rules, 2019. Rule 16 provides rules and procedure of Committee and Rule 17 provides additional functions and responsibilities of Committee. Said rules are reproduced hereinafter:

*"**16. Rules and Procedures of Committee.-(**1) The Chairperson and members of the Committee shall be paid such sitting allowance, travel allowance and any other allowance, as the State Government may prescribe but not less than Rs. 1500 (One Thousand and Five Hundred) per sitting.*

(2) A visit to an existing Child Care Institution by the Committee shall be considered as a sitting of the Committee.

(3) The Committee shall hold its sittings in the premises of a children's home or at a place in proximity to the children's home or, at a suitable premises in any institution run under the Act for children in need of care and protection.

(4) The Committee shall ensure that no person(s) un-connected with the case remains present in the room when the session is in progress.

(5) The Committee shall ensure that only those person(s), in the presence of whom the child feels comfortable, shall be allowed to remain present during the sitting.

(6) At least one member of the Committee shall always be available or accessible to take cognizance of any matter of emergency and issue necessary directions to the Special Juvenile Police Unit or local police of the district. For this purpose the Chairperson of the Committee shall draw up a monthly duty roster of the Committee members who shall be available and accessible every day, including on Sundays and holidays.

The roster shall be circulated in advance to all the police stations, the Chief Judicial Magistrate/Chief Metropolitan Magistrate, the District Judge. the District Magistrate, the Board, the District Child Protection Unit and the Special Juvenile Police Unit.

(7) The Committee shall sit on all working days for a minimum of six hours commensurate with the working hours of a Magistrate Court, unless the case pendency is less in a particular district and the State Government concerned issues an order in this regard:

Provided that the State Government may. by notification in the Official Gazette constitute more than one Committee in a district after giving due consideration to the pendency of the cases, area or terrain of the district. population density or any other consideration.

(8) On receiving information about a child or children in need of care and protection, who cannot be produced before the Committee, the Committee shall reach out to the child or children and hold its sitting at a place that is convenient for such child or children.

(9) While communicating with the child, the Committee members shall use child friendly techniques through their conduct.

(10) The Committee shall hold its sittings in a child-friendly premises which shall not look like a court room in any manner and the sitting arrangement should be such to enable the Committee to interact with the child face to face.

(11) The Committee shall not sit on a raised platform and there shall be no barriers, such as witness boxes or bars between the Committee and the children.

(12) The Committee shall be provided infrastructure and staff by the State Government."

"17. Additional Functions and Responsibilities of the Committee.-*In addition to the functions and responsibilities of the Committee under Section 30 of the Act, the Committee shall perform the following functions to achieve the objectives of the Act, namely:*

(i) document and maintain detailed case record along with a case summary of every case dealt by the Committee in Form 15;

(ii) maintain a suggestion box or grievance redressal box at a prominent place in the premises of the Committee to encourage inputs from children and adults alike which shall be operated by the District Magistrate or his nominee;

(iii) ensure smooth functioning of Children's Committees in the Child Care Institutions for children in need of care and protection within its jurisdiction, for realising children's participation in the affairs and management of the said Child Care Institutions;

(iv) review the Children's Suggestion Book at least once a month;

(v) send quarterly information in Form 16 about children in need of care and protection received by it to the District Magistrate with all relevant details on nature of disposal of cases, pending cases and reasons for such pendency:

(vi) wherever required, issue rehabilitation card in Form 14 to children in need of care and protection to monitor their progress;

(vii) maintain the following records in a register:

(a) entries of the cases listed in a day and next date and the Committee shall prepare a daily cause list of the cases before it;

(b) entries and particulars of children brought before the Committee and details of the Child Care Institution where the children are placed or the address where the children are sent;

(c) execution of bonds;

(d) movement including visits to institutions;

(e) children declared legally free for adoption;

(f) children recommended for or placed in sponsorship;

(g) children placed in individual or group foster care;

(h) children transferred to or received from another Committee;

(i) children for whom follow up is to be done;

(j) children placed in aftercare:

(k) inspection record of the Committee;

(l) record of Minutes of the meetings of the Committee:

(m) correspondence received and sent;

(n) any other record or register which the Committee may require.

(viii) all information listed in clause (vii) of this rule may be digitized and a software may be developed by the State Government."

24. Later on there were certain amendments w.e.f. 01.09.2022 in Rule 15 of Juvenile Justice (Care and Protection of Children) Model Rules, 2016, which still to be incorporated in in JJ Rules, 2019.

25. The above referred procedure of Committee and additional functions and responsibilities of Committee entrusted a great responsibility to Child Welfare Committee that it shall hold its sittings in the premises of a children's home or, at a place in proximity of children's home or, at a suitable premises in any institution run under the Act for children in need of care and protection. It further provides that it shall be ensured that no person or persons unconnected with case remains present in room when session is in progress and only those persons shall be allowed to remain present, in presence of whom child feels comfortable. Committee shall hold its sittings in a child friendly premises which shall not look like a Court Room in any manner. Committee has to review the Children's Suggestion Book atleast once in a month.

26. Concept of Child Welfare Committee has important factor in implementation of JJ Act, 2015 and JJ Rules, 2019. In the present case considering gravity of allegations, victim does require a very special and effective counselling by an experienced counsellor.

27. In the backdrop of above referred statutory provisions it is clear that Child Welfare Committee has a great responsibility when it is dealing with a case of minor girl victim, as the case in hand, who has suffered mental and physical trauma of repeated assault for many years. In such cases it would not be a mere formality of Child Welfare Committee to comply with above referred statutory provisions but it would require more cautious approach. In such cases victim should be dealt with extra care and responsibility and for that members of Child Welfare Committee required a trained support system, who can undertake counselling of such victims keeping in view their sufferings.

28. National Commission for Protection of Child Rights (NCPCR) has launched a training module for Child Welfare Committee. The module will be more beneficiary if it includes a requisite training to deal with minor victims of sexual assault.

29. Effect of act/ offence of rape is not momentary but it got pasted on mind, heart, body and soul of the victim and the object of Child Welfare Committee is to undertake such endeavours to erase such memories by counselling and it should be

done by well trained counsellors who have experience of treating such minor victims under proper guidance.

30. In view of above, Ministry of Women and Child Development, Government of U.P., Lucknow through its Secretary is directed to ponder on above referred issue by initiating process of interaction with all stakeholders in order to make Child Welfare Committee and its Members more competent, more responsible, more generous and more compassionate to deal with such cases, as the case in hand.

31. While undertaking above exercise it shall also take note the provisions of Rule 35 of JJ Rules, 2019 which provides mental health for children at Child Care Institution. Sub-rule (5) thereof provides that every Institution shall have the services of trained counsellors or collaboration with external agencies such as child guidance centres, psychology and psychiatric departments or similar Government and non-Governmental agencies, for specialized and regular individual therapy for child.

32. The object of above exercise is to provide sincere and appropriate counselling to minor victim and exercise shall not be limited to above observations. It is up to the senior officers of Department to come up with a concrete plan in order to achieve the above referred observations of this Court.

33. Registrar (Compliance) is directed to send a copy of this order to Secretary, Ministry of Women and Child Development, Government of U.P., Lucknow who shall undertake above exercise and submit report thereof before this Court.

34. List this matter after six months before appropriate Bench only for perusal of report submitted by Secretary, Ministry of Women and Child Development, Government of U.P., Lucknow.

(2023) 4 ILRA 451
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.04.2023

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. IInd Bail Application No. 51332 of 2022

Ankit Kumar Yadav ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Dr. D.B. Singh

Counsel for the Respondent:
Sri Sunil Srivastava, A.G.A.

(A) Criminal Law - Second Bail - Indian Penal Code, 1860 - Sections 302 & 201 - First bail application rejected by reasoned order - co-accused granted bail - subsequent event - applicant in jail since 03.03.2022 - charges not framed till date - Suppression of a material fact by not disclosing application for discharge - Applicant and co-accused were arrested on the spot - hammer and phones recovered from their motorcycle -9 c.m. long with head of diameter of 4 c.m**-** Observation of Coordinate Bench - "recovery of vivo mobile phone" from applicant - false and planted.**(Para -2 to 12 ,16)**

HELD:- Observation without consideration of any material on record has no legal consequence. No subsequent event of fact or law which requires consideration of Court in the present second bail application.**(Para - 16,17)**

Second Bail application rejected. (E-7)

List of Cases cited:

Ramanand @ Nandlal Bharti Vs St. of U.P., 2022 SCC OnLine SC 1396

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. This is second bail application filed on behalf of applicant who is facing trial in Case Crime No. 36 of 2022 under Sections 302, 201 I.P.C., Police Station- Chilh, District- Mirzapur.

2. The first bail application of applicant was rejected by this Court on 14.09.2022 by a reasoned order. In the order, it was taken note that co-accused Radhey Shyam Yadav was granted bail by an order dated 08.07.2022. For reference, reasons given therein are mentioned hereinafter :-

"I have given thoughtful consideration to the contentions raised by learned counsel for the parties. At the very outset, it is clarified that the role played by the accused-applicant is distinct from co-accused Radhe Shyam. From the possession of the accused-applicant, the mobile phone of the deceased was recovered and on his alleged disclosure statement a hammer from dickey of his motorcycle was also recovered. The accused has disclosed that by playing deceitful means he took the accused at lonely place near old railway track on the promise that he will provide him drink and a girl will also come there. The blood was also found on the lower part of the hammer. On his disclosure, the bloodstained water bottle was also recovered.

Keeping in view the facts and circumstances of the case and the evidence available on record as well as severity of punishment and the manner in which murder of Sunil Yadav close relative as alleged was committed by accused,

I do not find it fit for bail. Accordingly, the bail application of the applicant is rejected."

3. Present bail application was filed on 03.11.2022 i.e. within less than 2 months after the first bail application was rejected.

4. In the application, averments are mostly on merit of the case and only subsequent event is that the applicant is in jail since 03.03.2022, however, till date even charges are not framed.

5. On direction of this Court, the Trial Court has submitted a status report that the case was referred to Additional Sessions Judge on 04.06.2022. Applicant and co-accused have filed applications for discharge which were dismissed on 02.03.2023 and thereafter charges were framed under Sections 302/34 and 201 I.P.C. on same day.

6. Applicant has not disclosed that he has filed an application for discharge, therefore, the Trial Court could not be blamed for that no charge was framed. This is a suppression of a material fact.

7. It transpires from above referred facts that after the first bail application was rejected on 14.09.2022 and till the second bail application was filed on 03.11.2022, the trial could not proceed due to discharge applications filed by applicant and co-accused, therefore, there is no subsequent event to consider this bail application.

8. Dr. S.B. Singh, learned counsel for applicant has argued on merit that first bail application was rejected that many

incriminating materials were recovered on pointing out of applicant, whereas co-accused was granted bail. Recovery was false and planted. Learned counsel has placed reliance upon a judgment passed by Supreme Court in **Ramanand alias Nandlal Bharti vs. State of Uttar Pradesh, 2022 SCC OnLine SC 1396** and particularly its paragraph 53, that recovery panchnama in present case was deficient in all the relevant objects described in said paragraph. Paragraph 53 of said judgment is quoted hereinafter :-

"53. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence along with his blood stained clothes then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

9. Learned counsel has submitted that aforesaid judgment is a subsequent event and if the recovery memo is tested with aforesaid law of preparation of a memo of recovery, the memo of present case shall have no legal bearing.

10. Sri Sunil Srivastava, learned A.G.A. for State submitted that since first bail application was dismissed on merit, therefore, consideration of a judgment would be akin to review the order which is not permissible and for that applicant has to challenge the order before Supreme Court and since there is no subsequent event for consideration, therefore, this second bail application may be rejected.

11. Learned counsel for applicant has raised a point of law, therefore, I have carefully perused the arrest and recovery memo, a part of record.

12. According to arrest memo/recovery, the applicant and co-

accused were intercepted on a road and were arrested on spot. Both accused persons have narrated manner of crime and a hammer and phones were recovered from their motorcycle and on personal search, therefore, in present case the procedure that statement of accused be recorded in presence of two witnesses at police station that they wanted to show the incriminating material does not require. They are not taken to police station.

13. The memo has disclosed the informant Arvind Yadav and uncle of deceased Vijay Kumar also reached at the place of arrest as well as on the spot of arrest the accused have stated that they can point out other incriminating items and the police party along with witnesses and accused persons went the place and incriminating items were recovered on their pointing out. The names of independent witness as mentioned in memo are Skand Verma and Avesh Yadav, therefore, even the relevant aspects mentioned in paragraph 53 of **Ramanand (supra)** are prima facie satisfied.

14. The Supreme Court in Ramanand (supra) has considered the testimony of I.O. therein as well as of punch witnesses and only thereafter held that recovery memo was not proved and proceeded to consider other aspects of said case also. However, in the present case, testimony of I.O. and witnesses of panch are still to be led before Trial Court, therefore, at this stage, it cannot be held that memo of recovery is not proved or it was prepared contrary to procedure prescribed if any, as well as I have already mentioned that prima facie, there is no illegality in the arrest memo/recovery memo even in view of judgment of **Ramanand (supra)** and other aspects will be considered by Trial Court on basis of evidence.

15. The hammer recovered from applicant is 9 c.m. long with head of diameter of 4 c.m. An argument is raised that nature of injuries could not be caused by a hammer and size of lacerated wounds are 4cm x 1.5cm, 3cm x 1cm, 4cm x 1.5cm, 3cm x 1cm, 5cm x 4cm, 8cm x 3cm occipital region #fracture and Lw on Rt. parietal region with #fracture, which prima facie corroborate the size of hammer. 4 laceration is a tear produced by blunt trauma. The force and direction determine appearance, depth and associated injuries are such as fractures. Injuries caused by hammer blows are example of laceration, therefore, prima facie above argument has also no force.

16. It is also relevant to mention here that coordinate Bench has observed that "recovery of vivo mobile phone" from applicant is false and planted and the same does not belong to deceased. However, it appears that it was an observation without consideration of any material on record, therefore, it has no legal consequence as well as role assigned to co-accused is of providing a hammer to applicant and causing disappearance of dead body, whereas role assigned to present applicant to cause multiple injuries to deceased.

17. In view of above, there is no subsequent event of fact or law which requires consideration of this Court in the present second bail application.

18. The second bail application is hereby **rejected.**

(2023) 4 ILRA 455
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.03.2023

BEFORE

THE HON'BLE J.J. MUNIR, J.

Civil Revision No. 80 of 2022

Smt. Jyoti ...Revisionist
Versus
Ankit Dubey ...Opp. Party

Counsel for the Revisionist:
Sri Gaurav Tripathi

Counsel for the Opp. Parties:
Sri Puneet Bhadauriya

A. Family Law – Family Court Act, 1984 – Sections 10(1), 19(1) & 19(5) – Civil Procedure Code – S. 115 – Revision – Maintainability – Order passed on amendment application – Interlocutory order having the trapping of 'Judgment' is appealable u/s 19 or not – Held, upon a reading of Sections 10(1) and 19(5) of the Act of 1984 together, the position that emerges is that no revision from an order of the Family Court is competent except one that arises from a final order passed under Chapter IX of the Code of Criminal Procedure – The party, therefore, aggrieved by an interlocutory order may question it in appeal, if it has the trappings of a judgment, or so to speak is an order of moment pronouncing upon rights of parties – There is no avenue of a revision under Section 115 of the Code open to a party aggrieved by an order of the Family Court – High Court held revision not maintainable. (Para 20, 23 and 24)

Revision dismissed. (E-1)

List of Cases cited:

1. Sudhanshu Gupta Vs Komal Gupta; 2019 (5) AWC 4434

2. Smt. Raj Shri Agarwal @ Ram Shri Agarwal & anr. Vs Sudheer Mohan & ors.; 2022 (5) AWC 4192

3. Major Raja P. Singh Vs Smt. Surendra Kumari; AIR 1991 Raj 133

4. Kanupriya Vs Ashutosh Agrawal; AIR 2017 Utt 166

5. Smt. Kiran Bala Srivastava Vs Jai Prakash Srivastava; 2005 (23) LCD 1

6. Yogish Arora Vs Smt. Jennette Yogish Arora @ Miss Jennettee Dsouza; 2018 (9) ADJ 379

7. Sana Afrin Vs Zohaib Khan; AIR 2021 All 40

(Delivered by Hon'ble J.J. Munir, J.)

This civil revision is directed against an order of Smt. Renu Singh, Additional Principal Judge, Family Court, Etawah dated May the 31st, 2022, allowing the respondent's application, seeking amendment to his petition for divorce under Section 13 of the Hindu Marriage Act, 1955 (for short, 'the HMA').

2. A petition under Section 13 of HMA was instituted by the sole respondent, Ankit Dubey against the revisionist, Smt. Jyoti Dubey before the Principal Judge, Family Court, Agra, which was numbered on the file of the Principal Judge, Family Court, aforesaid as HM Petition No.291 of 2017. A decree for divorce was sought on the ground of cruelty.

3. It appears that the wife, who is a resident of Etawah, has secured a transfer of proceedings from the Principal Judge, Family Court, Agra to the Family Court at Etawah. The petition for divorce as aforesaid is pending before the Additional Principal Judge, Family Court, Etawah. This fact is not stated on record, but that is the only logical conclusion to be drawn considering that the proceedings commenced before the Family Court, Agra

and are now pending at Etawah, where the revisionist-wife resides.

4. Pending the divorce petition, the respondent moved to amend it on the basis of certain supervening events that he sought to plead in order to establish his case of actionable cruelty. The aforesaid amendment application was made on 06.04.2022, which was assigned paper No. 57-Ka on the file of the Trial Court, that is to say, the Court of the Additional Principal Judge, Family Court, Etawah. An objection to the amendment application was filed on behalf of the revisionist which was marked as paper No.65-Ga.

5. The thrust of the revisionist's objection before the Trial Court was that the amendment application being one made seeking to plead facts based on events that had occurred five years ago, the proposed amendment is highly belated which ought to be refused on that ground. Those events, even if true, would give rise to a cause of action to institute and pursue a criminal prosecution. Otherwise too, the facts sought to be pleaded were incorrect. The Trial Court by the order impugned has granted the amendment subject to payment of Rs.3000/- in costs by the respondent to the revisionist. The Trial Court has reasoned that cruelty is already a cause of action which the respondent has pleaded to found his claim for a decree of divorce, besides others. Since cruelty is already a ground pleaded in the petition, the facts sought to be brought in through amendment do not change the nature of the respondent's case. It was also remarked that issues have not been framed as yet, and, therefore, permitting the amendment would not prejudice the revisionist's case. It was also remarked that since the amendment has been sought after a long delay, it would be appropriate to compensate the other side by awarding costs.

6. Heard Mr. Gaurav Tripathi, learned Counsel for the revisionist in support of the motion to admit this Revision to hearing and Mr. Puneet Bhadauriya, Advocate who has opposed the motion on the question of maintainability.

7. Mr. Puneet Bhadauriya, learned Counsel for the respondent has raised an objection about the maintainability of this civil revision under Section 115 of the Code of Civil Procedure, 1908 (for short, 'the Code') urging that in the case of proceedings before the Family Court, governed by the Family Courts Act, 1984 (for short, 'the Act of 1984'), no revision lies from any of its orders under Section 115 of the Code, which may otherwise be maintainable on the ground that the order is a "case decided' within the meaning of that provision in the Code, as amended in its application to the State of Uttar Pradesh. He submits elaborating that even if a civil revision be competent against the kind of the order impugned here, if passed by a Civil Court, it would not be maintainable since the order has been made by the Family Court governed by the provisions of the Act of 1984. The learned Counsel for the respondent in aid of his submissions has relied upon the decision of this Court in **Sudhanshu Gupta v. Komal Gupta, 2019 (5) AWC 4434**. It is urged that the said decision holds that an order rejecting an amendment application, where it is made by a Family Court, is not revisable but appealable.

8. Refuting the above submission advanced by Mr. Bhadauriya, Mr. Gaurav Tripathi, learned Counsel for the revisionist has relied upon a later decision of this

Court in **Smt. Raj Shri Agarwal @ Ram Shri Agarwal and another v. Sudheer Mohan and others, 2022 (5) AWC 4192**. Learned Counsel for the revisionist submits that in **Smt. Raj Shri Agarwal (supra)**, this Court has clearly held that against an order rejecting an application seeking amendment to the petition filed before the Court, the remedy of a revision under Section 115 of the Code is open, and a petition under Article 227 of the Constitution to challenge that order is not maintainable.

9. This Court has considered the rival submissions advanced on behalf of parties about the maintainability of this revision under Section 115 of the Code.

10. The Act of 1984, under which the Family Courts are established and function, is a special statute, which sets up a special class of courts for the trial and decision of a very specific and different kind of causes, to wit, matrimonial causes. Matrimonial causes are reputed to be very different about everything from other classes of litigation. This is so because matrimonial causes are concerned about resolving conflicts arising out of the relationship between a husband and wife, and, what is known to the contemporary society as the nuclear family. A nuclear family comprises the husband, the wife and their minor children. This family in contemporary times is the mainstay of society, in the absence of which the society itself may disintegrate or go irremediably wayward. Therefore, it is the pious duty of the Family Court to carefully and expeditiously resolve disputes relating to marriage and family affairs. The enacting clause of the Act of 1984 reads:

"An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."

11. The statement of objects and reasons of the Act of 1984 are of much relevance here and, therefore, being quoted below:

"**Statement of Objects and Reasons**.--Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

2. The Bill inter alia, seeks to:--

(a) provide for establishment of Family Courts by the State Governments;

(b) make it obligatory on the State Governments to set up a Family Court in

every city or town with a population exceeding one million;

(c) enable the State Governments to set up, such courts in areas other than those specified in (b) above;

(d) exclusively provide within the jurisdiction of the family Courts the matters relating to:--

(i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of a marriage or as to the matrimonial status of any person;

(ii) the property of the spouses or of either of them;

(iii) declaration as to the legitimacy of any person;

(iv) guardianship of a person or the custody of any minor;

(v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;

(e) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and the rigid rules of procedure shall not apply;

(f) provide for the association of social welfare agencies, counsellors, etc., during conciliation stage and also to secure the services of medical and welfare experts;

(g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the Court may, in the interest of justice, seek assistance of a legal expert as amicus curiae;

(h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectually with a dispute;

(i) provide for only one right of appeal which shall lie to the High Court.

3. The Bill seeks to achieve the above objects."

12. The Family Courts though no doubt Courts in the sense understood in law as fora established for the hearing and determination of disputes between parties, are not Courts that are part of the general civil judicature. As already remarked, these are special courts established to decide a special class of disputes, that is to say, disputes relating to marriage and family affairs. These Courts are required to be established by the State Government by virtue of Section 3 of the Act of 1984 after consultation with the High Court by notification. The local limits of the territorial jurisdiction of a Family Court is also required to be specified by notification to be made by the State Government, also in consultation with the High Court. Judges to the Courts so established by the State Government are again required to be appointed by the State Government with the concurrence of the High Court. Section 4 provides for the appointment of the Judges to Family Courts, their qualifications and other matters. The provisions of Sections 3 and 4 if read together would remove every iota of doubt that Family Courts established under the Act of 1984 are not part of the general civil judicature, the latter being Courts which exist for the determination of every civil cause, where a civil right is affected, unless their jurisdiction is expressly or impliedly barred by statute. The Code applies to the established Civil Courts proprio vigore and all procedure to be followed in these Courts is exhaustively governed by it. In the case of the Family Courts, however, since these exercise a facet of the jurisdiction, which otherwise by its character was earlier vested in the established Civil Courts, the

Statute (Act of 1984) in its wisdom provides vide Section 10 thus :

"**10. Procedure generally**.--(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973) (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one Party and denied by the other."

(emphasis by Court)

13. Chapter V of the Act of 1984 is also of immense importance to the understanding of the issue that arises here. The Chapter is titled: "Appeals and Revisions". It comprises a single section, to wit, Section 19. Section 19 and Chapter V of the Act of 1984 is a complete code about the remedies available to a party aggrieved by an order made by the Family Court. It would profit to reproduce in extenso the provisions of Chapter V of the Act of 1984. These read:

"Chapter V

APPEALS AND REVISIONS

19. Appeal.--(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code or Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgement or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgement or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for an examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges."

(emphasis by Court)

14. **Sudhanshu Gupta *(supra),*** upon which Mr. Puneet Bhadauriya has relied to say that a civil revision from an order of the Family Court, allowing an amendment application is not maintainable, holds:

"11. From a bare perusal of Section 10, it emerges that the provisions of the Code of Civil Procedure are applicable to the proceedings under the Family Courts Act. However, the provisions of CPC are subject to other provisions of this Act and the Rules framed, thereunder. Therefore, the provisions of the CPC are applicable to the proceedings before the Family Court but these provisions are subject to and circumcised by the provisions of the Family Courts Act itself as also the rules framed thereunder.

12. Section 19 on the other hand starts with a non-obstante clause, namely, "notwithstanding anything contained in the Code of Civil Procedure." It therefore necessarily follows that an appeal lies against every order passed by the Family Court, which is not an interlocutory order, despite any provision of the CPC to the contrary.

13. The Full Bench decision cited by counsel for the revisionist, namely Rama Shanker Tiwari Vs. Mahadeo and Ors., 1968 (38) AWR 103, holds that an order under Order 6 Rule 17 CPC, either allowing or refusing to allow an amendment, is a "case decided".

14. Although, this judgment has been relied upon by counsel for the revisionist to submit that the revision is maintainable, in my considered opinion, this judgment necessarily holds against the revisionist. Once it is accepted that an order rejecting an amendment application is a case decided, it necessarily follows that it is not an interlocutory order and is therefore, appealable under Section 19 of the Family Courts Act.

15. The revision is not maintainable also because sub-section 3 of Section 115 CPC as applicable in U.P. provides that the Superior Court shall not, under this section, vary or reverse any order made, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. Even if the order impugned is set-aside and the amendment application of the revisionist is allowed, the proceedings before the Family Court shall not stand finally disposed of.

16. Under the circumstances, the order impugned in this revision being a final order and not an interlocutory order, it is clearly appealable under Section 19 of the Family Courts Act and for this reason alone, the revision is necessarily not maintainable. This is so because no revision lies against an order which is appealable."

15. In **Sudhanshu Gupta**, this Court has taken the view that a civil revision does not lie from an order of the Family Court rejecting an amendment application under Order VI Rule 17 of the Code, because it amounts to a case decided and, therefore, not an interlocutory order within the meaning of Section 19 of the Act of 1984, making it appealable. It, therefore, excludes a revision. While agreeing with the conclusion in **Sudhanshu Gupta**, I am of opinion that there could be added or very different reasons to reach the same conclusion.

16. On the other hand, the decision relied upon by Mr. Gaurav Tripathi, learned Counsel for the revisionist in **Smt. Raj Shri Agarwal** (*supra*) shows that the said

decision has no bearing at all on the point involved in this case. The reason is that the petition under Article 227 of the Constitution, that was filed from an order of the Trial Court rejecting the amendment application in the aforesaid case, was an order made by the Civil Court, that is to say, the Additional District Judge, Agra in an original suit. The principles, therefore, laid down in **Smt. Raj Shri Agarwal**, do not have the remotest application to the issue that has arisen here.

17. A similar issue, though not identical to the one that arises here, fell for consideration before a Division Bench of the Rajasthan High Court in **Major Raja P. Singh v. Smt. Surendra Kumari, AIR 1991 Raj 133. In Major Raja P. Singh** (*supra*), the Family Court, Jodhpur had passed an order rejecting two separate applications made by the appellant in that case. The first was an application where the appellant, who was the petitioner before the Family Court, prayed that his signatures be compared with those on documents Exhibits 2, 15 and 52. By the other application, relief was sought to add new grounds to the divorce petition. Both the applications were rejected by the Family Court. As facts appear in the report, the order rejecting amendment application was impugned in appeal before the High Court under Section 19 of the Act of 1984. The issue precisely in the appeal before the Division Bench was whether the order of the Family Court could be regarded as final and amenable to appeal under Section 19. It was in that context that the Division Bench held:

"11. The object of this Special Law of the Family Courts Act is to decide the matrimonial cases in a speedy manner. If, the order rejecting or allowing an amendment application will be termed as the case decided for the purpose of this Act and is appealable then, in ordinary course of law the decision of such cases would take years to come to reach the finality of the matter. In order to achieve the object of the Act i.e. speedy settlement of dispute relating to marriage, the purpose of expeditious trial is frustrated. That apart if the legislature intended that all interlocutory order be appealable, it should not have used the word in S. 19 of the Act "not being an interlocutory order" and that is why no appeal or revision has been provided. This Court in D.B. Civil Misc. Appeal No. 107/90 Smt. Vijay Kaur v. Radhey Shyam decided on 1-8-1990 has held that the order relating to adjournment cost is an interlocutory order and appeal is not maintainable u/Sec. 19 of the Act. In this view of the matter, the order dated 6-4-1989 cannot be termed finally deciding the case i.e. the controversy being settled. The parties can agitate the point in appeal after final disposal of the case by the trial court. In our considered opinion, the allowing or refusing an amendment is an interlocutory order against which no appeal u/sec. 19 of Act is provided. In conclusion the preliminary objection is sustained and it is held that the order dated 6-4-1989 is an interlocutory order and no appeal lies to this Court." (emphasis by Court)

18. The issue whether an order by the Family Court allowing amendment to the plaint is appealable under Section 19 of the Act of 1984 came up for decision before a Division Bench of Uttarakhand High Court in **Kanupriya v. Ashutosh Agrawal, AIR 2017 Utt 166. In Kanupriya** (*supra*) after an extensive review of the authority on the point, it was held :

"16. Therefore, it can be seen that there is no uniform understanding of the

word "interlocutory order". The word assumes the meaning from the context of the statute and the purpose of the statute. We have already noticed that the Apex Court in (1974) 2 SCC 387 took the view that an order of amendment can, in certain situations, be treated as a judgment. The court took the view that, if the amendment merely allows the plaintiff to state a new cause of action or ask a new relief or include a new ground of relief, all that happens is that it is possible for the plaintiff to make further contentions. The court does not decide the correctness of the contentions at that stage. It was found that such amendment merely regulates the procedure applicable. It does not decide any question touching the merit of the controversy. In a case, where, however, the defence of immunity available to the defendant is taken away in the matter of limitation, it becomes a judgment. That case, as already noticed, related to an intra-court appeal. Here, we are concerned with the Family Courts Act. Amendments of pleadings are of different kinds. If an appeal is allowed against amendments ordered, one way to look at it is that the matter would be decided at that stage and he does not have to wait for an opportunity, which he, undoubtedly, has to challenge the order of amendment in the course of the appeal against the final order, which would be passed. It could be that, at that stage, if the appellate court finds that the amendment was wholly unjustifiably allowed, the matter may merit a remand. If the intention of the Legislature in excluding interlocutory orders is to expedite the proceedings in the matrimonial causes, will not such a view hamper the object sought to be achieved by the Legislature? Even when a court allows an application for amendment, it is settled law that the court does not sit in judgment over the correctness or the merit of the pleadings. The amended proceedings only will provide the framework within which the trial would proceed, evidence adduced, arguments canvassed and decision rendered. Further, the party has always a right to challenge the order of amendment in the appeal from the main judgment. Also, it is not irrelevant to notice that the party can, in appropriate cases, invoke the jurisdiction under Article 226 of 227. The advantage of taking the view that an order of amendment will not be treated as a judgment and will be treated only as interlocutory order is that the purpose of the Family Courts would, in one sense, be advanced, inasmuch as, the delay which attends the challenge of proceedings and before the appellate court would stand obviated. Ordinarily, amendments are to be allowed liberally. Therefore, an order allowing an amendment is rarely interfered with.

17. Coming to the facts, this is not a case, where any vested right by way of limitation or any other right as such, which is accrued to the defendant, is being taken away. Two paragraphs are added by way of amendment. In fact, in the original plaint itself, it is stated that the marriage took place on 21.05.2013 and that the appellant left on 28.05.2013 for her paternal house. English translation of paragraph 4 of the original plaint reads as follows:

"4. That the intention of the respondent was always to stay away from the petitioner and, on one pretext or the other, she never gave matrimonial pleasure to the petitioner and always tried to escape from cohabitation and, after one week, on 28.05.2013, she went to her paternal house along with her jewelry and clothes."

18. The amended paragraphs appear to suggest that the marriage was not consummated. As already noticed, the court

does not sit in judgment over the correctness of the pleadings at the stage when amendment is allowed. Certainly, the burden is on the petitioner to establish his case with convincing evidence. We cannot even treat this as a case, even applying the tests applied in (1981) 4 SCC 8 or (1974) 2 SCC 387, which would qualify as a decision, which is amenable to appellate jurisdiction under Section 19 of the Act."

19. It must be noticed that both in **Major Raja P. Singh** and Kanupriya, the Court had before it the issue whether an application seeking amendment, rejected in one case by the Family Court and allowed in the other, would constitute a judgment within the meaning of Section 19 so as to be amenable to appeal under the aforesaid provision. The Rajasthan High Court and the Uttarakhand High Court both have laid down law mindful of the fact that the object of the Family Court is to provide speedy justice in causes matrimonial or those relating to the family. Their Lordships have been conscious that permitting interlocutory challenge to orders granting or refusing amendment, would work to place fetters on the fast-tracked procedure contemplated by the Statute. It has also been noticed that the person who is aggrieved by the order granting amendment can in the appeal from the final judgment, if the event goes against him/ her, assail that order too. No doubt, their Lordships of the Division Bench of the Uttarakhand High Court have found a dichotomy between classes of amendments, which may or may not constitute a judgment within the meaning of Section 19. This Court need not dilate much on the subtlety of principle about orders granting or refusing amendment being amenable to an appeal under Section 19 of the Act of 1984. This is so because in the present case that is not the point. The point here is whether from an order granting or refusing an amendment application by the Family Court, a revision lies to this Court under Section 115 of the Code. In the Rajasthan decision, there is a remark that the legislature did not intend all interlocutory orders passed by the Family Court to be appealable under Section 19 and that is why no appeal or revision has been provided under the Act of 1984.

20. The moot question, therefore, is whether that kind of a power can be inferred to be available to this Court under Section 115 of the Code. A reading of Section 10 of the Act of 1984 shows that the provisions of the Code are generally made applicable, but subject to other provisions of the Act of 1984 and the Rules. A juxtaposition of this provision with sub-Section (5) of Section 19 shows that sub-Section (5) expressly says that except as provided under sub-Sections (1) to (4) of Section 19, no appeal or revision would lie to any Court from any judgment or decree of a Family Court. The aforesaid provision expressly bars all kinds of revisions except an appeal envisaged under Section 19(1) of the Act of 1984 or a revision from a final order passed under Chapter IX of the Code of Criminal Procedure, 1973. No other kind of revision is envisaged by the Act of 1984. Thus, upon a reading of Sections 10(1) and 19(5) of the Act of 1984 together, the position that emerges is that no revision from an order of the Family Court is competent except one that arises from a final order passed under Chapter IX of the Code of Criminal Procedure. The party, therefore, aggrieved by an interlocutory order may question it in appeal, if it has the trappings of a judgment, or so to speak is an order of moment pronouncing upon rights of

parties. It is dwelling on that principle that the Full Bench of this Court in **Smt. Kiran Bala Srivastava v. Jai Prakash Srivastava, 2005 (23) LCD 1** held that an order under Section 24 of the HMA granting maintenance *pendente lite* is a judgment, which is appealable under Section 19 of the Act of 1984.

21. Likewise, a learned Single Judge of this Court in **Yogish Arora v. Smt. Jennette Yogish Arora @ Miss Jennettee Dsouza, 2018 (9) ADJ 379** held that an order of temporary injunction passed by a Family Court under Order XXXIX of the Code falls in the category of an intermediate order, to which finality is attached. It has been observed that finality has been attached at a particular stage of proceedings to such an order of temporary injunction, which would render it appealable under Section 19(1) of the Act of 1984.

22. By contrast, in **Sana Afrin v. Zohaib Khan, AIR 2021 All 40**, an order passed under Section 12 of the Guardians and Wards Act, 1890 pending custody proceedings under Section 25 of the last mentioned Act, granting visitation rights to enable the father to meet his child, was held to be purely interlocutory and not amenable to an appeal under Section 19(1) of the Act of 1984.

23. In summation, therefore, orders passed by the Family Court, if interlocutory, have to be established to be ones that have trappings of a judgment in order to enable a party to avail the remedy of an appeal under Section 19(1) of the Act of 1984. And, that is the only remedy available by way of appellate procedures under the Act of 1984. There is no avenue of a revision under Section 115 of the Code open to a party aggrieved by an order of the Family Court. The provisions of the Code though generally applicable, stand excluded as regards the remedy of a revision under Section 115 of the Code in view of the provisions of Sections 10(1) and 19(5) of the Act of 1984.

24. In view of what has been said above, this Court finds this revision to be not maintainable. It is, accordingly, **dismissed as not maintainable**. It is made clear that this order will not prejudice the revisionist's right to seek such remedy against the order impugned at the appropriate stage as advised.

25. Interim order dated 14.09.2022 is hereby vacated.

(2023) 4 ILRA 464
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.03.2023

BEFORE

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

Criminal Revision No. 167 of 2020

Anwar @ Shanu ...Revisionist
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Revisionist:
Anurag Narayan, Shailendra Kumar Mishra

Counsel for the Opp. Parties:
G.A., Farhan Alam Osmani

Criminal Law – Criminal Procedure Code, 1973 - Sections 125 & 125(B) - The Muslim Women (Protection of Rights on Divorce) Act, 1986 - Sections 3, 4 & 7 - Criminal Revision - revisionist is the husband of wife (opposite party no. 2) and father of opposite party no. 3 - revisionist challenged the impugned order by which Trial court ordered to

revisionist to pay the maintenance to his wife and daughter while accepting the application of the wife preferred u/s 125 of Cr.P.C. - revisionist opposing the application on the ground that, he has already divorced her as per the personal law in front of witnesses and paid a cash of Rs. 1,55,000/- as *mehar* and also returned the jewelry & other items which was received as dowry and also paid the expenses for the period of *Iddat* including 80gm. gold for towards maintenance of daughter, as such she is not entitled for any maintenance - maintainability of application - Court observed that, revisionist has failed to prove the fact of divorce and termination of their status as husband and wife between them due to divorce - held, in the light of the legal principle pronounced in 'Daniel Latif & Shamima Farooqui' cases, a Muslim wife, after divorce from her husband is also fully capable of submitting an application u/s 125 of Cr.P.C. for the period till she does not remarry - therefore, application in question submitted by the opposite party no. 2 is maintainable and the order, under review is completely based on evidence on record, in which no illegality, material error or jurisdictional error is reflected - resulted criminal revision stands dismissed. (Para – 18, 28, 29)

Criminal Revision is dismissed. (E-11)

List of Cases cited:

1. Secretary, Tamilnadu Waqf Board Vs Saiyad Fatima Nachi (AIR 1996 SC 2423),

2. Smt. Azmerilushan Vs Moin Ahmad (1983 ALJ 1332),

3. Danial Latifi & ors. Vs U.O.I.(2001 vol. 7 SCC 740),

4. Shamim Aara Vs St. of UP & ors. (2002 vol. 7 SCC 518),

5. Vimla Vs Veera Swami (1991 vol. SCC 375),

6. Manak Chand Vs Chandra Kishore (AIR 1970 SC 446),

7. Mithlesh Kumari VS Vindhyavashini (1990 CRLJ 830),

8. Chaturbhuj Vs Seeta Ram (2007 CRLJ 727 SC),

9. Ashok Kumar Singh Vs Additional Session Judge Varanasi (1991 CRLJ 2357 (Alld.),

10. Shamima Farooqui Vs Shaheed Khan (2015 vol. 5 SCC 705),

11. Rajthi Vs C. Nageshan (AIR 1999 SC 2374),

12. St. of Rajasthan Vs Guru Charan Das Chadha (AIR 1979 SC 1895),

13. Vinay Tyagi Vs Irshad Ali (2013 vol. 5 SCC 762),

14. Amit Kapoor VS Ramesh Chandra (2012 vol. 9 SCC 460).

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

1. पुनरीक्षणकर्ता द्वारा प्रस्तुत दाण्डिक पुनरीक्षण, दाण्डिक प्रकीर्ण वाद संख्या 553/2016 श्रीमती जेबा खानम आदि बनाम अनवर उर्फ शानू में पारित निर्णय दिनांकित 26.10.2019 से क्षुब्ध होकर योजित किया गया है। जिसके माध्यम से विद्वान विचारण न्यायालय ने विपक्षी सं०- 2 द्वारा धारा 125 दण्ड प्रक्रिया संहिता, जिसे अग्रेतर विवेचना में संहिता शब्द से सम्बोधित किया जायेगा के अंतर्गत प्रस्तुत आवेदन पत्र स्वीकृत करते हुए पुनरीक्षणकर्ता को यह आदेशित किया है कि वह विपक्षी सं०- 2 जैबा खानम को अंकन 3,000/- रुपये प्रतिमाह एवं विपक्षी सं०- 3 कुमारी आलिया को उनके वयस्क होने तक अंकन 2,000/- रुपये प्रतिमाह भरण-पोषण हेतु प्रदान करना सुनिश्चित करें।

2. सर्व श्री अनुराग नरायण एवं फरहान आलम ओस्मानी जो क्रमशः पुनरीक्षणकर्ता एवं विपक्षी संख्या 2 के सुयोग्य अधिवक्तागण हैं, उनके

तर्कों को विस्तारपूर्वक सुना गया। राज्य के पक्ष से श्री आलोक शरण सुयोग्य सहायक शासकीय अधिवक्ता के तर्कों को भी विस्तारपूर्वक सुना एवं पत्रावली का परिशीलन किया।

<u>तथ्यात्मक पृष्ठभूमि</u>

3. प्रस्तुत दाण्डिक पुनरीक्षण हेतु सुसंगत तथ्य इस प्रकार हैं कि विपक्षी संख्या 2 श्रीमती जेबा खानम का निकाह पुनरीक्षणकर्ता से मुस्लिम रीति-रिवाज के अनुसार 27.11.2014 को संपन्न हुआ था। पक्षों के वैवाहिक संसर्ग से एक पुत्री कुमारी आलिया का जन्म हुआ। निकाह के पश्चात से ही पुनरीक्षणकर्ता एवं उसके परिवार के सदस्यगण विपक्षी संख्या 2 को विवाह में कम दहेज लाने के कारण प्रताड़ित करते थे। पुनरीक्षणकर्ता भी विपक्षी संख्या 2 को शारीरिक एवं मानसिक यातनाएँ देते थे। विपक्षी संख्या 2 को अंततः पुनरीक्षणकर्ता द्वारा अवयस्क पुत्री आलिया सहित अपने आवास से निष्कासित कर दिया गया। विपक्षी संख्या 2 निराश्रित होने के कारण वर्तमान में अपने मायके में निवास कर रहीं हैं। पुनरीक्षणकर्ता एक स्वस्थ व्यक्ति हैं जो जनपद हरदोई में विक्रय कर कार्यालय में शासकीय सेवारत हैं, जिनकी मासिक आय 30,000/- रुपये है। विपक्षी संख्या 2 स्वयं का भरण-पोषण करने में असमर्थ है। वह किसी घरेलू कार्य यथा सिलाई, कढ़ाई अथवा बुनाई आदि हेतु भी प्रशिक्षित एवं दक्ष नहीं है इस कारण वह स्वयं एवं अपनी अवयस्क पुत्री का भरण-पोषण करने में असमर्थ हैं। उपरोक्त वर्णित तथ्यों के आधार पर विपक्षी संख्या 2 द्वारा स्वयं के भरण-पोषण हेतु 5,000/- रुपये प्रतिमाह तथा अवयस्क पुत्री आलिया के भरण-पोषण हेतु 7,000/- रुपये तथा संयुक्त रूप से अंकन 12,000/- रुपये मासिक भरण-पोषण स्वीकृत करने की प्रार्थना किया गया।

4. पुनरीक्षणकर्ता द्वारा आपत्ति प्रस्तुत कर पुनरीक्षणकर्ता का निकाह विपक्षी संख्या 2 के साथ होना स्वीकार किया गया तथा पक्षों के वैवाहिक संबंध से अवयस्क पुत्री कुमारी आलिया के जन्म के तथ्य को भी स्वीकार किया गया। शेष तथ्यों से इंकार करते हुए इस आशय का कथन किया गया है कि निकाह के पश्चात से विपक्षी संख्या 2 का विपक्षी एवं उसके परिवार के सदस्यों के प्रति व्यवहार उचित नहीं था। वह दुर्व्यवहार करती थीं। विपक्षी के अनुसार दिनांक 16.08.2016 को विपक्षी ने साक्षीगण के सम्मुख स्वीय विधि के अनुसार विपक्षी संख्या 2 को तलाक़ दे दिया एवं अंकन 1,55,000/- रुपये नकद मेहर अदा कर दिया। समस्त आभूषण एवं दहेज में प्राप्त सभी समान भी उन्हें वापस कर इद्दत की अवधि का व्यय भी प्रदान कर दिया गया। इस कारण विपक्षी संख्या 2 पुनरीक्षणकर्ता से स्वयं अथवा विपक्षी संख्या 2 के लिए किसी धनराशि को प्राप्त करने की अधिकारिणी नहीं है। यह भी कथन किया गया है कि विपक्षी संख्या 3 कुमारी आलिया के भरण-पोषण के लिए विपक्षी संख्या 2 ने 80 ग्राम सोना भी प्राप्त कर लिया है।

5. उपरोक्त वर्णित समस्त आधारों पर भरण-पोषण हेतु प्रस्तुत आवेदन पत्र निरस्त करने की प्रार्थना किया गया।

6. विपक्षी संख्या 2 द्वारा आवेदन कथानक के समर्थन में ए०पी०डब्लू०1 के रुप में स्वंय को, ए०पी०डब्लू०2 के रूप में नवी खाँ एवं ए०पी०डब्लू०3 के रुप में इमरान को परीक्षित कराया गया है।

7. वर्तमान पुनरीक्षणकर्ता द्वारा ओ०पी०डब्लू०1 के रूप में स्वयं को एवं ओ०पी०डब्लू०2 हसन अख्तर एवं ओ०पी०डब्लू०3 अख्तर को विद्वान विचारण न्यायालय के समक्ष परीक्षित कराया गया है तथा प्रलेखीय साक्ष्य के रूप में विलेख दिनांकित 16.08.2016 का मूल एवं नोटरी द्वारा सत्यापित प्रति, रजिस्ट्री की रसीद दिनांकित 12.01.2019, तलाक़ से संबंधित नोटिस दिनांकित 11.01.2019 एवं मूल वाद संख्या 54/2017 अनवर उर्फ शानू बनाम जेबा खानम में न्यायालय द्वारा पारित आदेश दिनांकित 16.08.2019 की प्रति प्रस्तुत की गयी है।

8. विद्वान विचारण न्यायालय द्वारा अधोलिखित अवधार्य बिन्दु विरचित किये गयेः-

(i) क्या प्रार्थिनी श्रीमती जेबा खानम, विपक्षी अनवर उर्फ शानू की विधिक रूप से ब्याहता पत्नी एवं कु० आलिया उसकी पुत्री हैं?

(ii) क्या प्रार्थिनी, विपक्षी से युक्तियुक्त कारण से अलग रह रही हैं?

(iii) क्या प्रार्थिनी स्वयं का भरण-पोषण करने में सक्षम नहीं है और विपक्षी के पास आय का पर्याप्त साधन है?

9. आक्षेपित निर्णय दिनांकित 26.10.2019 के माध्यम से विद्वान विचारण न्यायालय ने इस आशय का निष्कर्ष अवधारित किया कि विपक्षी संख्या 2 श्रीमती जेबा खानम पुनरीक्षणकर्ता की विवाहिता पत्नी हैं। न्यायालय ने इस आशय का भी निष्कर्ष अवधारित किया कि विपक्षी संख्या 2 श्रीमती जेबा खानम का तलाक़ नहीं हुआ है। अन्यथा भी विद्वान अवर न्यायालय के अनुसार यदि विपक्षी संख्या 2 श्रीमती जेबा खानम पुनरीक्षणकर्ता की तलाक़शुदा पत्नी भी होतीं तो भी वह संहिता की धारा 125 के स्पष्टीकरण (ख) में किये गये उपबंध के अनुसार स्वयं के पुनर्विवाह तक पुनरीक्षणकर्ता से भरण-पोषण की धनराशि प्राप्त करने की अधिकारिणी हैं। इसी प्रकार आवेदिका संख्या 2 कुमारी आलिया आयु 1 वर्ष, जो पुनरीक्षणकर्ता की स्वीकृत रूप से अवयस्क पुत्री हैं, वह भी पुनरीक्षणकर्ता से भरण-पोषण प्राप्त करने की अधिकारिणी हैं। इसी प्रकार विद्वान अवर न्यायालय ने उभय पक्षों द्वारा प्रस्तुत साक्ष्य के सम्यक विश्लेषण के उपरान्त इस आशय का निष्कर्ष अभिलिखित किया कि विपक्षी संख्या 2 श्रीमती जेबा खानम पुनरीक्षणकर्ता से युक्तियुक्त कारणों से पृथक रह रही हैं एवं वह स्वयं का भरण-पोषण करने में असमर्थ हैं। विपक्षी द्वारा आवेदकगण के भरण-पोषण के प्रति आर्थिक रूप से समर्थ होने के पश्चात भी उपेक्षा की गयी है। परिणामस्वरूप विद्वान अवर न्यायालय ने आक्षेपित निर्णय दिनांकित 26.10.2019 उपरोक्त वर्णित आशय से पारित किया।

<u>उभयपक्षों के तर्कः-</u>

10. पुनरीक्षणकर्ता के सुयोग्य अधिवक्ता द्वारा यह तर्क प्रस्तुत किया गया है कि विद्वान विचारण न्यायालय द्वारा पारित आलोच्य निर्णय दिनांकित 26.10.2019 अविधिक एवं पक्षों द्वारा प्रस्तुत साक्ष्य के प्रतिकूल होने के कारण अर्धाय है। पुनरीक्षणकर्ता के सुयोग्य अधिवक्ता का यह तर्क भी है कि यद्यपि पुनरीक्षणकर्ता ने विपक्षी संख्या 2 श्रीमती जेबा खानम से अपने विवाह तथा वैवाहिक संबंधों से एक पुत्री कुमारी आलिया के जन्म के तथ्य को स्वीकार किया है किन्तु पुनरीक्षणकर्ता ने विपक्षी संख्या 2 श्रीमती जेबा खानम को स्वीय

विधि के अनुसार तलाक़ दे दिया जिससे पुनरीक्षणकर्ता एवं विपक्षी के मध्य वैवाहिक संबंधों का विच्छेद हो गया। उनका तर्क है कि इसी कारण पंचायत में विपक्षी संख्या 2 श्रीमती जेबा खानम को मेहर की धनराशि अंकन 1,55,000/- एवं दहेज में प्राप्त अन्य सामग्रियाँ, आभूषण एवं कपड़े इत्यादि भी वापस कर दिया गया तथा इद्दत की अवधि की धनराशि भी प्रदान कर दी गई। इस कारण न्यायालय द्वारा विपक्षी संख्या 2 श्रीमती जेबा खानम एवं उनकी अवयस्क पुत्री के भरण-पोषण की धनराशि प्रदान करने का आलोच्य आदेश अविधिक है तथा मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम, 1986 के प्रावधान के प्रतिकूल होने के कारण भी अर्धाय है। पुनरीक्षणकर्ता के सुयोग्य अधिवक्ता के अनुसार विपक्षी संख्या 2 श्रीमती जेबा खानम स्वयं पर्याप्त शिक्षित हैं एवं पारिणामिक रूप से स्वयं एवं अपनी पुत्री हेतु भरण-पोषण की धनराशि अर्जित करने में पूर्णतः समर्थ हैं। ऐसी दशा में पुनरीक्षणकर्ता के विरुद्ध विपक्षी संख्या 2 श्रीमती जेबा खानम हेतु 3,000 रुपये मासिक तथा अवयस्क पुत्री हेतु 2,000/- रुपये मासिक की धनराशि आलोच्य निर्णय के माध्यम से स्वीकृत किया जाना पत्रावली पर उपलब्ध साक्ष्य के प्रतिकूल होने के साथ-साथ पुनरीक्षणकर्ता की सीमित आय तथा उनके अन्य वित्तीय दायित्वों के आलोक में अत्यधिक है एवं पारिणामिक रूप से अपास्त किये जाने योग्य है।

11. अपने उपरोक्त वर्णित तर्कों के समर्थन में पुनरीक्षणकर्ता द्वारा मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम, 1986 की धारा 3 एवं 5 में उल्लिखित प्राविधानों पर बल देते हुए माननीय उच्चतम न्यायालय द्वारा **सेक्रेटरी, तमिलनाडु वक्फ बोर्ड बनाम सैय्यद फातिमा नाची**1 के प्रस्तर 6 लगायत 9 में प्रतिपादित सिद्धान्त के आधार पर यह तर्क भी प्रस्तुत किया गया है कि विपक्षी संख्या 2 श्रीमती जेबा खानम प्रस्तुत मामले के तथ्य एवं परिस्थितियों के आलोक में संबंधित वक्फ बोर्ड से भरण-पोषण की धनराशि प्राप्त कर सकती हैं साथ ही उन्होंने **श्रीमती अजमेरीलुसान बनाम बनाम मो० अहमद**2 में माननीय इलाहाबाद उच्च न्यायालय द्वारा प्रतिपादित विधि सिद्धान्त के आलोक में यह तर्क प्रस्तुत किया कि यदि पति ने स्वयं द्वारा प्रस्तुत लिखित कथन में पत्नी को तलाक़ दे दिये जाने का कथन किया है तब ऐसी दशा में तलाक़ का तथ्य अन्यथा साबित नहीं होने की दशा में भी पक्षों के मध्य तलाक़ लिखित कथन की तिथि से स्वतः प्रभावी हो जायेगा। इस विधिक स्थिति को विद्वान विचारण न्यायालय ने दृष्टिगत नहीं रखा है।

12. उपरोक्त वर्णित समस्त तर्कों के आधार पर पुनरीक्षणकर्ता का यह तर्क है कि आलोच्य आदेश अविधिक होने के कारण अर्धाय है एवं पारिणामिक रूप से अपास्त किये जाने योग्य है।

13. विपक्षी संख्या 1 राज्य हेतु श्री आलोक शरण एवं विपक्षी संख्या 2 श्रीमती जेबा खानम के सुयोग्य अधिवक्ता श्री फरहान आलम ओस्मानी ने उपरोक्त वर्णित तर्कों का बलपूर्वक खण्डन करते हुए यह तर्क प्रस्तुत किया है कि आलोच्य आदेश उभयपक्षों के अभिकथनों एवं पक्षों द्वारा प्रस्तुत साक्ष्य के सम्यक विश्लेषण के उपरान्त पारित किया गया सकारण निर्णय है, जो किसी भी प्रकार अविधिक नहीं है एवं पारिणामिक रूप से आलोच्य निर्णय एवं आदेश में हस्तक्षेप किया जाना अपेक्षित नहीं है।

14. यह तर्क भी प्रस्तुत किया गया है कि पुनरीक्षणकर्ता का विपक्षी संख्या 2 श्रीमती जेबा

खानम से विवाह का स्वीकृत तथ्य है। विपक्षी संख्या 2 श्रीमती जेबा खानम ने विद्वान विचारण न्यायालय के समक्ष ए०पी०डब्लू०1 के रूप में अपने सशपथ साक्ष्य में पुनरीक्षणकर्ता द्वारा तलाक़ दिये जाने के तथ्य का खण्डन किया है। विपक्षी संख्या 2 श्रीमती जेबा खानम द्वारा यह भी सिद्ध किया गया है कि यद्यपि वह शिक्षित हैं किन्तु वह स्वयं एवं अपने 1 वर्षीय अवयस्क पुत्री का भरण-पोषण करने में असमर्थ हैं। साक्ष्य के सम्यक विश्लेषण के आधार पर विद्वान विचारण न्यायालय ने यह उचित निष्कर्ष अभिलिखित किया है कि पुनरीक्षणकर्ता द्वारा साधन सम्पन्न होने के पश्चात भी विपक्षी संख्या 2 श्रीमती जेबा खानम एवं अपनी अवयस्क पुत्री कुमारी आलिया के भरण-पोषण के प्रति उपेक्षा किया गया एवं विपक्षी संख्या 2 श्रीमती जेबा खानम अपनी अवयस्क पुत्री के साथ उचित कारण से पुनरीक्षणकर्ता से पृथक रह रही हैं। ऐसी दशा में आलोच्य आदेश पूर्णतः सकारण है तथा साक्ष्य एवं विधि के सम्यक विश्लेषण पर आधारित है। अतः पारिणामिक रूप से इसमें किसी हस्तक्षेप की आवश्यकता नहीं है।

15. विपक्षीगण के सुयोग्य अधिवक्तागण ने अपने तर्कों को विराम देने के पूर्व न्यायालय का ध्यान इस तथ्य की ओर भी आकृष्ट किया है कि मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम, 1986 की धारा 3, 4 एवं 7 तथा संहिता की धारा 125 के समेकित अवलोकन से यह पूर्णतः स्पष्ट हो जायेगा कि विपक्षी संख्या 2 श्रीमती जेबा खानम द्वारा संहिता की धारा 125 के अंतर्गत दिया गया आवेदन पत्र पोषणीय है तथा इस निष्कर्ष को माननीय उच्चतम न्यायालय द्वारा **डैनियल लतीफी एवं अन्य बनाम यूनियन ऑफ इण्डिया**3 में प्रतिपादित विधि सिद्धान्त से भी बल प्राप्त होता है।

निष्कर्ष

16. उभय पक्षों के तर्कों के आलोक में पत्रावली के सम्यक परिशीलन से यह विदित होता है कि पुनरीक्षणकर्ता ने यह तथ्य स्वतः स्वीकार किया है कि पुनरीक्षणकर्ता एवं विपक्षी संख्या 2 श्रीमती जेबा खानम का निकाह मुस्लिम रीति-रिवाज से दिनांक 27.11.2014 को संपन्न हुआ था। पक्षों के वैवाहिक संबंध से एक अवयस्क पुत्री कुमारी आलिया, आयु 1 वर्ष के जन्म के तथ्य को भी पुनरीक्षणकर्ता द्वारा स्वीकार किया गया है।

17. पुनरीक्षणकर्ता के सुयोग्य अधिवक्ता द्वारा मुख्य रूप से इस तथ्य पर बल दिया गया है कि पुनरीक्षणकर्ता ने विद्वान विचारण न्यायालय में स्वयं द्वारा प्रस्तुत लिखित उत्तर में इस तथ्य का उल्लेख किया था कि पुनरीक्षणकर्ता ने दिनांक 16.08.2016 को साक्षीगण के सम्मुख स्वीय विधि के अनुसार विपक्षी संख्या 2 श्रीमती जेबा खानम को तलाक़ दे दिया था। इस तथ्य के लिखित उत्तर में उनके द्वारा उल्लेख कर दिये जाने के पश्चात इस न्यायालय की खण्डपीठ द्वारा **श्रीमती अजमेरीलुसान बनाम मोईन अहमद**, उपरोक्त वर्णित के प्रस्तर8 एवं 9 में प्रतिपादित विधि सिद्धान्त के अनुसार ऐसा उल्लेख लिखित कथन प्रस्तुत किये जाने की तिथि से पुनरीक्षणकर्ता द्वारा विपक्षी संख्या 2 श्रीमती जेबा खानम को तलाक़ दे दिये जाने की उद्घोषणा का प्रभाव रखेगा। अतः पारिणामिक रूप से विपक्षी संख्या 2 श्रीमती जेबा खानम पुनरीक्षणकर्ता की तलाक़शुदा पत्नी होने के कारण संहिता की धारा 125 के अंतर्गत भरण-

पोषण हेतु आवेदन प्रस्तुत करने हेतु समर्थ नहीं थीं तथा ऐसा आवेदन पत्र दिनांक 16.08.2016 के पश्चात पोषणीय भी नहीं है। किन्तु पुनरीक्षणकर्ता के सुयोग्य अधिवक्ता का यह तर्क माननीय उच्चतम न्यायालय द्वारा **शमीम आरा बनाम स्टेट ऑफ उत्तर प्रदेश एवं अन्य**4 में प्रतिपादित विधि सिद्धान्त के आलोक में कदापि स्वीकार्य नहीं है। माननीय उच्चतम न्यायालय द्वारा शमीम आरा, उपरोक्त में यह विधि सिद्धान्त स्पष्ट रूप से प्रतिपादित किया गया है कि तलाक़ के तथ्य प्रभावी होने हेतु यह एक पूर्ववर्ती शर्त है कि तलाक़ दिये जाने का तथ्य साक्ष्य के आधार पर सिद्ध किये जाने चाहिए। मात्र तलाक़ दे दिये जाने का तथ्य लिखित कथन में अभिलिखित करने से अथवा अन्य किसी कार्यवाही में अभिकथित किये जाने से तलाक़ स्वतः प्रभावी हो जाने की अवधारणा नहीं किया जा सकता है।

18. यह अविवादित है कि यद्यपि पुनरीक्षणकर्ता ने विपक्षी सं०- 2 से तलाक़ हो जाने के तथ्य की उद्घोषणा हेतु पृथक वाद योजित किया था किन्तु स्वतः उनके द्वारा ही ऐसा वाद वापस ले लिया गया। अतः विद्वान अवर न्यायालय ने पक्षों द्वारा प्रस्तुत साक्ष्य के सम्यक विश्लेषण के उपरान्त उचित रूप से निष्कर्ष अवधारित किया है कि पुनरीक्षणकर्ता विपक्षी संख्या 2 श्रीमती जेबा खानम को तलाक़ देने एवं तलाक़ दे दिये जाने के कारण उनके मध्य पति-पत्नी की प्रास्थिति समाप्त होने के तथ्य को सिद्ध करने में असफल रहे हैं। अतः विपक्षी संख्या 2 श्रीमती जेबा खानम द्वारा संहिता की धारा 125 के अंतर्गत भरण-पोषण हेतु प्रस्तुत आवेदन पत्र सर्वथा उचित रूप से पोषणीय होना अवधारित किया गया है।

19. माननीय उच्चतम न्यायालय द्वारा संहिता की धारा 125 दं०प्र०सं० के उद्देश्यों का निर्वचन करने के क्रम में **विमला बनाम वीरा स्वामी**5 में यह विधि सिद्धान्त प्रतिपादित किया गया है कि संहिता की धारा 125 का उद्देश्य परित्यक्त एवं उपेक्षित पत्नी एवं बच्चों को भुखमरी से बचाने हेतु एक त्वरित एवं सुलभ उपचार प्रदान करना है। यह उपचार संक्षिप्त प्रकृति का है जैसा कि **माननीय उच्चतम न्यायालय द्वारा मानक चंद बनाम चन्द्र किशोर**6 में कहा गया है।

20. यह अविवादित तथ्य है कि विद्वान विचारण न्यायालय के समक्ष प्रस्तुत लिखित कथन में पुनरीक्षकर्ता द्वारा यह उल्लेख किया गया कि उन्होंने विपक्षी संख्या 2 को तलाक़ दे दिया है। यद्यपि वह साक्ष्य के आधार पर यह तथ्य सिद्ध करने में पूर्णतः असफल रहे हैं अतः ऐसी स्वीकृत परिस्थितियों में विपक्षी संख्या 2 का पुनरीक्षकर्ता से पृथक रहना स्वतः एक पर्याप्त कारण है।

21. इसी क्रम में माननीय इलाहाबाद उच्च न्यायालय द्वारा **मिथिलेश कुमारी बनाम विन्ध्यवासिनी**7 में प्रतिपादित विधि सिद्धान्त का उल्लेख भी सुसंगत है, जिसके अनुसार पुनरीक्षणकर्ता द्वारा विपक्षी संख्या 2 के भरण-पोषण के प्रति उपेक्षा अथवा इससे इन्कार किए जाने का अनुमान वाद के तथ्य एवं परिस्थितियों से भी निकाला जा सकता है। यह अनुमान विपक्षी/पति के आचरण से भी निकाला जा सकता है। विद्वान खंडपीठ द्वारा यह सिद्धान्त भी प्रतिपादित किया गया कि यदि पत्नी के पक्ष में यह निष्कर्ष अवधारित किया जाता है कि उनका पति से पृथक रहने का आधार उचित एवं पर्याप्त है, तब ऐसी परिस्थिति में पति द्वारा उनके भरण-पोषण करने

से विरत रहने के तथ्य का अनुमान स्वतः निकाला जा सकता है।

22. प्रस्तुत मामले में भी ऐसा कोई साक्ष्य विद्वान विचारण न्यायालय के समक्ष विपक्षी/पुनरीक्षणकर्ता द्वारा नहीं प्रस्तुत किया गया जिससे यह विदित होता हो कि उन्होंने विपक्षी संख्या 2 एवं अपनी अवयस्क पुत्री के पृथक रहने की अवधि में उनके भरण-पोषण हेतु कोई आर्थिक सहायता की हो।

23. विद्वान विचारण न्यायालय का यह निष्कर्ष भी पत्रावली पर उपलब्ध साक्ष्य पर ही आधारित है कि विपक्षी एक साधन सम्पन्न व्यक्ति हैं, उनके पास विपक्षी एवं उसकी अवयस्क पुत्री के भरण-पोषण हेतु आदेशित धनराशि अदा करने हेतु पर्याप्त साधन हैं, इसके प्रतिकूल विपक्षी संख्या 2, यद्यपि वह शिक्षित हैं किन्तु वह स्वयं आय अर्जित करने में असमर्थ हैं। पत्रावली पर ऐसा कोई साक्ष्य उपलब्ध नहीं है जिसके आधार पर यह निष्कर्ष दिया जा सके कि विपक्षी स्वयं एवं अपनी अवयस्क पुत्री के भरण-पोषण हेतु आय अर्जित करने में समर्थ हैं। माननीय उच्चतम न्यायालय द्वारा **चतुर्भुज बनाम सीताराम**8 में इस आशय का विधि सिद्धान्त प्रतिपादित किया गया है कि यदि पत्नी कुछ आय अर्जित भी कर रही हो, तथापि वह अपने पति से भरण-पोषण प्राप्त कर सकती है, क्योंकि "स्वयं का भरण-पोषण कर पाने में असमर्थ" का आशय यह है कि वह ऐसे स्तर का भरण-पोषण करने में असमर्थ हैं जैसा कि वह अपने पति के साथ रहकर प्राप्त करती थीं।

24. इसी क्रम में इस न्यायालय की खंडपीठ द्वारा **अशोक कुमार सिंह बनाम एडिशनल सेशन जज वाराणसी**9 का उल्लेख भी सुसंगत है, जिसमें यह अवधारित किया गया है कि यदि पत्नी शिक्षित है किन्तु सेवारत नहीं है, तो भी वह पति से भरण-पोषण प्राप्त करने की अधिकारिणी हैं।

25. विद्वान विचारण न्यायालय ने इस आशय का उचित निष्कर्ष अभिलिखित किया है कि पुनरीक्षणकर्ता स्वयं विपक्षी संख्या 2 एवं अवयस्क पुत्री के भरण-पोषण हेतु पर्याप्त साधन सम्पन्न व्यक्ति हैं, क्योंकि सुस्थापित विधि सिद्धान्तों के अनुसार एक स्वस्थ शरीर के व्यक्ति का यह वैधानिक दायित्व है कि वह अपनी पत्नी एवं अवयस्क पुत्री का भरण-पोषण यथा योग्य करें। इस आशय के निष्कर्ष को माननीय उच्चतम न्यायालय द्वारा **शमीमा फारुकी बनाम शाहिद खान**10 में प्रतिपादित विधि सिद्धान्त से भी बल प्राप्त होता है।

26. इसी क्रम में माननीय उच्चतम न्यायालय द्वारा **रजथी बनाम सी. गनेशन**11 का उल्लेख भी पूर्णतः सुसंगत है, जिसके अनुसार स्वयं के भरण-पोषण में असमर्थ होने का आशय यह है कि परित्यक्त पत्नी अथवा पृथक रह रही पत्नी, पति से पृथक रहने की अवधि के उस स्तर के भरण-पोषण की अधिकारिणी हैं जिस स्तर का जीवन-यापन वह अपने पति के साथ रहकर कर रही थीं।

27. यह सुस्थापित विधि सिद्धान्त है कि पुनरीक्षण क्षेत्राधिकार अत्यंत सीमित होता है। तथ्य सम्बंधित निष्कर्ष में हस्तक्षेप मात्र उसी दशा में अनुमन्य होता है, जब आलोच्य आदेश अनुचित एवं क्षेत्राधिकार विहीन हो। इस सम्बंध में माननीय उच्चतम न्यायालय द्वारा **स्टेट ऑफ राजस्थान बनाम गुरु चरण दास चढ्ढा12, विनय त्यागी**

बनाम इरशाद अली13 एवं **अमित कपूर बनाम रमेश चन्दर**14 का उल्लेख किया जाना सुसंगत है।

28. अतः उपरोक्त वर्णित विवेचना के आलोक में आलोच्य निर्णय एवं आदेश दिनांकित 26.10.2019 पूर्णतः साक्ष्य सम्मत एवं पक्षों द्वारा प्रस्तुत साक्ष्य के सम्यक विश्लेषण पर आधारित है, जिसमें कोई अवैधानिकता, तात्विक त्रुटि अथवा क्षेत्राधिकारिता संबंधी त्रुटि परिलक्षित नहीं होता है।

29. निर्णय पूर्ण करने के पूर्व यह उल्लेख किया जाना भी सुसंगत प्रतीत होता है कि यद्यपि प्रश्नगत प्रकरण में विद्वान विचारण न्यायालय ने इस आशय का स्पष्ट निष्कर्ष अवधारित किया है कि विपक्षी संख्या 2 पुनरीक्षणकर्ता की विवाहित पत्नी हैं एवं पुनरीक्षणकर्ता यह सिद्ध करने में पूर्णतः असफल रहे हैं कि उनके द्वारा विपक्षी संख्या 2 को तलाक़ दे दिया गया है। तथापि इस न्यायालय का यह सुविचारित मत है कि **डैनियल लतीफी (उपरोक्त वर्णित) एवं शमीमा फारुकी बनाम शाहिद खान (उपरोक्त वर्णित)** में प्रतिपादित विधि सिद्धान्त के आलोक में यह अब कदापि अनिर्णित विषय नहीं है कि एक मुस्लिम पत्नी अपने पूर्व पति से तलाक़ के उपरान्त भी पुनर्विवाह न करने तक की अवधि हेतु भरण-पोषण की धनराशि प्राप्त करने हेतु संहिता की धारा 125 के अन्तर्गत आवेदन पत्र प्रस्तुत करने हेतु सर्वथा समर्थ है।

30. उपर्युक्त वर्णित समस्त विचार-विमर्श का सार यह है कि प्रस्तुत दाण्डिक पुनरीक्षण बलहीन है एवं पारिणामिक रूप से निरस्त किए जाने योग्य है।

<u>आदेश</u>

31. पारिणामिक रूप से दाण्डिक पुनरीक्षण निरस्त किया जाता है।

32. निर्णय की एक प्रति विद्वान अवर न्यायालय को सूचनार्थ एवं अनुपालनार्थ अविलंब प्रेषित की जाए।

(2023) 4 ILRA 472
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Revision No. 339 of 2020

Lallan Kumar ...Revisionist
Versus
Union of India & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Pradeep Kumar Singh, Sri Afshan Shafaut, Sri Ashish Kumar Singh, Sri Sunil Kumar Singh, Sri Sushil Kumar Yadav, Sri Amit Singh

Counsel for the Opp. Parties:
A.S.G.I., Sri Sudarshan Singh, Sri Ashish Pandey

Criminal Law – Criminal Procedure Code, 1973 - Sections 451 & 457(1) - Narcotic Drugs and Psychotropic Substances Act, 1985 – Sections 8, 20, 27-A, 29, 51, 60 & 60(3) - Criminal Revision - Challenging the order impugned - by which the application of revisionist for released the vehicle in question, alleged to be recovered, was rejected - court finds that, vehicle in question was purchased on load for which he is paying EMI - after confiscation vehicle was laying in the concerned police station since 2019 - plea taken that same was not released it will be damaged and revisionist has been paying the EMI of the bank - there would be no useful purpose to keep the vehicle in police station - held, impugned order is absolutely erroneous being in contrary to law laid down by Apex Court in 'Sunder Bhai Ambala Desai Case' - hence, impugned order deserve to be set aside and it is directed that interim custody of vehicle be given to revisionist on producing Registration Certificate of concerned vehicle during pendency of trial and also

furnishing security of to the satisfaction of concerned Court - Revision Allowed. (Para – 4, 5, 7)

Criminal Revision Allowed. (E-11)

List of Cases cited:

1. Kapil Jha Vs The St. of M. P. (MCRC No.4636 of 2022),

2. Sunderbhai Ambalal Desai Vs St. of Guj., 2002 (10) SCC 283.

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

1. Heard Sri Sunil Kumar Singh, learned counsel for the revisionist.

2. No one appears on behalf of Union of India despite the fact that counter affidavit has been filed by the special public prosecutor (NCB).

3. By the present criminal revision, revisionist has challenged the order dated 16.12.2019 passed by the Additional Sessions Judge, Court No.-16, Varanasi in Case No.10 of 2019, under Sections-8, 20, 27-A, 29, 60 (III) of NDPS Act, Police Station-N.C.B. Mahanagar, Lucknow was rejected on the ground that the applicant could not brought on record any evidence that this fact was not in his knowledge that his vehicle was used in the aforesaid crime. Therefore, on the ground of Section 60(3) of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act'), the aforesaid application was rejected.

4. As per against the case of the prosecution itself, only five packet containing ganja was alleged to be recovered from his vehicle though, there was no independent witness in the aforesaid recovery and ganja was recovered from the truck standing behind his vehicle. It is further stated that vehicle in question was purchased on loan for which he is paying EMI. His vehicle, after confiscation, were lying in the concerned Police Station and will be damaged, if not released. In support of his contention, learned counsel for the revisionist has placed reliance upon a judgement of Madhya Pradesh High Court in ***MCRC No.4636 of 2022 (Kapil Jha Vs. The State of Madhya Pradesh***) in which the Hon'ble Court after relying upon the judgement of the Apex Court in ***Sunderbhai Ambalal Desai Vs. State of Gujarat 2002 (10) SCC 283*** observed that the vehicle confiscated under Section 60 of the N.D.P.S. Act but by virtue of Section 36-C as well as Section 51 of N.D.P.S. Act, it is clear that the provision of Section 451 or 457(1) of Cr.P.C. also applicable which provides that during pendency of the trial, property should be released in the interim custody of the owner so as to save it from damage.

5. I am of the view since the vehicle in question was lying in the concerned police station since 2019 and the revisionist has been paying the installment of bank and there would be no useful purpose to keep the vehicle in police station under the confiscation because trial may take time, in the meantime, vehicle in question may be damaged. Therefore, the impugned order is absolutely erroneous being in contrary to law laid down by the Apex Court in ***Sunderbhai Ambala Desai (supra)***, therefore deserve to be set aside and it is directed that interim custody of Scorpio Car bearing Registration No.BR-10-PA-9743 be given to the revisionist on producing Registration Certificate of the concerned vehicle during the pendency of trial and also furnishing the security of

Rs.2,00,000/- to the satisfaction of the concerned Court.

6. With the aforesaid observations, the revision is **allowed.**

7. In view of the above, the finding of the Court below that since the vehicle is liable to be confiscated, interim custody cannot be granted, is liable to be set aside and accordingly, the impugned order dated 16.12.2019 passed by the Additional Sessions Judge, Court No.-16, Varanasi is hereby set aside. Accordingly, by allowing the application, the vehicle is ordered to be released on following conditions:-

(i) It is ordered that on furnishing personal bond of Rs.2,00,000/- (Rupees Two Lacs Only) with one solvent surety in the like amount to the satisfaction of the trial Court by the revisionist, the aforesaid vehicle (Scorpio bearing registration No. BR-10-PA-9743) shall be handed over to the respective revisionist on Supurdginama on proving ownership of the same;

(ii) whenever it would be required by the competent Court the same will be produced on petitioner's own expenses at the place as would be directed in this regard;

(iii) at the time of release of the vehicle on Supurdginama, the aforesaid Authority shall ensure to take note of chassis number, engine number and registration number of the aforesaid vehicle and keep on record;

(iv) the petitioner shall neither alter or change the condition of the aforesaid vehicle in any manner whatsoever during pendency of the litigation;

(v) the petitioner shall not create any third party rights over the aforesaid vehicle;

(vi) the petitioner shall not fiddle with or scratch or erase numbers engraved in the chassis and engine of the vehicle;

(vii) in the event, all or any of the aforesaid conditions are found to have been violated, the respondent / State is at liberty to move this Court to such modification / variation of the order passed by this Court today.

(2023) 4 ILRA 474
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.01.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Revision No. 2213 of 2018

Vinod Kumar ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri M.P.S. Chauhan

Counsel for the Opp. Parties:
G.A., Sri S.P.S. Chauhan, Smt. Meenakshi Chauhan

Criminal Law- Code of Criminal Procedure,1973-Sections 154,156 & 397-Application u/s 156 (3) CrPC moved by the revisionist was rejected by the learned Court below-Magistrate u/s 156 (3) CrPC is legally authorized to order for registration of F.I.R. , investigate into the matter or to treat such application as a complaint, as the case may be and he is fully empowered even to reject the application moved before it-Before taking recourse of the Court the complainant ought to move to the police station for registration of the F.I.R. and if unattended there, move an application to the Superintendent of Police and this fact also be deposed clearly in his application u/s 156(3) CrPC moved before the Magistrate-If no affidavit was filed in support of the application u/s 156(3) CrPC the same could not have been entertained by the

court concerned. (Para 9-15, 25-28, 35-41)

Revision dismissed. (E-15)

List of Cases cited:

1. Jagannath Verma & Others Vs St. of U.P. & anr., AIR 2014 Allahabad 214 (Lucknow Bench) (F.B.)

2. Father Thomas Vs St. of U.P. & anr. 2011 Criminal Law Journal 2278 (Allahabad) (F.B.)

3. Lalita Kumari Vs St. of U.P., (2014) 2 SCC 1

4. Priyanka Srivastava Vs St. of U.P., (2015) 6 Supreme Court Cases 287

5. Sukhwasi Vs St. of U.P., 2008 Cri LJ 472 (Allahabad) (D.B.)

6. Suresh Chandra Jain Vs St. of M.P., A.I.R. 2001 Supreme Court 571,

7. Gopal Das Sindhi Vs St. of Assam, A.I.R. 1961 Supreme Court 986,

8. Madhu Bala Vs Suresh Kumar, A.I.R. 1997 Supreme Court 3104,

9. Ramesh Kumari Vs St. (N.C.T. of Delhi), A.I.R. 2006 Supreme Court 1322

10. Babu Venkatesh & ors. Vs St. of Karn. & anr., (2022) 5 Supreme Court Cases 639

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

1. Heard learned counsel for the revisionist, learned A.G.A. for the State and learned counsel for the opposite party no.2.

2. An application under Section 156 (3) Cr.P.C. moved by the revisionist / applicant registered as Misc. Case No.136 of 2018, Vinod Kumar Vs. Aidal Singh, P.S. Gabhana, Aligarh was rejected by the Court of Additional Sessions Judge, Court No.5, Aligarh vide order dated 26.05.2018, feeling aggrieved of which, the present revision has been filed.

3. The submissions of learned counsel for the revisionist, in brief, are that the impugned order has been passed without considering the facts of the case and evidence on record. It is against the provisions of law and suffers from the jurisdictional error as the jurisdiction vested in the Court has not been exercised properly. The observations made by the learned Sessions Court are perverse and arbitrary in nature. From a bare perusal of the application moved by the revisionist under Section 156 (3) Cr.P.C., a cognizable offence was clearly made out and the Court ought to have ordered for the registration of F.I.R. and investigation into the matter, but the same was rejected in an illegal manner. Hence, a prayer has been made to set-aside the impugned order by allowing the present revision.

4. The learned A.G.A. appearing on behalf of the State as well as learned counsel for the opposite party no.2 have vehemently opposed the present revision and it has been submitted that the impugned order has been passed in accordance with the legal principles governing the matter. The application under Section 156 (3) Cr.P.C. moved by the revisionist was not sustainable in law and the learned Sessions Court committed no legal or jurisdictional error in passing the impugned order. Hence, the revision is liable to be dismissed.

5. The factual scenario, as reveals from the perusal of the application under Section 156 (3) Cr.P.C. is that on 09.03.2018, the victim, daughter of the applicant, aged about 14 years, had gone to

some outer place alongwith other women of the village. In the night at 11:00 P.M., the accused seduced her minor daughter and taking her into a Car, committed rape upon her and pressed her mouth so that she could not make any shriek. She was also threatened for her life. The incident was informed by the victim to her mother and when the informant, who was not present in the village, came back, his wife told him the incident. He searched for the accused, but could not find. Subsequently, on 27.03.2018, the accused again made an attempt to drag the victim when she was coming with her mother and when the wife of the informant and other witnesses tried to hold him, he fled away. Several applications were moved by the informant to the S.S.P. and other Police Officers and Human Rights Commission and he also went to P.S. Gabhana, but no report was lodged. Hence, application under Section 156 (3) Cr.P.C. was moved before the concerned Magistrate.

6. Applications given to Station Officer, P.S. Gabhana, Aligarh dated 27.03.2018 and to S.S.P., Aligarh dated 28.03.2018 with Registry receipts were made annexures to the application. The learned Sessions Judge considering the allegations made therein false, frivolous and unnatural and also finding that no medical examination of the victim was performed, rejected the said application vide impugned order dated 26.05.2018.

7. From the rival contentions of both the sides, some relevant points for determination emerge out.

Point for determination no.1

8. At the very outset, it is desirable to elucidate whether the present revision is maintainable as such or not.

9. The learned State counsel and learned counsel for opposite party no.2 have made it a point of assailment that since the order rejecting an application under Section 156 (3) Cr.P.C. falls into the category of interlocutory order, criminal revision against the same is not maintainable.

10. Further, the prospective accused persons were necessary parties before the revisional court and since they were not afforded with an opportunity of hearing, their valuable rights were going to be affected by the order, which was eventually passed by the revisional court, is the second ground of contention taken by the learned counsel for the State and the opposite party no.2.

11. The question raised by the learned State counsel has already found its answer in a Full Bench case of this Court, **Jagannath Verma & Others Vs. State of U.P. & another, AIR 2014 Allahabad 214 (Lucknow Bench) (F.B.)**. In this Full Bench case, another Full Bench case of this Court **Father Thomas Vs. State of U.P. & Another 2011 Criminal Law Journal 2278 (Allahabad) (F.B.)** was also discussed. In that matter, the Court of Chief Judicial Magistrate, Ambedkar Nagar rejected an application under Section 156 (3) Cr.P.C. considering the contents of the complaint and coming to the conclusion that there was no ground for directing the police to register and investigate the case. The aggrieved party preferred a revision before the Session Judge, which was allowed and the order of the Chief Judicial Magistrate was set-aside and the latter was directed to decide the said application afresh. It was against that revisional order aggrieved by which the petitioners moved to the High Court.

12. The Hon'ble Full Bench in Jagannath Verma case (supra) held like this -

"The power of the magistrate under Section 202 to postpone the issuance of process and to direct an investigation to be made by a police officer for the purpose of deciding whether or not there is sufficient ground for proceeding, is distinct from an order under Section 156 (3). Hence, where an order is passed by the magistrate declining to order an investigation under Section 156 (3), such an order affects the valuable rights of the complainant and is a matter of moment. Access to the remedy of a revision under Section 397 (1) is not barred since such an order is not an interlocutory order under sub-section (2) nor can access to the statutory remedy of a revision under Section 397 (1) be defeated on the ground that the complainant may avail of the procedure prescribed in Chapter XV of the Code."

13. Hon'ble Full Bench specifically laid down that in a revision petition against the order of the Magistrate rejecting the application under Section 156 (3) Cr.P.C. for registration of F.I.R. and investigation of case, the prospective accused has right to be heard. It was also said that - "But a right to be heard in revision is not excluded because a person who claims such a right was not entitled to be heard before the original order, which is assailed, was passed in the first instance or merely because a right of a hearing will not be available in the original proceedings on remand.....".

It was further explained that -

"Natural justice in our jurisprudence is not merely a matter of statutory entitlement but is an emanation or recognition of the constitutional right to fair procedure, fair treatment and objective decision making. Hence, a prospective accused is entitled to be heard in revision under Section 397 when an order rejecting an application under Section 156 (3) is assailed."

14. The connotative pronouncement of the Full Bench of this Court makes the legal position discernible and clarifies all the doubts regarding the maintainability of the present revision and accordingly it is held to be maintainable.

15. It is also apparent from the perusal of the record that the prospective accused has been impleaded as opposite party no.2 in the present revision by the revisionist and he has participated in the proceedings of the present revision.

Point for determination no.2.

This point relates to the extent of power of a Magistrate while dealing with an application under Section 156 (3) of Cr.P.C.

16. Before going into the discussion, a perusal of the relevant provisions of law appears to be necessary.

The provisions of Section 154 of the Criminal Procedure Code read like this -

"Sec. 154. Information in cognizable cases. - (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the

substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

17. The provision given under Section 154 (1) Cr.P.C. clearly indicates that if a cognizable offence is made out from the very perusal of the information given to an officer in charge of a police station, the police is thereby apprised about the alleged criminal activity and then it is the duty of the police to take suitable steps and to set the criminal law into motion and first step in this regard is the lodging of the F.I.R. and at that stage, as held in **Lalita Kumari Vs. State of U.P., (2014) 2 SCC 1**, "'reasonableness' or 'credibility' of the information is not a condition precedent for the registration of a case under Section 154 Cr.P.C."

18. Having an exhaustive account of incident or containing every minute details of the occurrence is never supposed to be a pre-requisite of an F.I.R. Thus, we find that it is unequivocally clear that in case of information of any cognizable offence, the registration of F.I.R. is mandatory. Although, in some cases, it may be required to have a preliminary inquiry and the requirement of preliminary inquiry was emphasized by the Apex Court in **Priyanka Srivastava Vs. State of U.P., (2015) 6 Supreme Court Cases 287**, wherein the Constitutional Bench of Lalita Kumari case (supra) has been referred like this -

"115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint."

19. Further, the Constitutional Bench proceeded to hold that where a preliminary enquiry is necessary, it is not for the purpose for verification or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

20. The question arises as to the remedy of the person who is victim or aggrieved, if the police denies to fulfill its constitutional and legal duty and F.I.R. is not lodged ignoring the mandatory provisions of law. Section 154 (3) is provisioned by the legislature in its wisdom and farsightness to provide a remedy to such an aggrieved person and that is why under the aforesaid provision the S.P.

concerned was made empowered to proceed into the matter as referred hereinabove.

21. Situation arises when the crime on a victim remains unheard despite approaching the Superintendent of Police and this leaves him in a state of disgust and distress. This takes the victim / informant to the Magistrate, who may order for registration of F.I.R. and investigation into the matter under Section 156 (3) Cr.P.C.,which provides as under.

"Sec. 156. Police officer' s power to investigate cognizable case. - (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

22. Since investigation in a criminal matter may be initiated after lodging of the F.I.R., hence needless to say that the power of the Magistrate to order for investigation implies his power to order for registration of the F.I.R. in any cognizable case.

23. Hence, sufficient provisions have been embodied in the Criminal Procedure Code to safeguard the rights of the victims / informants. On the one hand, it is incumbent upon the police to lodge an F.I.R. on receiving information regarding a cognizable case and at the same time the duty has been cast upon the Superintendent of Police that in case there is a refusal on the part of the officer in charge of the police station to record the information of a cognizable offence as an F.I.R., to either investigate such case himself or through any other subordinate police officer.

24. Inspite of such requisite safeguards for the victim / informant and obligatory provisions for the police, there may be several instances when F.I.R. is not lodged despite invocation of provisions of Section 154 Cr.P.C. and that is why the Magistrate was equipped with the power to make an order for lodging of the F.I.R. and to investigate the matter.

25. Now the point to be tackled at this juncture is that whether the Magistrate after receiving an application under Section 156 (3) Cr.P.C. for registration of F.I.R. is bound to accept it or any other course is available to him.

26. The answer to it we find in **Sukhwasi Vs. State of U.P., 2008 Cri LJ 472 (Allahabad) (D.B.),** wherein the Division Bench firstly quoted the question referred before it as - "The, following question, has been referred, for consideration;

Whether the Magistrate is bound to pass an order on each and every application under Section 156 (3) Cr.P.C. containing allegations of commission of a cognizable offence for registration of the F.I.R. and its investigation by the police even if those allegations, prima-facie, do not appear to be genuine and do not appeal to reason, or he can exercise judicial discretion in the matter and can pass order for treating it as 'complaint' or to reject it in suitable cases?"

Answering to the question, it was held that - "For the reasons mentioned above, I am of the opinion that the Magistrate is not always bound to pass an order for register of the case and investigation after receipt of the application under Section 156 (3) Cr.P.C. disclosing a cognizable offence. The Magistrate may use his discretion judiciously and if he is of the opinion that in the circumstances of the case, it will be proper to treat the application as a complaint case then he may proceed according to the procedure provided under Chapter XV of Cr.P.C. I am also of the opinion that it is not always mandatory in each and every case for the Magistrate to pass an order to register and investigate on receipt of the application under Section 156 (3) Cr.P.C. In the present case, the Magistrate is perfectly within the judicial power to treat the application under Section 156 (3) Cr.P.C. as a complaint case. There is no illegality or impropriety in the order. The revision is devoid of merit and is liable to be dismissed."

It was also held that - "It will not be proper to deal with this hypothetical position that if the Magistrate is of opinion that false and frivolous allegation has been made in application then he may reject the application or it is for the investigating officer to decide the truthfulness of the story and if found false then launch prosecution against the applicant But it is discretion of the Magistrate to be used judiciously while disposing of the application."

27. It will be apposite to note here that in Sukhwasi (supra), the cases of **Suresh Chandra Jain Vs. State of M.P., A.I.R. 2001 Supreme Court 571, Gopal Das Sindhi Vs. State of Assam, A.I.R. 1961 Supreme Court 986, Madhu Bala Vs. Suresh Kumar, A.I.R. 1997 Supreme Court 3104, Ramesh Kumari Vs. State (N.C.T. of Delhi), A.I.R. 2006 Supreme Court 1322** have been discussed and followed in its true spirit.

28. From the above, it is clear that the Magistrate dealing with an application under Section 156 (3) Cr.P.C., is legally authorized to make an order for registration of F.I.R. and investigate into the matter or to treat such application as a complaint, as the case may be and he is fully empowered even to reject the application moved before it under Section 156 (3) Cr.P.C.

Point for determination no.3.

This point relates to the question as to whether application under section 156 (3) Cr.P.C. necessitates the filing of an affidavit in support thereof -

29. As the legal pronouncements delivered by the Courts in India on several occasions are the result of the constant study of developing Society and swiftly changing socio-economic conditions, they always stand in conformity with the need of the hour and requirement of the Society.

30. At one point of time, it was gathered by the Hon'ble Apex Court that the provisions of Section 156 (3) Cr.P.C. are being misused on several occasions by some deviant, unscrupulous and unprincipled litigants, as the required sense of responsibility on the part of the applicants / victims in moving such applications even on flimsy and false grounds, is lacking and resulting into the unnecessary and deceitful hardships and agony caused to the prospective accused persons.

31. In this backdrop, the legal principles enumerated by the Hon'ble Apex

Court and directions issued in the case of Priyanka Srivastava (supra) are relevant and must be kept into mind.

32. In the factual scenario of the aforesaid case of Priyanka Srivastava, an application under Section 156 (3) Cr.P.C. was moved against the bank authorities of the Punjab National Bank Housing Finance Limited with an intent to avoid bank loan and the order passed on that application gave rise to an F.I.R. under Sections 465, 467, 468, 471, 386, 506, 34 and 120-B IPC against the bank authorities. When the appellants being aggrieved therewith moved to the High Court, the High Court declined to interfere with the order passed by the Magistrate opining that from the perusal of the F.I.R., it could not be said that no cognizable offence was made out.

33. The Hon'ble Supreme Court while quashing the impugned F.I.R. made several relevant observations and issued specific directions to the Courts dealing with the application under Section 156 (3) Cr.P.C. It was held that -

"30. In our considered opinion, a stage has come in this country where Section 156 (3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31.We have already indicated that there has to be prior applications under Section 154 (1) and 154 (3) while filing a petition under Section 156 (3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156 (3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156 (3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

Thus we find the answer to this point in affirmative.

34. Now the question arises whether the application under Section 156 (3) Cr.P.C., which is in question before the

Court, was entertainable by the concerned court or not.

35. Recently in **Babu Venkatesh and Others Vs. State of Karnataka and another, (2022) 5 Supreme Court Cases 639,** the Hon'ble Apex Court reiterated the prerequisites for exercise of the power of Magistrate under Section 156 (3) Cr.P.C. and the manner in which it is to be exercised. In that case, order passed by the Magistrate under Section 156 (3) Cr.P.C. led to registration of FIRs under Sections 420, 471, 468, 465 and 120-B IPC against the appellants and petitions filed by appellants under Section 482 Cr.P.C. before High Court for quashing aforesaid criminal proceedings were dismissed on ground that serious allegations of cheating and forgery were shown in complaints and as such no case was made out for quashing FIRs.

36. Clarifying the principles governing the scope and power of Magistrate under Section 156 (3) Cr.P.C. and reiterating the principles laid down in Priyanka Srivastava case (supra), it was observed that -

"This court has clearly held that, a stage has come where applications under Section 156 (3) of Cr.P.C. are to be supported by an affidavit duly sworn by the complainant who seeks the invocation of the jurisdiction of the Magistrate....."

"This court has further held that prior to the filing of a petition under Section 156 (3) of the Cr.P.C., there have to be applications under Section 154 (1) and 154 (3) of the Cr.P.C. This court emphasizes the necessity to file an affidavit so that the persons making the application should be conscious and not make false affidavit. With such a requirement, the persons would be deterred from causally invoking authority of the Magistrate, under Section 156 (3) of the Cr.P.C. In as much as if the affidavit is found to be false, the person would be liable for prosecution in accordance with law."

37. The Hon'ble Apex Court found that no affidavit in support of the application under Section 156 (3) Cr.P.C. was filed by the complainant, hence it was observed that -

"In any case, when the complaint was not supported by an affidavit, the Magistrate ought not to have entertained the application under Section 156 (3) of the Cr.P.C."

38. Principle has been thus laid down by the Hon'ble Apex Court for the Courts dealing with the application under section 156 (3) Cr.P.C. that if such an application is not supported with the affidavit duly sworn by the complainant, such application cannot be entertained by Magistrate.

39. From the perusal of record, this Court finds that nowhere it has been mentioned in the memo of revision that any affidavit in support of the aforesaid application under section 156 (3) Cr.P.C. duly sworn by the complainant was filed before the court concerned. Nothing in this regard can be found in the impugned order passed by the Additional Sessions Judge, Court No.5, Aligarh. The copy of application under Section 156 (3) Cr.P.C. also goes to show that nowhere it has been asserted therein that any affidavit is being filed by the applicant in support of the aforesaid application. As a matter of fact, the Court finds not even a whisper to this effect from the perusal of the whole record that any affidavit in support of the

allegations made in the application under Section 156 (3) Cr.P.C. has ever been filed by the applicant.

40. From the above discussion, it is explicit that before taking recourse of the Court, the complainant ought to move to the police station for registration of the F.I.R. and if unattended there, move an application to the Superintendent of Police and this fact also be deposed clearly in his application under Section 156 (3) Cr.P.C. moved before the Magistrate. In the matter in hand, copies of the applications moved by the applicant to the police station Gabhana, District Aligarh and to the S.S.P., Aligarh have been filed on record, but this fact has not been deposed anywhere by the informant by way of affidavit, which was a necessary compliance of the law governing the subject. Although the learned Court has not paid any attention to this legal omission and the impugned order has been passed on factual aspect, but this Court can, in no circumstance, ignore legal principles governing the present matter. If no affidavit was filed in support of the application under Section 156 (3) Cr.P.C., it even, could not have been entertained by the court concerned. The application itself suffers from a serious legal flaw and was not entertainable as such.

41. It is not required for this Court to examine the facts of the case and to draw a conclusion whether the learned Sessions Court analyzed the factual scenario of the matter in proper manner or not because it has been already held that the application in itself was not entertainable for want of affidavit and rejection of the same was a right consequence.

42. On the basis of the aforesaid discussion, I am of the considered view that the revision is devoid of merit and deserves to be dismissed.

43. The revision is accordingly dismissed.

(2023) 4 ILRA 483
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.04.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Criminal Revision No. 2913 of 2019

Nadeem @ Kalia ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Bhavya Sahai, Sri Brijesh Sahai (Sr. Advocate)

Counsel for the Opp. Parties:
G.A., Sri Avnish Kumar Srivastava, Sri Anoop Trivedi (Sr. Advocate)

Criminal Law-Juvenile Justice (Care and Protection of Children) Act, 2000-Sections 7A, 49-Juvenile Justice (Care and Protection of Children) Rules, 2007-Rule 12)- Revision against the judgment and order passed in Juvenile Criminal Appeal-A person can move an application claiming himself to be juvenile at any stage of the case and even after the judgment of the case-The word 'any court in Section 7A(1)' means the trial court/High Court/Apex Court and does not mean that any court in U.P. wherever a person wants an application to be moved-Medical report does not bear the thumb impression/signature of the accused thereby the presence of the revisionist at the time of medical examination cannot be ascertained-St.ment of the revisionist u/s 313 CrPC and license of DBBL gun issued in the name of revisionist before the date

of incident an admission on the part of the accused revisionist of being major on the date of incident-Two agreement to sale and one power of attorney have been placed which bear the thumb impression of the revisionist this again indicates that the revisionist was major before the date of incident. (Para 10, 33, 38)

Revision dismissed. (E-15)

List of Cases cited:

1. Ram Vijay Singh Vs St. of U. P., LL 2021 SC 117

2. Mukarrab & ors. Vs St. of U. P. (2017) 2 SCC 210

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard Sri Brijesh Sahai, learned Senior Advocate assisted by Sri Bhavya Sahai, learned counsel for the revisionist and Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Avnish Kumar Srivastava, learned counsel for the opposite party no. 2.

2. This revision has been preferred against the judgement and order dated 04.07.2019 passed in Juvenile Criminal Appeal No. 08 of 2019 arising out of Case Crime No. 131 of 2003 under Sections 147, 148, 149, 307 and 302 IPC, Police Station Kotwali, District Meerut.

3. As per facts of the case Sessions Trial Nos. 668, 669 and 671 of 2003, Case Crime No. 131 of 2003 and 134 of 2003 respectively under Sections 147, 148, 149, 307, 302 IPC and 25/27 Arms Act, Police Station Kotwali, District Meerut were decided by the trial court vide judgement dated 04.08.2007 and all the four accused persons were found guilty. The case was decided into capital punishment. Criminal Reference No. 21 of 2007 - State Vs. Khalid and others, was made to this court to confirm the capital punishment. The accused persons also filed Criminal Appeal No. 5169 of 2007 - Khalid and others Vs. State of U.P. before this court. Both the reference and criminal appeal were heard together by the Division Bench of this court. The reference was dismissed and the appeal was partly allowed vide judgment and order dated 05.09.2008. The death sentence was set aside and was commuted to life imprisonment i.e. imprisonment for whole life with the provision that the accused persons shall not be entitled to be considered for remission of sentence, unless they have undergone an actual term of 20 years imprisonment including the period already undergone by them. The sentence of fine awarded to the appellants under Sections 302/149 IPC as well as sentence of imprisonment and fine awarded to them under Section 307/149 and 148 IPC and the conviction of accused appellants Tahir and Moinuddin and the sentence awarded to them under Section 25 Arms Act were upheld. All the sentences of imprisonment were to run concurrently. The convict/revisionist along with other co-accused persons was thereafter transferred to Central Jail, Agra to serve the sentence.

4. One Sister Sheeba Jose, a lawyer and human right activist, filed a Public Interest Litigation No. 855 of 2012 (Sister Sheeba Jose Vs. State of U.P. and others) before this Court for release of the prisoners, who may have been below 18 years of age at the time of incident and were detained in various district or Central Jail. For Agra, Central Jail a list of 18 prisoners was made for grant of such relief. This writ petition was decided by the division bench of this Court vide order dated 24.05.2012 and directions were

issued to the District Judges, who were also the Chairpersons of their Legal Services Authorities to see that the efficient lawyers were appointed for the purpose of providing legal aid to the prisoners, who were unable to engage private lawyers and who were mentioned in the list furnished by the State Government and described to be below 18 years in age on the date of commission of offence. The present applicant applied (through Jail Superintendent, Central Jail, Agra) before the Secretary, District Legal Services Authority for providing him legal aid. On his application, the District Legal Services Authority appointed an advocate for providing him legal aid and thereafter on 22.03.2017 an application was moved on behalf of the revisionist before the Juvenile Justice Board, Agra claiming therein that he was juvenile at the time of incident and as he was not literate and having no documentary evidence regarding his age, as such by constituting a medical board his age may be determined. His medical was done by the medical board and on the basis of report of medical board dated 19.04.2017 the Principal Magistrate, Juvenile Justice Board, Agra vide order dated 22.04.2017 declared the revisionist juvenile on the date of incident.

5. On various grounds and vide order dated 03.05.2017 of Juvenile Justice Board, Agra the revisionist, who was said to had served incarceration of more than 13 years 10 months, was ordered to be released from the jail. Against these orders dated 22.04.2017 and 03.05.2017 Application U/S 482 No. 18718 of 2017 was filed by Dr. Mohd Iqbal Gaji, which was withdrawn by him on 11.10.2017 with the version that against these orders the remedy of appeal has been provided in the statute and the application had been filed in the wrong court, hence, with liberty to avail proper legal remedy against the orders, the permission to withdraw this application was seeked, which was allowed accordingly. Then an appeal was filed by Haji Baseeruddin, opposite party no. 2 against the orders dated 22.04.2017 and 03.05.2017, which was allowed vide order dated 04.07.2019 of the Sessions Judge, Agra. The orders dated 22.04.2017 and 03.05.2017 were set aside and the revisionist/accused was ordered to be arrested by issuing non bailable warrant against him.

6. Admittedly, the revisionist remained absconding and the processes were issued by the concerned court for his arrest. At last vide order dated 17.05.2022 in Writ Petition (Criminal) No. 155 of 2022 the revisionist was directed to be released on bail subject to the conditions to be imposed by the trial court until further orders and vide order dated 06.09.2022 in the same writ petition the Apex Court disposed of the writ petition with the request to this court to dispose of the Criminal Misc. Application No. 20368 of 2017 of the co-accused and Criminal Revision No. 2913 of 2019 (present revision) as expeditiously as possible not later than six months.

7. This revision was placed before this court along with Application U/S 482 No. 20368 of 2017 of the co-accused on 22.03.2023 for the first time and the learned counsel for the applicant in application under Section 482 Cr.P.C. seeked time so that he may inform the counsel for the revisionist and accordingly 28.03.2023 was fixed and on 28.03.2023 the arguments were heard in Application U/S 482 No. 20368 of 2017 and due to paucity of time on next date i.e. 29.03.2023

the arguments on present revision were heard.

8. The present revision has been preferred against the order dated 04.07.2019 of the Sessions Judge, Agra in Criminal Appeal No. 08 of 2019 related to Case Crime No. 131 of 2003.

9. The judgment is assailed on the ground that the impugned judgment is against the settled principles of law. It is based on surmises and conjectures. The District Judge, Agra misread the record, thus, the order is arbitrary and against the principle of natural justice and not sustainable. The provisions of Section 94 of the Juvenile Justice (Care and Protection of Children) Act have not been followed, whereby the educational certificate/birth certificate by a corporation or municipality or panchayat/ ossification test are relevant for the purpose of determination of age. As per provisions of Juvenile Justice (Care and Protection of Children) Act, the voter ID, statement under Section 313 Cr.P.C. and arms license are irrelevant for the purpose of determination of age. No admissible evidence could be attributed by the appellant regarding the age of the accused revisionist. The order has been passed mechanically and without application of mind, which needs to be quashed.

10. Admittedly, a person can move an application claiming himself to be juvenile at any stage of the case and even after the judgement of the case. As in the present case, the judgement in S.T. No. 668, 669 and 671 of 2003 was passed on 04.08.2017 and the application for declaring him to be juvenile was moved by the revisionist in the year 2017 and on his medical examination by the medical board, report was submitted on 19.04.2017 and vide order dated 22.04.2017 the revisionist was declared juvenile. On 03.05.2017 he was ordered to be released from the Central Jail.

11. The only law question involved in this revision is whether in the presence of report of medical examination by the medical board the appellate court could find the revisionist major on the date of incident on the basis of other evidence on record?

12. Admittedly, this appeal was decided in the absence of revisionist finding sufficient service by refusal on him.

13. The incident is dated 07.06.2003. Admittedly, at that time Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'Act') was prevalent and later on in 2007, Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 'Rules 2007') were framed. Regarding procedure for a claim of juvenility Section 7A and Section 49 of the Act are apposite to mention here:-

[7A. Procedure to be followed when claim of juvenility is raised before any court.- (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall

be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.]

49. Presumption and determination of age.--(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person.

14. A reading of Section 7A of the Act makes it clear that as per Section 7A (1) claim of juvenility shall be determined in terms of provisions contained in the Act and the Rules made therein even if the juvenile ceased to be so on or before commencement of this act.

15. In the case in hand, an application for declaring him juvenile was moved by the present revisionist in the year 2017, till then the above Rules, 2007 had been framed, hence, regarding determination of age of the revisionist Rule 12 of the Rules, 2007 shall be applied.

16. Rule 12 of the Rules, 2007 runs as under:-

12 Procedure to be followed in determination of Age.

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the

medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or Ihe juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

17. Thus, as per learned counsel for the revisionist for declaration of a person to be juvenile in conflict with law, the court or the board shall determine the age of the child by inquiry and seeking evidence by obtaining (1) the matriculation or equivalent certificates available and in the absence whereof (2) the date of birth certificate from the school (other than a play school) first attended and in the absence whereof (3) the birth certificate given by a corporation or a municipal authority or a panchayat and in the absence of above three, the medical opinion will be sought from a duly constituted Medical Board, that would declare the age of the juvenile or child. In case exact assessment of the age could not be done, the Court or the Board, for the reasons to be recorded, give benefit to the child/juvenile by considering his/her age on lower side within the margin of one year.

18. It is the version of the learned counsel for the revisionist that as in the present case the revisionist was illiterate person so his matriculation or equivalent certificate or the date of birth certificate from any school were not available and the certificate of any corporation or municipal authority or panchayat was also not available, so the Juvenile Justice Board rightly relied upon the report of medical examination done by the medical board and declared the revisionist juvenile.

19. This argument of the revisionist counsel is assailed on various grounds.

20. It is submitted by the learned counsel for the opposite party no. 2 that the

medical examination report submitted by the medical board dated 19.04.2017 does not bear the thumb impression/ signature of the revisionist so in the absence of thumb impression/signature of the revisionist this certificate has no legal sanctity and is a bare piece of paper and when there was neither any educational certificate nor any certificate issued by the municipal board or panchayat nor any reliable medical report, the court was free to collect other evidence which could be available before the court and pass an order accordingly.

21. Learned counsel for the opposite party no. 2 placed before the court judgement in ***Ram Vijay Singh Vs. State of Uttar Pradesh, LL 2021 SC 117*** wherein the apex court held that the medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other circumstances. Paragraphs 26, 27 and 28 of the judgement in ***Mukarrab & others Vs. State of Uttar Pradesh (2017) 2 SCC 210*** were referred in that judgement. These paragraphs run as under:-

"26. Having regard to the circumstances of this case, a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. At p. 31 of Modi's Textbook of Medical Jurisprudence and Toxicology, 20th Edn., it has been stated as follows:

"In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, an opinion should be given according to the following Table, but it must be remembered that too much reliance should not be placed on this Table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development."

Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person though a very useful guiding factor is not conclusive and has to be considered along with other circumstances.

27. In a recent judgment, State of M.P. v. Anoop Singh, (2015) 7 SCC 773 : (2015) 4 SCC (Cri) 208], it was held that the ossification test is not the sole criteria for age determination. Following Babloo Pasi [Babloo Pasi v. State of Jharkhand, (2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266] and Anoop Singh cases [State of M.P. v. Anoop Singh, (2015) 7 SCC 773 : (2015) 4 SCC (Cri) 208], we hold that ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. More so, the appellants herein have certainly crossed the age of thirty years which is an important factor to be taken into account as age cannot be determined with precision. In fact in the medical report of the appellants, it is stated that there was no indication for dental x-rays since both the accused were beyond 25 years of age.

28. At this juncture, we may usefully refer to an article "A study of wrist ossification for age estimation in paediatric group in Central Rajasthan", which reads as under:

"There are various criteria for age determination of an individual, of which eruption of teeth and ossification activities of bones are important. Nevertheless age can usually be assessed more accurately in

younger age group by dentition and ossification along with epiphyseal fusion.

[Ref.: Gray H. Gray's Anatomy, 37th Edn., Churchill Livingstone Edinburgh London Melbourne and New York: 1996; 341-342];

A careful examination of teeth and ossification at wrist joint provide valuable data for age estimation in children.

[Ref.: Parikh C.K. Parikh's Textbook of Medical Jurisprudence and Toxicology, 5th Edn., Mumbai Medico- Legal Centre Colaba: 1990; 44-45];

Variations in the appearance of centre of ossification at wrist joint shows influence of race, climate, diet and regional factors. Ossification centres for the distal ends of radius and ulna consistent with present study vide article "A study of wrist ossification for age estimation in paediatric group in Central Rajasthan" by Dr Ashutosh Srivastav, Senior Demonstrator and a team of other doctors, Journal of Indian Academy of Forensic Medicine (JIAFM), 2004; 26(4). ISSN 0971-0973].

22. It was argued on the basis of this finding of the Apex Court that no dental x-ray of the revisionist was done. It was also argued that examination of teeth and ossification, wrist and joint would be considered for age estimation in children and as per medical report itself the revisionist is found to be 29 years of age presently, hence, his age cannot be said to be assessed more accurately.

23. This argument of the learned counsel for the opposite party no. 2 was opposed by the learned counsel for the revisionist on the ground that as per findings of this judgement no medical reprot was available before the court and in absence of medical report, when High School certificate or the certificate of first school or Nagar Nigam or Panchayat were already not available then only on the basis of admission of the accused revisionist made in the arm license, the age of the accused was determined.

24. If we go through the provisions of the Act in this regard in Section 7A itself speaks that "whenever a claim is made by the accused in the court and the court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry," which clearly indicates that from the physical appearance of the accused if the court finds prima-facie that the inquiry is must in the matter to determine the age of the person only then the inquiry shall be held. As is opined by the Apex Court in para-15 of the judgement Ram Vijay Singh (supra), which is as under:-

15. As per the Scheme of the Act, when it is obvious to the Committee or the Board, based on the appearance of the person, that the said person is a child, the Board or Committee shall record observations stating the age of the Child as nearly as may be without waiting for further confirmation of the age. Therefore, the first attempt to determine the age is by assessing the physical appearance of the person when brought before the Board or the Committee. It is only in case of doubt, the process of age determination by seeking evidence becomes necessary. At that stage, when a person is around 18 years of age, the ossification test can be said to be relevant for determining the approximate age of a person in conflict with law. However, when the person is around 40-55 years of age, the structure of bones cannot be helpful in determining the age. This Court in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors. (2020)7SCC 1*** held, in

the context of certificate required under Section 65B of the Evidence Act, 1872, that as per the Latin maxim, lex non cogit ad impossibilia, law does not demand the impossible. Thus, when the ossification test cannot yield trustworthy and reliable results, such test cannot be made a basis to determine the age of the person concerned on the date of incident. Therefore, in the absence of any reliable trustworthy medical evidence to find out age of the appellant, the ossification test conducted in year 2020 when the appellant was 55 years of age cannot be conclusive to declare him as a juvenile on the date of the incident.

25. Thus, first attempt of the court to determine the age of the accused is by assessing the physical appearance of the person when brought before the medical board or the committee and it is only in the case of doubt that the process of age determination by seeking other evidence becomes necessary.

26. If we go through the order of the medical board dated 22.04.2017 wherein on the date of incident the age of the revisionist is determined to be 15 years, 01 month and 18 days, while in his statement under Section 313 Cr.P.C. the accused has disclosed himself to be of 26 years. Thus, he was about 23 years old on the date of incident. Had the accused been 15 years of age on the date of incident it could have very well be assessed by the court by his physical appearance when he used to appear in the trial court at the time of hearing of the trial. Admittedly during complete trial the revisionist remained in jail and he might have appeared from the jail in the court. Thus, in compliance of Section 7A of the Act, the trial court never assessed the accused to be juvenile on his appearance from the jail, so no process of age determination by seeking any evidence was adopted by the trial court. The revisionist himself from the year 2003 till 2017 when he remained in jail for about 13-14 years, he never claimed himself to be a juvenile and its reason has not been disclosed by the revisionist anywhere.

27. It is argued by the learned counsel for the revisionist that the appeal was heard in the absence of the accused. In the judgment of the appeal itself it has been mentioned that the process was send to the revisionist and the service on him was found to be sufficient by refusal. Admittedly, since the release of the revisionist from the jail after 2017 till today he has not appeared before the court. He is absconding. Even in the revision the affidavit of Subhan Jamal, the nephew of the revisionist, has been filed in support of the prayer in the revision. Thus, it can be said that revisionist has not come in the revisional court with clean hands.

28. It is also argued by the learned counsel for the opposite party no. 2 that the medical report of the medical board, which was relied upon by the Juvenile Justice Board, does not bear the thumb impression/signature of the revisionist, which makes the report unreliable and in the absence of any medical report the court was bound to decide the age of the accused on the basis of other evidence present on record. A perusal of the medical report submitted by medical board clearly shows that it does not bear the thumb impression or signatures of the accused and this report is of no importance in the absence of the thumb impression or signatures of the convict/revisionist.

29. In compliance of court's order dated 24.05.2012 passed in Criminal Writ -

Public Interest Litigation No. 855 of 2012, the list of 18 persons was prepared in the Central Jail Agra and the age of these 18 persons was to be determined to be below 18 years by the Principal Judge, Juvenile Justice Board. As per the learned counsel for the opposite party no. 2 this list did not include the name of the present revisionist and he, with the ill intention against the order of this court, moved an application through Jail Superintendent before the Juvenile Justice Board to declare him juvenile. As the list of 18 persons prepared in the Central Jail, Agra, for assessing those persons to be juvenile on the date of the incident, is not placed before the court, so this argument of the learned counsel for the opposite party no. 2 has no force.

30. However, this is admitted fact that the division bench of this court vide order dated 24.05.2012 in Criminal Writ - Public Interest Litigation No. 855 of 2012, held for determination of age of the persons, who may be below 18 years of age on the date of commission of offence and who appear to be wrongly lodged in the regular prisons for adults. It was clearly opined by the division bench that the prosecution and the **complainant** will also, of course, be given an opportunity to examine their own witnesses and to cross-examine the witnesses, who have been got examined on behalf of the accused and for that purpose notice of the proceedings before the J.J. Board shall be served on the complainant/ prosecution. Admittedly and also from perusal of the impugned order dated 22.04.2017 the presence of the complainant or his counsel is not noted therein. However, learned ADGC is shown to be heard while passing order dated 22.04.2017, but in compliance of this court's order dated 24.05.2012 the complainant was neither heard nor given a notice before being heard. This is not the version of the revisionist also that the complaint was served or his counsel was heard at the time of passing order dated 22.04.2017. There is nothing on record to show that before determination of age of the accused the complainant/opposite party no. 2 was ever heard. Thus, order dated 22.04.2017 was clearly an exparte order wherein the complainant was never given an opportunity of appearing or being heard, wherein in the present appeal it is clear finding of the appellate court that the service on revisionist was found sufficient by refusal.

31. It is also argued by the learned counsel for the opposite party no. 2 that the Juvenile Justice Board, Agra had no jurisdiction to determine the age of the accused as the matter belonged to District Meerut and it was after conviction from Meerut District Court only that the accused was lodged in Central Jail, Agra. This fact does not give authority to Juvenile Justice Board, Agra to hear the application of age determination of the accused/convict.

32. In this regard, para-2 of Section 7A(1) is apposite to mention here as under:-

[7A. Procedure to be followed when claim of juvenility is raised before any court.- (1) .....

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

33. From the above provision, the word 'any court' means the trial court/High Court/Apex Court. It does not mean that any court in U.P. wherever a person wants an application to be moved he could move the same. As the case belonged to District Meerut and it was decided by the District Court Meerut, the District Court, Meerut/Principal Magistrate, Juvenile Justice Board, Meerut only had jurisdiction to decide the question of juvenility of the applicant. Thus, the order dated 22.04.2017 passed by the Principal Magistrate, Juvenile Justice Board, Agra was an order passed without jurisdiction.

34. It is however further argued by the learned counsel for the opposite party no. 2 that as per the statement under Section 313 Cr.P.C. of the accused he disclosed himself to be 26 years old on 16.05.2006, thus, according to his own admission his age on the date of incident becomes about 22 years and 11 months. In the voter list also in the year 2017, his age is shown to be 40 years, thus, his age becomes 26 years on the date of incident. As per the judgment of the trial court, the revisionist was acquitted for the offence under Section 25 of Arms Act on the ground that he was having a valid gun license in his name. This fact is not opposed by the learned counsel for the revisionist. As gun license is issued in favour of a major person so on this basis also accused was claimed to be major on the date of incident.

35. Again the attention of the court is drawn that the present revisionist by the name Gulam Shahjad @ Kaliya s/o Jamiluddin has put his thumb impression on agreements to sale dated 20.09.2000 and 15.09.2000 and on a revocable power of attorney dated 27.08.1998. All these documents on record show that on the respective dates the revisionist was major and only then he put his signatures as a major person on the dates mentioned therein on the agreements to sale and the power of attorney. Thus, it was argued by the learned counsel for the opposite party no. 2 that in his statement under Section 313 Cr.P.C., in his valid gun license, on two agreement to sale and power of attorney, the revisionist by putting his thumb impression/signatures himself has admitted to be major on the date of incident.

36. Learned counsel for the revisionist, however, opposed these arguments and submitted that as the revisionist was minor on the date of incident, so he was not prudent enough to make an admission about his age.

37. However, the court is not convinced with this argument of the learned counsel for the revisionist.

38. In compliance of Rule 12 of the Rules, 2007, the revisionist was not having any matriculation or equivalent certificate or birth certificate from any school, corporation, municipal board or panchayat. In absence of these documents his medical was done by the medical board and that medical report does not bear the thumb impression/signature of the accused thereby the presence of the revisionist at the time of medical examination by the medical board cannot be ascertained. Otherwise also, as per above discussion, the age of a person by medical examination can be accurately determined only if he is about 18 years of age and a person, who is shown to be 29 years of age at the time of examination by the medical board, his age cannot be determined by precision. In the light of Section 7A of the Act, on his appearance in the trial court the court never assessed him

to be a juvenile to make an inquiry for determination of his age. As per Section 7A of the Act at the time of enquiry the court may take such evidence as it thinks necessary, so as to determine the age of such person and shall record a finding whether the person is juvenile or not. In the present case also, the Appellate Court has clearly reached at a conclusion that at the time of determination of age the complainant was not given a notice while at the time of appeal the revisionist intentionally did not appear before the court even after service by refusal and kept absconding after the non bailable warrants were issued against him by the court concerned. The appellant court found the statement of the revisionist under Section 313 Cr.P.C. and license of DBBL gun issued in the name of revisionist before the date of incident, to be an admission on the part of the accused revisionist of being major on the date of incident. Apart from this, in this court again two agreement to sale and one power of attorney have been placed which bear the thumb impression of the revisionist this again indicates that the revisionist was major before the date of incident as he was putting his thumb impression on the above mentioned documents independently and not under the guardianship of any other person claiming to be minor.

39. Thus, on the basis of judgement in Ram Vijay Singh (supra) and in absence of any document mentioned in Rule 12 (3a) of Rules, 2007, the only document before the trial court was the report of medical board that was also found to be suspicious not bearing the thumb impression of the revisionist and in the absence of all documents mentioned in Rule 12 above, in the light of Section 7A of the Act, on the basis of evidence produced before the appellate court, the appellate court, in the opinion of this court, has rightly reached at a conclusion that the revisionist was not a juvenile on the date of incident.

40. In the opinion of this court, the appellate court has rightly placed reliance on the evidence on record other than the medical examination report of the accused and has reached at a right conclusion.

41. The question whether in the presence of the report of medical examination by the medical board the appellate court could find the revisionist major on the date of incident on the basis of other evidence on record, is decided in affirmative.

42. There is no illegality, irregularity or improprietary in impugned judgment/order.

43. The revision having no force is liable to be dismissed.

44. The revision is hereby **dismissed.**

(2023) 4 ILRA 494
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE GAJENDRA KUMAR, J.

Criminal Misc. Writ Petition No. 3238 of 2023

M/s Balmokand Faqir Chand ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Prakash Dwivedi, Sri Pranshu Dwivedi, Sri H.N. Singh, Sr. Advocate

Counsel for the Respondents:
G.A.

(A) Criminal Law – Constitution of India,1950 - Article - 226 - U.P. Gangsters and Anti Social Activities Prevention Act, 1986 - Sections 14, 14(3), 15, 15(1), 15(2), 16 & 17 - Writ Petition – for quashing the order by which district magistrate directed to appoint an Administrator under Gangster Act, - sale deed - petitioner claims to be the statutory tenant of the shop - interest in the shop in question has been claimed - on the basis of Police report and recommended by the Senior Superintendent of Police - shop has been attached by DM - Respondent no.6 was reported to be a criminal, who had amassed huge property by indulging in cheating hapless persons and was also indulging in anti-social activities – petitioner moved representation for appointment of the administrator, but same was declined by the district magistrate - held, Court shall fix a date for enquiry and give notices thereof and also to any other person whose interest appears to be involved in said property after due enquiry under Act - Court shall also make delivery to any other person entitled to possession thereof or otherwise - hence, Order passed by District Magistrate to be correct and does not warrant any interference - Petitioner avails the statutory remedy available to him, same should have been considered by the concerned District Magistrate and will pass the order in light of provisions contained in Section 14(3) of the aforesaid Act – in above terms, Petition dismissed.

Writ Petition Dismissed. (E-11)

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

1. Heard learned counsel for the petitioner and learned AGA for the State-respondents.

2. The instant writ petition has been filed with the following prayer:-

"(a) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 20.01.2023 passed by the District Magistrate, Agra in Case No.11270 of 2022 (State Vs. Mohd. Shan alias Sanno) (Annexure No.11 to the writ petition).

(b) Issue a writ, order or direction in the nature of Mandamus commanding the District Magistrate, Agra to appoint an Administrator under Section 14(3) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 in respect of the shop in the name of M/s. Balmokand Faqir Chand, 3/43-A, Kacheri Ghat, Police Station-Chhatta, District-Agra within a period of time specified by this Hon'ble Court.

(c) Issue a writ, order or direction in the nature of Mandamus commanding the respondents to direct the Administrator appointed to realize the rent of the shop in question from the petitioner month to month and deposit the same in the public exchequer.

(d) Issue any other writ, order or direction which this Hon'ble Court may deem fit in the facts and circumstances of the case.

(e) To award the cost of the writ petition to be paid to the petitioner.

3. The facts of the case as emerging from the impugned order are that on the basis of police report of SHO, P.S.-Mantola, District-Agra dated 27.9.2022 which was forwarded and recommended by the Senior Superintendent of Police, Agra vide order dated 03.10.2022, the respondent no.6 was reported to be a criminal, who had amassed huge property by indulging in cheating hapless persons and was also indulging in anti-social activities. Petitioner is a partnership firm in the name and style of M/s. Balmokand Faqir Chand, 3/43-A, Kacheri Ghat, duly registered under the Partnership Act, 1932 and is dealing the

business of Edible Oils. Counsel for the petitioner has contended that the District Magistrate has passed the impugned order on the report prepared by respondent no.4 and approved by the Senior Superintendent of Police, Agra (respondent no.3) on 20.01.2023. The said property has been attached on the ground that the same was acquired by money earned out of criminal activity, whereas the petitioner or its partner is not the accused in the Gangster Act and the First Information Report has been registered against respondent no.6 (Mohd. Shan), who has purchased the building in question, in which, shop is situated from successors of Gopi Nath Agarwal on 11.02.2019, whereas the tenancy is from 1948. It is further contended that there is rent receipts in favour of the Firm available on record. It is further contended that successor of Late Gopi Nath Agarwal by sale deed dated 11.02.2019, has transferred the aforesaid House/shop Nos.3/43, 3/43-A, 3/43-A/1 in favour of respondent no.6 (Mohd. Shan) having total area of 161.62 sq. meters, out of which, 17.82 sq. meter is commercial shop, for which, petitioner is continuously paying rent to respondent no.6 @ Rs.2000/- per month, copies of receipts issued by respondent no.6 have been annexed as Annexure-6 to the writ petition. Thereafter, petitioner had moved a representation claiming himself to be the bona fide tenant before the District Magistrate, Agra, but the same was rejected by the District Magistrate, Agra considering the fact that petitioner is not a bona fide tenant and he does not come within the purview of Section 15(1) of the Act. It is further submitted that finding recorded by the District Magistrate, Agra that petitioner is not a bona fide tenant is misconceived as the District Magistrate has omitted to consider the affidavit as well as the license granted by the Department which is renewed from time to time and also payment of GST regularly paid by the petitioner's firm, which clearly proves that the petitioner-firm is the tenant of the shop in question and the business was being run therein. Under such circumstances, the impugned order is liable to be quashed.

4. On the other hand, learned A.G.A. opposed the contention aforesaid and submitted that petitioner is neither owner nor claimant of the aforesaid property and as a tenant he is not entitled to get the property released in his favour or to get the Administrator appointed for the said purpose as on the satisfaction of the District Magistrate, Agra that attached properties had been acquired as a result of commission of an offence triable under the Act. Therefore, order passed by the District Magistrate, Agra is in accordance with law and does not suffer from any infirmity.

5. In order to appreciate the rival submissions, it seems to be just and expedient to refer to the relevant provisions i.e. sections 14, 15, 16 and 17 of the Act.

"14. (1) If the District Magistrate has reason to believe that any property , whether moveable or immoveable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

(2) The provisions of the Code shall, mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under sub-section (1) and the

Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. (1) Where any property is attached under section 14, the claimant thereof may within three months from the date of knowledge of such attachment make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

16. (1) Where no representation is made within the period specified in sub-section (1) of section 15 or the District Magistrate does not release the property under sub-section (2) of section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of section 14 or has ordered for release of any property under sub-section (2) of section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such Court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3) (a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub-section (2) or, as the case may be, to the person making the representation under section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under section 17 as may be just and necessary in the circumstances of the case.

(4) for the purpose of inquiry under sub-section (3) the Court, shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No. 5 of 1908), in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(C) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court orj office;

(e) issuing commission or examination of witness or documents;

(f) dismissing a reference for default or deciding it ex parte;

(g) setting aside an order of dismissal for default or ex parte decision.

(5) In any proceedings under this section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act,shall be on the person claiming the property, anything to the

contrary contained in the Indian Evidence Act, 1872 (Act No.1 of 1872) notwithstanding.

17. If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise. "

6. It is now well settled that the property being made subject matter of an attachment under section 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act. The District Magistrate has to record his satisfaction on this point. The satisfaction of the District Magistrate is not open to challenge in any appeal. Only a representation is provided for before the District Magistrate himself under section 15 of the Act and in case he refuses to release the property on such representation, he is to make a reference to the court having jurisdiction to try an offence under the Act. The Court, while dealing with the reference made under sub-section (2) of Section 15 of the Act has to see whether the property was acquired by a gangster as a result of commission of an offence triable under the Act and has to enter into the question and record his own finding on the basis of the inquiry held by him under section 16 of the Act. If the court comes to the conclusion that the property was not acquired by the gangster as a result of commission of an offence triable under the Act, the court shall order for release of the property in favour of the person from whose possession it was attached. If the conclusion of the court is otherwise, it may pass such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof or otherwise. This power has been conferred on the Court under section 17 of the Act. In other words, the attachment made under section 14 of the Act can be upset by the court after an inquiry under section 16 of the Act and in that situation the court has power to release the attached property in favour of the person from whose possession the property was attached.

7. The power of the Court to hold an inquiry under section 16 on the reference made by the District Magistrate is not an empty formality, which has a purpose behind it. The object behind providing the power of judicial scrutiny under section 16 of the Code is to check arbitrary exercise of the power by the District Magistrate in depriving a person of his properties and to restore the rule of law. Therefore, a heavy duty lies on the court to hold a thorough inquiry to find out the truth with regard to the question, whether the property was acquired by or as a result of the commission of an offence triable under the Act. This order to be passed under section 17 of the Act must disclose reasons and the evidence in support of the finding of the court. The Court is not expected to act as a post office or mouthpiece of the State or the District Magistrate. If a person has no criminal history during the period the property was acquired by him, how the property can be held to be a property acquired by or as a result of commission of an offence triable under the Act is a pivotal question which has to be answered by the Court. Besides the aforesaid question, the other important question to be considered

by the Court is whether the property which was acquired prior to the registration of the case against the accused under the Act or prior to the registration of the first case of the gang chart, can be attached by the District Magistrate under section 14 of the Act.

8. In the instant case, the petitioner claims itself to be the statutory tenant of the shop since 1948, therefore, interest in the shop in question has been claimed. The aforesaid shop has been attached by the District Magistrate, Agra, thereafter, a representation was made by the petitioner for appointment of the Administrator, but the same was declined by the District Magistrate, Agra holding that petitioner is neither owner nor the claimant of the aforesaid shop. From the above provisions mentioned under sections 14 to 17 of the Act, it is apparent that on receipt of the reference, the Court shall fix a date for enquiry and give notices thereof and also to any other person whose interest appears to be involved in the said property after due enquiry under the Act. The Court shall make delivery to any other person entitled to the possession thereof or otherwise. As such, the order dated 20.01.2023 passed by the District Magistrate, Agra appears to be correct and does not warrant any interference by this Court.

9. So far as prayer made by the counsel for the petitioner regarding appointment of Administrator in respect of aforesaid property is concerned, this aspect has not been dealt with by the District Magistrate, Agra in his order dated 20.01.2023. In case, the petitioner avails the aforesaid statutory remedy available to him, the same should have been considered by the concerned District Magistrate and will pass the order in the light of the provisions contained in Section 14(3) of the aforesaid Act.

10. In above terms, as statutory remedy is available to him, the present petition deserves to be dismissed on this ground alone and it is accordingly **dismissed**.

(2023) 4 ILRA 499
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.03.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE RAJIV GUPTA, J.

Criminal Misc. Writ Petition No. 11743 of 2022

Satya Prakash Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.K. Baranwal, Sri Akhilesh Chandra Shukla, Sri Saurabh Chaturvedi, Sri I.K. Chaturvedi (Sr. Advocate)

Counsel for the Respondents:
G.A., Sri Akhilesh Chandra Shukla

(A) Criminal Law – Constitution of India, 1950 - Article 14, 226 - Prisons Act, 1894 - Section 55, Indian Penal Code, 1860 - Sections 34, 223, 224, 302 & 307 - Writ Petition – filed by petitioner who is a closed relative of the deceased and the nephew of the one of the informant and he has doing pairavi in the criminal cases upto High Court - challenging the impugned order of remission by which Governor remitted the remaining part of sentence of 8th respondent, on the ground that, 8th respondent is a hardened criminal and a history-sheet was also opened in his name and 9 other cases were pending against him - court hold that, remission has been granted to the contesting respondent on the basis of incomplete and false information provided by

the various jail authorities - hence, the impugned order granting remission/commutation cannot be sustained - petition allowed.(Para - 31, 32, 33, 34, 37)

(B) Criminal Law – Constitution of India, 1950 - Article - 14, 226 - Prisons Act, 1894 - Section - 55 - Indian Penal Code, 1860 - Sections 34, 223, 224, 302 & 307 - Writ Petition – for quashing the impugned order of remission/commutation passed by the St. Government - on the basis of wrong and incomplete information which was provided by the Jail authorities, on the basis whereof, remission was granted to the contesting respondent, although he was not entitled for the same - court finds that, this act of concealment and falsehood appears to be manifestly purposive - hence, court direct to the respondent no. 1 to institute an enquiry to indentify and to take appropriate action against the responsible person(s). - Directions issued, accordingly.(Para - 41, 42)

Writ Petition Allowed. (E-11)

List of Cases cited:

Ram Chander Vs St. of Chhattisgarh & anr., AIR 2022 SC 2017.

(Delivered by Hon'ble Anjani Kumar Mishra, J. & Hon'ble Rajiv Gupta, J.)

1. Heard Shri I. K. Chaturvedi, assisted by Shri V. K. Baranwal, for the petitioner, Shri Akhilesh Chandra Shukla, learned counsel for the respondent No. 8 and Mr. Pankaj Saxena, learned A.G.A. for the State.

2. The instant writ petition seeks a writ of certiorari for quashing of the order dated 28.05.2022 passed by respondent no.2, which has granted remission to respondent no.8 and has ordered for his release.

3. The 8th respondent, a life convict, was convicted in Sessions Trial No. 807 of 2000 under Section 304/34 and 307/34 IPC arising out of Case Crime No. 158 of 2000, Police Station-Sarai Inayat, District-Allahabad and was sentenced to life imprisonment for the offence under Section 302/34 IPC and for three years rigorous imprisonment for the offence under Section 307/34 IPC.

4. The remission granted to the 8th respondent has been challenged by the petitioner on the ground that the respondent is a hardened criminal and that a history-sheet was opened in his name being No. 7A at Police Station-Sarai Inayat, District-Allahabad.

5. It is also contended that the 8th respondent was brought from Fatehgarh Central Jail, District-Farrukhabad on 26.07.2010 for being produced in Court. He, however, fled from custody and a First Information Report was lodged on the same day at Police Station- Colonelganj, District-Allahabad, giving rise to Case Crime No. 319 of 2010 under Sections 223/224 of IPC. He was, arrested on the same day from Prayag Railway Station. After investigation, a charge-sheet was filed by the Police.

6. It is next contended that apart from the fact that the 8th respondent is a hardened criminal, he has been repeatedly transferred from one jail to another on account of his bad behaviour. It is averred in the writ petition that initially he was lodged in Central Jail Naini, from where he was transferred to Central Jail Fatehgarh, District Farrukhabad and from there to District Jail Bareilly and finally he was transferred to District Jail, Rampur.

7. The next contention is that remission/premature release has been obtained by the 8th respondent by concealing material facts in connivance with his brothers. One brother, namely Pawan Mishra is Head Jail Warden, in District-Bagpat while another brother, Vimal Mishra, is a Jail Warden in District Agra.

8. It is lastly submitted by learned counsel for the petitioner that remission has been granted to the 8th respondent placing reliance upon a Government Order 564/218/1106/22.02.2018-07G/2018 dated 01.08.2018. In view of Clauses 2(b) and 3(ix) of the GO, the 8th respondent could not have been granted remission. Clause 3(ix) provides that a convict who has absconded from custody is not entitled to remission. The order dated 28.05.2022, whereby the Governor is stated to have granted remission/commutation in exercise of power under Section 160 of Constitution of India is, therefore, clearly vitiated and is liable to be set aside.

9. The contention of Shri Akhilesh Chandra Shukla, learned counsel appearing for the 8th respondent is that the writ petition itself is not maintainable and that the petitioner has no locus to challenge the order impugned. He is not the first informant and is only the nephew of the first informant and a practising lawyer. The immediate relatives of first informant and the deceased in the crime for which the 8th respondent has been convicted have not come forward. The writ petition is based on mala fides. After the 8th respondent was released, illegal gratification to the tune of Rs. 5,00,000/- was demanded by the petitioner and on non-payment of the same, the instant writ petition has been filed.

10. On the merits of the writ petition, it has been stated that the remission granted to the 8th respondent is not hit by Clause 3(ix) of the policy framed by the Government for granting premature release/remission as he did not abscond from jail. He has at best absconded from judicial custody, even if the case of the petitioner is to be accepted in toto. Therefore, the guidelines framed by the Supreme Court and the State Government have been followed fully.

11. Moreover, the 8th respondent has already undergone 16 years of incarceration without remission which period with remission comes to almost 21 years.

12. It is next contended that there is no material on record to show that the contesting respondent was transferred from one jail to the other on account of bad conduct or behaviour. It is reiterated that the conduct of the 8th respondent has always been above board.

13. It is lastly submitted that the case of the petitioner having absconded when he was brought to the Civil Court Allahabad to be produced before the Court is a false and fabricated case which has been manipulated by the petitioner in connivance with the police. The contesting respondent did not abscond. On the contrary, the police personnel accompanying him left him unattended and thereafter, filed the false FIR against him.

14. In the counter affidavit filed, it has additionally been averred that the criminal appeal filed by the petitioner against his conviction and sentence was rendered infructuous after remission/ commutation was granted to the contesting respondent.

15. In rejoinder, the contention of the learned counsel for the petitioner is that the petitioner is the nephew of the first informant. After the death of the first informant, it is the petitioner who has been doing pairavi in all the cases pertaining to the murder of the Jay Prakash Tiwari, the deceased in Case Crime No. 158 of 2000 and has continued to do pairavi even in the criminal appeals filed by the convicts against their conviction. It is also stated that the son of the deceased was a minor at the time of incident.

16. In any case, the rejoinder affidavit in the instant writ petition has been sworn by the son of the first informant and therefore, the objection regarding the maintainability of the writ petition is liable to be rejected.

17. It is additionally submitted that the relevant material regarding at least 09 other cases having been registered against the contesting respondent and the fact that he absconded from judicial custody have not been mentioned in the records that were placed before the concerned authority while the application for the remission/commutation was being considered.

18. He has also placed reliance upon paragraph 138 of the Jail Manual which provides for transfer of a prisoner from one Jail to another. The said paragraph provides that the reason for transfer should always be communicated to the District Magistrate and the Superintendent of the District Jail to which the prisoner is transferred and should also be recorded on the history ticket of the prisoner concerned. Relying upon this provision, it has been submitted that no history ticket was prepared in the case of the petitioner which also shows the mala fides and the connivance of the brothers of the 8th respondent who are themselves Jail Wardens.

19. Learned AGA has produced the original record of the proceedings wherein remission/commutation has been granted to the 8th respondent, pursuant to the direction issued by this Court vide order dated 20.09.2022.

20. We have considered the submissions of the learned counsel for the parties and have perused the record and also perused the original record produced by the learned AGA.

21. Perusal of the GO of 2018, where under remission has been granted, provides that all prisoners who do not fall within the prohibited categories, as provided under Clause 3 and its sub-clauses, and who have completed 16 years of incarceration without remission, and 20 years of incarceration including remission are liable to be granted remission.

22. Clause 3(ix) provides that prisoners who are life convicts or are convicts and have absconded during their period of incarceration fall under the prohibited category meaning thereby, that they are not entitled for remission/commutation.

23. The issue which arises for consideration is whether 8th respondent absconded from Jail or whether the term jail would also include within it, the period when a prisoner is being transported for whatever reason.

24. It is not in dispute that the contesting respondent at the relevant point of time was a life convict and was serving

out his sentence. He was brought to Allahabad from Fatehgarh Central Jail, Farrukhabad to be produced in Court in a case, where-from he is alleged to have absconded. In this regard, it is relevant to refer to Section 55 of the Prisons Act, 1894, which reads as follows:-

"55. Extramural custody, control and employment of prisoners. *- A prisoner, when being taken to or from any prison in which he may be lawfully confined, or whenever he is working outside or is otherwise beyond the limits of any such prison in or under the lawful custody or control of a prison officer belonging to such prison, shall be deemed to be in prison and shall be subject to all the same incidents as if he were actually in prison."*

25. This provision is a complete answer to the submission made by learned counsel for the respondents as according to it, the 8th respondent would still to be deemed to be in jail at the moment he absconded. The submission of learned counsel for the petitioner is, therefore, without substance and is specifically repelled.

26. We have closely examined the original record produced by learned AGA.

27. The fact which emerges from the perusal of this original record is that the Jail Report, signed by the Medical Officer, District Jail, Rampur and the Chairman of the District Prisoners Committee, in column 10, mentions that that no other case is pending against the contesting respondent. The information provided in column 10 is, therefore, patently incorrect because it is admitted by the 8th respondent that as many as 09 other cases are registered against him and are pending before various Courts. In his counter affidavit, the 8th respondent has averred that these cases are fabricated and have remained pending over a long period as no one has come forward to depose in favour of the prosecution.

28. It would also be relevant to note that no history ticket appears to have been prepared, as is provided under Paragraph 138 of the Jail Manual. There is also no mention thereof in the original record produced before us. In fact, the Jail Report on record states that the contesting respondent is entitled to remission in view of para 2(b) of the Government Order dated 01.08.2018.

29. There is yet another report in Tabular form which purports to be a list of convicts entitled to be released on the occasion of Republic Day in pursuance of Government Order 564/218/1106/22.02.2018-07G/2018 dated 01.08.2018. Even this report states that the contesting respondent is entitled for remission in view of Clause 2(b) of the GO concerned. This report requires signature of 04 persons including the Deputy Inspector General of Prisons apart from junior officials. However, this document has not been signed by the Deputy Inspector General of Prisons.

30. There is also a certificate issued by the Superintendent District Jail Rampur in the original record produced which is undated. Column 6 of this Certificate is revealing. This column, in effect, seeks information regarding the restriction contained in Clause 3(ix) of the GO. The certificate states that the prisoner Kamal Mishra did not abscond during the period of his incarceration. The facts available on the record of this petition render this report, patently false.

31. Therefore, remission has been granted to 8th respondent, a life convict, on

the basis of incomplete and false material having been placed for consideration. The fact that as many as 09 other cases were pending against the contesting respondent and also the fact that he has been charge-sheeted in a case under Section 223/224 of IPC, do not find mention in the jail reports. The failure to report these two aspects in the Jail reports can only be said to be purposive concealment.

32. There is yet another aspect of this issue. As already observed, the remission/commutation has been granted by the State Government on account of false information insofar as the 8th respondent having absconded is concerned and also the fact that report states that no criminal case is pending against the contesting respondent, contrary to the averment in the writ petition and admitted in the counter affidavit and also because information which was relevant had been withheld by the jail authorities. At least one of the documents that has been relied upon for granting remission to the contesting respondent has not been signed by the Deputy Inspector General of Prisons, although, the form in which the information has been submitted clearly requires him to be one of the co-signatories. It cannot be said that the Deputy Inspector General of Prisons was not required to sign the document. The Jail Certificate which has been relied upon to grant remission to the contesting respondent also furnishes false information insofar as it mentions that the contesting respondent, the convict, never absconded during the period of his incarceration.

33. Under the circumstances, we are constrained to hold that remission has been granted to the contesting respondent on the basis of incomplete and false information provided by the various jail authorities. The State Government has manifestly granted remission/commutation to the 8th respondent relying upon the reports which state that the 8th respondent is entitled to said release under Clause 2(b) of the relevant GO of 2018.

34. We would also like to refer to the decision of the Apex Court in ***Ram Chander Vs. State of Chhattisgarh & Another,*** AIR 2022 SC 2017. Paragraph 12 of this judgmet reads as follows:-

"12. While a discretion vests with the government to suspend or remit the sentence, the executive power cannot be exercised arbitrarily. The prerogative of the executive is subject to the rule of law and fairness in state action embodied in Article 14 of the Constitution. In Mohinder Singh (supra), this Court has held that the power of remission cannot be exercised arbitrarily. The decision to grant remission should be informed, fair and reasonable. The Court held thus:

"9. The circular granting remission is authorized under the law. It prescribes limitations both as regards the prisoners who are eligible and those who have been excluded. Conditions for remission of sentence to the prisoners who are eligible are also prescribed by the circular. Prisoners have no absolute right for remission of their sentence unless except what is prescribed by law and the circular issued thereunder. That special remission shall not apply to a prisoner convicted of a particular offence can certainly be a relevant consideration for the State Government not to exercise power of remission in that case. Power of remission, however, cannot be exercised arbitrarily. Decision to grant remission has to be well

informed, reasonable and fair to all concerned."

35. We also do not find any substance in the submission made by counsel for the respondent on the question of locus of the petitioner to maintain the writ petition. The petitioner is definitely a close relative of the deceased and the nephew of the first informant in Case Crime No. 158 of 2000. He has also appeared in the witness box as PW No.2 during trial. He is also said to have been doing pairavi in the criminal cases even up to the High Court even in pending appeal which fact is not denied.

36. There is substance in the contention of learned counsel for the petitioner that it cannot be said that the petitioner alone is challenging the impugned order because even the son of the deceased who was minor at the time of incident has supported the writ petition having sworn the rejoinder affidavit which is filed on record.

37. For the foregoing reasons, in our considered opinion, the impugned order granting remission/commutation to the 8th respondent cannot be sustained.

38. The writ petition is liable to be allowed and is hereby allowed. The impugned order dated 28.05.2022 is hereby set aside.

39. No order as to costs.

40. The original record produced by learned AGA be returned to him forthwith after obtaining his signatures on the order-sheet evidencing receipt thereof.

41. In the body of the judgment, we have observed that wrong and incomplete information was provided by the jail authorities, on the basis whereof, remission was granted to the contesting respondent, Kamal Mishra, although he was not entitled for the same, and this act of concealment and falsehood appears to be manifestly purposive.

42. It, therefore, appears fit and proper to direct the respondent no.1, Principal Secretary, Prison Administration and Reform, Section 2, U.P. Government, Lucknow, to institute an enquiry to identify and to take appropriate action against the person(s) responsible for such falsehood and concealment. This is being directed as the Apex Court has held that: "Decision to grant remission has to be well-informed, reasonable and fair to all concerned."

(2023) 4 ILRA 505
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Misc. Writ Petition No. 14644 of 2019

Zaved Akhtar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Mishra, Sri Akhilesh Kumar Mishra

Counsel for the Respondents:
G.A.

(i) Criminal Law – Constitution of India,1950 - Article 19(1)(a), 19(1)(d), 21, 226, - Criminal Procedure Code,1973 - 110-G, - Indian Penal Code,1860 - Sections 147, 324, 325, 504 & 506 – U.P. Police Regulations,1861 - Para 228, 238 -

Writ Petition - to quash the history-sheet issued against petitioner in class B Category - the act of opening Class B history-sheet against the petitioner was erroneous without the facts being verified and without reasonable satisfaction being reached by the respondents - court finds that, in the give facts and circumstances and having regard to the nature of the cases lodged against the petitioner would not fall within the ambit of Regulations 228 to have persuaded the St. Authorities to open Class B history sheet against the petitioner - hence, impugned charge-sheet is quashed, direction accordingly.(Para – 10, 11, 12)

Writ Petition Allowed. (E-11)

List of Cases cited:

Munna Lal Gupta Vs St. of UP & ors. (2016 vol. 4 ADJ (NOC) 46).

(Delivered by Hon'ble Suneet Kumar, J. & Hon'ble Syed Waiz Mian, J.)

1. Heard learned counsel for the parties.

2. This is the third writ petition filed by the petitioner seeking to quash the history-sheet No. 18/B, P. S.-Kotwali Dehat, district-Bijnor opened against the petitioner.

3. The history-sheet has been prepared in Class-B category noting therein the following cases:

(i) Case Crime No. 74A/1995, under Sections-324, 325, 504, 506 and 147 I. P. C.

(ii) Case Crime No. 160 of 2015, under Section-110G Cr. P. C.

4. It is submitted that the history-sheet in Class B category could not have been opened against the petitioner as the history-sheet is not in accordance with the provisions of Paragraph 228 of the U. P. Police Regulations, which read as under:

"**Para 228. History sheet and surveillance:** Part V consists of history sheets. These are the personal records of criminals under surveillance. History-sheet should be opened only for persons who are or likely to become habitual criminal or abettors of such criminals. There will be two classes of history-sheets.:

(1) Class A history-sheets for dacoits, burglars, cattle-thieves, railway-goods wagon thieves, and abettors thereof.

(2) Class B history-sheets for confirmed and professional criminals who commit crimes other than dacoity, burglary, cattle-theft, and theft from railway goods wagons, e. g., professional cheats and other experts for whom criminal personal files are maintained by the Criminal Investigation Department, poisoners, cattle poisoners, railway passenger thieves, bicycle thieves, expert pick-pockets, forgers, coiners cocaine and opium smugglers, hired ruffians and goondas, telegraph wire-cutters, habitual illicit distillers and abettors thereof.

5. History-sheets of both classes will be maintained in similar form, but those for class B will be distinguished by a red bar marked at the top of the first page. No history-sheet of class B may be converted into a history-sheet of class A, though should be the subject of a history-sheet of class B be found to be also addicted to dacoity, burglary, cattle-theft or theft from railway goods wagons. A class, as well as B Class, surveillance may under paragraph 238 be applied to him. In the event of a class A history-sheet man becoming addicted to miscellaneous crime his history-sheet may be converted into a class

B history-sheet with the sanction of the Superintendent.

6. Further Regulation 228 provides that Class-B history-sheet can be opened only against the confirmed and professional criminal, who had committed a crime of dacoity, burglary, cattle theft or theft from railway goods, wagons etc. or who is expert or habitual offender in other crimes as mentioned in this paragraph.

7. In this backdrop, it is submitted that in the sole criminal case, petitioner came to be acquitted by the competent Court. Further it is submitted that the petitioner has been falsely implicated due to village party bandi at the behest of Gram Pradhan. In the counter affidavit filed by the State Government, it is not in dispute that the petitioner came to be acquitted and at present there is no case pending against him.

8. It is stated that the history-sheet in Class-B could not have been opened as the petitioner is neither a habitual or professional criminal indulging in criminal activities. It is not the case of the respondent-State that the petitioner was found guilty in any of the offences. In the past seven years, no criminal activity of the petitioner was ever been reported or any other anti-social activities. It is further submitted that opening of the Class-B history-sheet against the provisions of Regulation 228 violates the provisions of Article 19 (1) (a) of the Constitution of India that protects the fundamental right to freedom of speech and expression of a citizen. Further Article 19 (1) (d) of the Constitution which confers right to move freely throughout the territory of India and Article 21 of the Constitution of India that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'

9. It is specifically pleaded that the petitioner and his family members are being deprived of character certificates only for the reason that the petitioner's name is recorded in Class-B history-sheet. In this backdrop, it is submitted that petitioner is being deprived of his right to freedom. Reliance has been placed on a Division Bench decision of this Court rendered in **Munna Lal Gupta Versus State of U. P. and others; 2016 4 ADJ (NOC) 46.**

10. Having regard to the facts and circumstances of the case and stand of the respondent-State, we are of the opinion, that the act of opening Class B history-sheet against the petitioner was erroneous without the facts being verified and without reasonable satisfaction being reached by the State-respondent. The history-sheet was never reviewed because rules provide that Class B history-sheet shall continue till death.

11. We are of the view that in the given facts and circumstances and having regard to the nature of the cases lodged against the petitioner, he would not fall within the ambit of Regulation 228 to have persuaded the State authorities to open Class B history-sheet against the petitioner.

12. Hence, history-sheet No. 18/B, P. S.-Kotwali Dehat, district-Bijnor opened against the petitioner is quashed. The State respondents are directed to close the present history-sheet of the petitioner and not to keep surveillance on the petitioner in pursuance of the said history-sheet.

13. Writ petition is allowed.

(2023) 4 ILRA 508
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.04.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

First Appeal From Order No. 189 of 1993
alongwith
First Appeal From Order Nos. 190 of 1993, 191 of 1993, 193 of 1993, 196 of 1993 & 198 of 1993

Radhey Shyam Jawarani & Ors.
...Appellants
Versus
Walliguru Khan & Ors. ...Respondents

Counsel for the Appellants:
S.P. Shukla, Abhishek Dhaon, Sankalp Mehrotra

Counsel for the Respondents:
M.S. Kotwal

A. Civil Law - Motor Vehicles Act, 1989- Section 173-enhancement of award- Tribunal without any basis awarded a sum of Rs. 1,78,000/- towards non-pecuniary benefits which is contrary to the settled principles as laid down by the Apex Court-the claimants shall be entitled to a total compensation of Rs. 7, 53, 835 which shall carry interest @ of 9% per annum from the date of application till the date of its actual payment-the claimants shall be entitled to recover the total compensation from either of the two joint tortfeasor and any of the two joint tortfeasor who satisfies the award shall be entitled to recover the 50% of the award from the other joint tortfeasor in accordance with law as settled by the Apex Court in Khenyei.(Para 1 to 71)

The writ petition is partly allowed. (E-6)

List of Cases cited:

1. Khenyei Vs New India Ass. Co. Ltd. & ors. (2015) 9 SCC 273

2. Smt. Suman & ors. Vs Smt. Anisa Begum & Another, FAFO No. 126 of 2010

3. National Ins. Co. Ltd. Vs Pranay Sethi (2017) 16 SCC 680

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

1. This is a bunch of six appeals preferred under section 173 of the Motor Vehicles Act 1989. Three appeals have been preferred by the claimants seeking enhancement of the award whereas the other three appeals have been instituted by the insurance company assailing the award. Since the issue of enhancement shall come subsequent as it first has to be determined whether the award passed by the Tribunal is in order. In case if the award survives only then the issue of enhancement shall be considered and in view thereof this Court proposes to take up the three appeals first which have been preferred by the insurance company.

2. The record would indicate that in the appeals filed by the Insurance Company, an application for substitution has been moved as the respondent no. 3 Sri Kungoo Mal had expired and he is survived by his son Radhey Shyam Jawarani. Significantly, despite the applications having been moved by the Insurance Company in the appeals filed by them yet the appellants of the other three appeals which have been filed by the claimants have not moved similar application for substitution.

3. Be that as it may, considering that the application for amendment is on record in few appeals which are being allowed as there is no issue of abatement as the legal

heir is already on record, consequently, the said application shall also enure to the benefit of three other appeals filed by the claimants. The learned counsel for the appellant Sri I.P.S. Chaddha is permitted to carry out the necessary amendment in all the six appeals during the course of the day.

4. To put the controversy in a perspective, certain brief facts giving rise to the instant appeals are being noticed hereinafter: -

5. On 02.01.1992, Sri Radheshyam Jawarani was driving a Fiat car bearing number UGC 2184 and was returning from Lucknow to Sitapur. The said car belonged to Sri Kungoo Mal, the private respondent no 3 in the claim petition. Shri Kungoo Mal is the father of Radheshyam Jawarani. Radheshyam Jawarani was travelling along with his wife Janki and his two daughters and a son. It is also the case that on the fateful day that is 02.01.1992 when the car being driven by Radheshyam Jawarani had reached near Village Barabhari P.S. Kairabad on Lucknow Sitapur Road at the relevant time a truck bearing number UP 77/9256 was parked in the center of the road. The truck did not have any of its indicators or any reflectors to caution that the truck was stationary on the road. However, a small boy suddenly dashed across the road from one side to another and in order to save the said boy, the car of Radheshyam Jawarani dashed with the stationary truck. It is in this accident that Radheshyam and his son Gaurav sustained injuries whereas his wife Janki sustained grievous injuries and while she was taken to the district hospital at Sitapur, where she was declared dead.

6. It is in respect of this accident that three claim petitions came to be filed before the Motor Accidents Claims Tribunal/4th ADJ, Sitapur, (I) Claim petition No. 66/92 was filed by Radheshyam along with his daughters and sons for the compensation on account of death of Smt. Janki. (II) Claim petition bearing No. 67/92 was filed by Radheshyam for the injuries sustained by him. (III) Claim petition bearing No. 68/92 was filed by Gaurav for the injuries sustained by him.

7. After due contest, claim petition No. 66/1992 was allowed and the Tribunal awarded a sum of ₹ 5,36,100/-along with interest at the rate of 15% per annum. This award dated 25.05.1983 has been challenged by the Insurance Company in F.A.F.O. No. 193 of 1993 whereas the said award is under challenge seeking enhancement in F.A.F.O. No. 189 of 1993 filed by the claimants.

8. The claim petition No. 67/92 filed by Radheshyam for the injuries sustained by him was allowed and a sum of Rs. 40,000/- was awarded by the Tribunal along with interest at the rate of 15% per annum and this award dated 25.05.1993 is challenged by the Insurance Company in F.A.F.O. No. 190 of 1993 whereas the said award is challenged by the claimant seeking enhancement in F.A.F.O. No. 198 of 1993.

9. The Claim petition No. 68/92 filed by Sri Gaurav Zawrani for the injuries sustained by him was also allowed for a sum of Rs. 40,000/- along with interest at the rate of 15% per annum and this award dated 25.05.1993 challenged by the Insurance Company in F.A.F.O. No. 191 of 1993 whereas the said award dated 25.05.1993 is challenged by the claimant seeking enhancement in F.A.F.O. No. 196 of 1993.

10. Thus, it would be seen that F.A.F.O. Nos. 189 of 1993, 198 of 1993 and 196 of 1993 are the three appeals which have been filed by the claimants for seeking enhancement of the awarded sum vide award dated 25.05.1993. On the other hand three appeals have been filed by the insurance company bearing number 193 of 1993 which assails the award passed in claim petition No. 66 of 1992. The F.A.F.O. 191 of 1993 arises out of the award passed in Claim Petition No. 68 of 1992 relating to the award passed in favour of Gaurav and the appeal bearing number 190 of 1993 challenges the award passed in Claim Petition No. 67 of 1992 relating to the award in favour of Radheshyam for the injuries sustained by him.

11. It is in the aforesaid backdrop, as all the six appeals arise out of the same accident relating to the same parties in question and involving similar questions of both law and fact therefore this court has clubbed together all the six appeals which have been heard together and are being decided by this common judgment.

12. The court for the sake of convenience is taking up the three appeals preferred by the insurance company that is bearing F.A.F.O. No. 193 of 1993, F.A.F.O. No. 191 of 1993 and F.A.F.O. No. 190 of 1993 first.

13. Shri IPS Chaddha learned counsel appearing for the insurance company has assailed the award dated 25.05.1993 in the three appeals on primarily two grounds. It is urged by the learned counsel that the Tribunal fell in error in passing the award in Claim Petition No. 66 of 1992 which related to the compensation on account of death of Smt. Janki. It is submitted that Smt. Janki was travelling in the car which belonged to Sri Kungoo Mal and as the insurance policy did not cover any other person other than the driver, hence, no compensation could have been awarded on account of death of Smt. Janki. It is also submitted that there is a clear finding that the accident had occurred wherein the driver of the car which is insured by the insurance company was not negligent even then the award has been passed against insurance company which is not sustainable.

14. It is submitted that as per the version in the claim petition ,the Fiat car was being driven by Radheshyam and in order to save a boy who suddenly crossed the road, Radheshyam dashed with the stationary truck. The Tribunal has also returned a finding that in the said accident Radheshyam was not negligent rather it was the offending truck which was parked in the centre of the road which caused the accident and for the said reason without fastening the entire liability on the truck owner and in absence of impleading the insurer of the said truck, the award passed against the appellant insurance company is bad in the eyes of law.

15. It is also urged that if at all the award is to be satisfied the same was the liability of the insurer of the truck or its owner and it could not be fastened on the insurance company who had insured the Fiat car bearing No. UGC 2184.

16. It is also submitted that where no negligence has been attributed to the car owner which is insured with the appellant and it is also not a case of contributory negligence yet apportioning half of the awarded sum on the appellant and the other half on the owner of the offending truck is erroneous and by doing this the Tribunal

has completely misdirected itself which has resulted in miscarriage of justice.

17. In so far as the award passed in the case of Smt. Janki is concerned, it is submitted by Sri Chaddha that the Tribunal has awarded a total sum of Rs. 5,36,100/- but from a bare perusal of the award, it would indicate that the Tribunal has arrived at the aforesaid sum by resorting to surmises and conjectures. There is no proper consideration and even otherwise on the given facts and the material on record there was no question of any enhancement, inasmuch, as it would indicate that the Tribunal has erroneously awarded a sum of Rs. 1,78,100/- towards non-pecuniary benefits but has disclosed no reason as to how the aforesaid amount has been arrived at.

18. The ground upon which the award passed in the claim petitions filed by Radheshyam and Gaurav is concerned, it is urged that Radheshyam and Gaurav could not establish any injury sustained by them nor did they lead any evidence regarding their injuries, treatment and in absence of any documentary evidence to establish the same, the amount which has been awarded is not appropriate and is hugely excessive rather the claim petitions ought to have been dismissed for want of evidence.

19. It is further urged that a mere statement was recorded in evidence that Sri Radheyshyam had spent a sum of Rs. 60,000/- on his treatment and on the treatment of his son Gaurav. It is also urged that it is alleged that the said treatment was made in the nursing home at Lucknow but there is no document to indicate whether the claimant Radheshyam and Gaurav were ever admitted or treated in the said nursing home as there is no evidence oral or documentary to indicate the date upon which they were admitted or were under treatment. There is no prescription nor there is any receipt for the medicines bought. It is alleged that Radhey Shyam had six broken teeth but there is nothing to substantiate it, accordingly, there is no question of enhancement of the award rather the amount which has been awarded also deserves to be set aside as without establishing the injuries as well as the amount spent on the treatment, the award could not have been passed.

20. Thus, it is submitted that the Tribunal has erred in fastening the liability of the award on the appellant company. it is urged that the award cannot be enhanced and in light of the submissions made in context with the appeals preferred by the insurance company wherein the award has been challenged, the award itself deserves to be set aside and the appeals of the insurance company deserves to be allowed whereas the three appeals preferred by the claimant respondents deserves to be dismissed.

21. Shri Sankalp Mehrotra, learned counsel appearing for the claimant-respondents has submitted that the submission of the counsel for the insurance company is not tenable for the reason that it was a clear case of composite negligence and in the aforesaid circumstances it is open for the claimants to seek the awarded sum from either the truck owner or the car owner. It is urged that insofar as the claim petition relating to death of Smt. Janki is concerned, since she was travelling in the car and was a third party and there is a clear finding that she had not contributed to the accident in any manner as the car was being driven by Radheshyam, thus, it being a case of composite negligence as a result

of which Smt. Janki expired leaving behind her legal heirs who are the claimants and they are entitled to claim the compensation and also recover the same from the insurance company as the car involved bearing No. UGC 2184, in question, was insured and involved in the mishap.

22. It is also submitted that the car was badly damaged and the appellant company has already cleared the claim for the damage and loss occurred to the car and as such at this stage it is not open for the insurance company to allege that the insurance company is not going to honour the award. It is further submitted that insofar as the injuries sustained by Radheshyam and Gaurav was concerned, their claim petition have been rightly allowed as it was clearly established by the evidence on record that they had sustained injuries and for the aforesaid reasons the appeals filed by the insurance company deserve to be dismissed.

23. Shri Mehrotra learned counsel for the claimants while pressing his appeals for enhancement submits that the Tribunal has erred in directing 50% of the amount awarded to be recovered from the appellant insurance company and though it was a case of composite negligence and apportioning the liability inter-se between the truck owner and the insurance company of the car could have been done but the rights of the claimant-appellants could not be limited to 50% rather the claimants are entitled to receive the entire sum from either the insurance company or the truck owner or both and it would be open for the insurance company or the truck owner to recover the apportioned part from the other, as the case may be, after satisfying the award in full to the claimants and to the aforesaid extent, the award requires to be modified.

24. It is also submitted that Smt. Janki was an income tax payee and she had her own income and considering her age, while awarding compensation future prospects have not been provided nor the Tribunal has awarded appropriate sum towards non-pecuniary benefits, thus the award deserves to be enhanced for non-pecuniary benefits after factoring her future prospects.

25. It is also submitted that the Tribunal has erred in not awarding appropriate compensation towards injuries sustained by Radhey Shyam and Gaurav and though a sum of Rs. 60,000/- was claimed in respect of the two claim petitions but only a sum of Rs.40,000/- each awarded which is on the lower side and accordingly the award deserves to be enhanced in this respect as well.

26. The Court has heard the learned counsel for the parties and also perused the material on record.

27. In order to resolve the controversy, the facts as pleaded by the parties, require to be noticed.

28. To recapitulate, it is the case of the claimants-appellants that on the fateful day i.e. 02.01.1992 Sri Radhey Shyam Jawarani was driving his Fiat Car bearing No. UGC 2184 and in the said Car his wife Smt. Janki, his son Sri Gaurav Jawarani and his two daughters and a servant were returning from Lucknow to Sitapur. As soon as the car neared Village Barabhari, P.S. Khairabad on Lucknow Sitapur road, a small boy suddenly rushed to cross the road and in order to save the said boy, Sri Radhey Shyam Jawarani hit the stationary truck which was parked in the centre of the road and that too without any indicators or

any reflector to put the people to notice that the truck was stationary.

29. It is also the case of the claimants that the accident was an outcome of negligence of the truck driver as there was no occasion for the truck driver to park the truck in the centre of the road and noticing that the accident occurred on 02.01.1992 i.e. during winter time when the sun sets early and at the relevant time i.e. 06:30-07:00 PM, it was dark and without proper indicators or reflector, the driver of the car could not contemplate that the truck was stationary and since he was attempting to save the boy who suddenly crossed the road, he hit the truck instead. It was the duty of the truck driver to have ensured that the truck was not left unattended in the centre of the road without adequate precautions.

30. The Tribunal has also returned a finding that there was no negligence on the part of the car driver rather the negligence has been found to be that of the truck driver/owner. In this regard, it will also be relevant to notice that no appeal has been preferred by the truck owner nor any cross objections has been filed by him.

31. The effect of non-filing of a cross appeal or cross objections is that the finding returned by the Motor Accident Claim Tribunal in so far as the negligence of the truck owner/driver is concerned remains intact and is liable to be accepted by this Court in absence of any challenge or material to the contrary.

32. Now, in the aforesaid backdrop if the contention of the learned counsel for the Insurance-company is examined, it reveals that the thrust of the submission lies in the fact that where the negligence has been attributed to the offending truck and no negligence has been attributed to the Fiat car which is insured with the Insurance-company, hence, under these circumstances, the Insurance-company cannot be fastened with the liability to honour half of the awarded sum leaving the other half to be recovered from the truck owner rather if the award survives then the entire liability of the award ought to be fastened on the truck owner.

33. In order to meet the aforesaid argument, it has been urged by the learned counsel for the claimant-respondents that it was a case of composite negligence and not contributory negligence and thus in so far as the claimants are concerned, they are entitled to recover the same from the Insurance Company or the truck owner as their liability is both joint and several.

34. In order to explore the aforesaid dissenting arguments, it will be first necessary to notice the difference between contributory negligence and composite negligence. In case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the loss, injury or damage sustained by him in the accident to the extent of his negligence. Whereas in composite negligence, a person who has suffered has not contributed to the accident but has suffered due to the combination of outcome of negligence of two or more wrong doers.

35. The difference between the two type of negligence in context with a motor accident has been very well explained by the Apex Court in ***Khenyei Vs. New India Assurance Company Limited and others; (2015) 9 SCC 273*** and the relevant paragraphs reads as under:-

"15. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but due to the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan [(2008) 3 SCC 748 : (2008) 1 SCC (Civ) 832 : (2008) 2 SCC (Cri) 738] has held that in case of contributory negligence, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder : (SCC pp. 750-51, paras 6-7)

"6. "Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

*36. 7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence' will not apply nor can there be an automatic inference that the negligence was 50 : 50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contribut*ory negligence. The High Court has failed to correct the said error."

The decision in T.O. Anthony v. Karvarnan [(2008) 3 SCC 748 : (2008) 1 SCC (Civ) 832 : (2008) 2 SCC (Cri) 738] has been relied upon in A.P. SRTC v. K. Hemlatha [(2008) 6 SCC 767 : (2008) 3 SCC (Cri) 34] .

16. In Pawan Kumar v. Harkishan Dass Mohan Lal [(2014) 3 SCC 590 : (2014) 2 SCC (Civ) 303 : (2014) 4 SCC (Cri) 639] , the decisions in T.O. Anthony [(2008) 3 SCC 748 : (2008) 1 SCC (Civ) 832 : (2008) 2 SCC (Cri) 738] and Hemlatha [(2008) 6 SCC 767 : (2008) 3 SCC (Cri) 34] have been affirmed, and this Court has laid down that where the plaintiff/claimant himself is found to be negligent jointly and severally, liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. He is entitled to damages not attributable to his own negligence. The law/distinction with respect to contributory as well as composite negligence has been considered by this Court in Machindranath Kernath Kasar v. D.S. Mylarappa [(2008) 13 SCC 198 : (2009) 3 SCC (Cri) 519] and also as to joint tortfeasors. This Court has referred to Charlesworth and Percy on Negligence as to cause of action in regard to joint tortfeasors thus : (Machindranath Kernath Kasar case [(2008) 13 SCC 198 : (2009) 3 SCC (Cri) 519] , SCC p. 212, para 42)

"42. Joint tortfeasors, as per 10th Edn. of Charlesworth & Percy on Negligence, have been described as under:

"Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely, that the same evidence would support an action against them, individually.... Accordingly, they will be jointly liable for a tort which they both commit or for which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time. This occurs in cases of (a) agency; (b) vicarious liability; and (c) where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them.'"

17. The question also arises as to the remedies available to one of the joint tortfeasors from whom compensation has been recovered. When the other joint tortfeasor has not been impleaded, obviously question of negligence of non-impleaded driver could not be decided. Apportionment of composite negligence cannot be made in the absence of impleadment of joint tortfeasor. Thus, it would be open to the impleaded joint tortfeasors after making payment of compensation, so as to sue the other joint tortfeasor and to recover from him the contribution to the extent of his negligence. However, in case when both the tortfeasors are before the court/Tribunal, if evidence is sufficient, it may determine the extent of their negligence so that one joint tortfeasor can recover the amount so determined from the other joint tortfeasor in the execution proceedings, whereas the claimant has right to recover the compensation from both or any one of them.

18. This Court in National Insurance Co. Ltd. v. Challa Upendra Rao [(2004) 8 SCC 517 : 2005 SCC (Cri) 357] with respect to mode of recovery has laid down thus : (SCC p. 523, para 13)

"13. The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in

favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case, considering the quantum involved, we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

22. What emerges from the aforesaid discussion is as follows:

22.1. In the case of composite negligence, the plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

22.2. In the case of composite negligence, apportionment of compensation between two tortfeasors vis-à-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

22.3. In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/Tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of the payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/Tribunal, in the main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

22.4. It would not be appropriate for the court/Tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

37. The aforesaid decision of Khenyei (supra) was followed by this Court in ***F.A.F.O. No. 126 of 2010 (Smt. Suman and Others Vs. Smt. Anisa Begam and Another)*** along with other connected matters which was decided on 22.02.2019.

38. Having noticed the settled legal position regarding the contributory and composite negligence and applying it to the present case, it would indicate that in so far as the case of Smt. Janki is concerned, it can be a case of composite negligence so also the case of Gaurav Jawrani but in so far as the case of Radhey Shyam Jawrani is concerned, it cannot be treated to be a case of composite negligence.

39. As noticed above where a person contributes to the wrong doing then it is a case of contributory negligence and in the instant case, the Fiat Car bearing No. UGC 2184 was being driven by Sri Radhey Shyam Jawrani and as such the manner in which the accident has occurred which has been noticed in the previous paragraphs, it

was a case where the car being driven by Sri Radhey Shyam Jawrani hit a stationary truck and the only two vehicles involved was the Fiat Car and the stationary truck.

40. In this scenario, after going through the evidence which was led by Sri Radhey Shyam Jawrani, it would indicate that he had deposed that around 06:30-07:00 PM on 02.01.1992 while a boy suddenly crossed the road and also the lights from an oncoming truck from the opposite directions had blinded Radhey Shyam Jawrani, hence, in order to avoid a collision with the oncoming truck as well as save the boy, he could not see the stationary truck and he dashed against it. The manner in which the accident has occurred and explained in the deposition, it cannot be said that there was no role of the car driver at all. It may be true that the truck ought not have been parked on the road without reflectors/indicators but nevertheless in case if the deposition of Sri Radhey Shyam Jawrani is believed in its entirety, it would indicate that he had stated that his speed was about 40 to 50 Kms. per hour and he failed to see the said truck. This also indicates a degree of negligence on the part of the car driver as even from a distance, the driver could have seen the stationary truck from the lights of his own car itself. Another reason why the car driver was also negligent is of the fact that while driving on a highway, it is but natural that all sorts of vehicles including trucks ply and it cannot be said that because of the oncoming lights from a truck, Sri Radhey Shyam Jawrani was blinded and in order to avoid the collision, he dashed in the stationary truck which could not be seen.

41. In view thereof, the negligence of Sri Radhey Shyam Jawrani cannot be ruled out and in the aforesaid facts and circumstances, the Tribunal, though, without recording any finding on contributory negligence in so far as the case of Sri Radhey Shyam Jawrani has yet apportioned the liability 50% on the car as well as 50% on the truck and this apportionment is affirmed by this Court and it is held that Sri Radhey Shyam Jawrani was also responsible and contributed to the accident and the Tribunal has erred in coming to the conclusion that the negligence was solely of the truck owner and it also indicates that the Tribunal has not sifted through the evidence available on record in the right perspective keeping the concept of negligence in mind which the Tribunal is required to inquire in a petition under Section 166 of the Motor Vehicles Act, 1988.

42. In light of the aforesaid, the Court finds substance in the submission of learned counsel for the Insurance Company that the car driver was also negligent and had contributed to the accident.

43. Having said that, it will also be seen that this contributory negligence can only be attributed to the case of Sri Radhey Shyam Jawrani and cannot be extended to the other two namely Smt. Janki and Sri Gaurav. Accordingly, while considering the respective submissions of the parties, the case of Smt. Janki and Sri Gaurav will be considered as a case of composite negligence where the accident is the outcome of wrong doing of two persons namely the car driver and the truck driver/owner and as far as the case of Sri Radhey Shyam Jawrani is concerned that would be treated to be a case of contributory negligence.

44. Now, the stage is set to examine the matter in respect of the claim petitions

in context to the submissions advanced by the learned counsel for the respective parties.

A:- Claim of Radhey Shyam Jawarani:-

45. Considering the respective submissions and from the perusal of the material on record, it would be seen that the main contention of the learned counsel for the Insurance Company is that it was a case of contributory negligence and treating the same as such 50% of the award has been apportioned on the Insurance Company whereas the remaining 50% has been apportioned on the truck owner but while dealing with the issue, the Tribunal has held that the negligence was solely of the truck owner. This finding of the Tribunal, noticed above in the preceding paragraphs has been held to be fallacious and accordingly it cannot be said that Sri Radhey Shyam Jawrani did not contribute to the accident. Thus, the case of Radhey Shyam Jawrani is treated as a case of contributory negligence and in this light it will further have to be seen as to how much many injuries and quantum of damages has been sustained and how the amount as granted by the Tribunal can be sustained or enhanced since a contention has been raised by the learned counsel for the Insurance Company that there was no material or evidence to indicate the injuries sustained as well as the amount spent and without considering the material on record a sum of Rs. 40,000/- has been awarded in a mechanical manner.

46. In this context, if the material on record is seen, it would reveal that Sri Radhey Shyam Jawrani deposed before the Tribunal that he had sustained injuries. He further deposed that he was admitted in the District Hospital, Sitapur for few days and thereafter he was even admitted to Krishna Medical Center at Lucknow where he had undergone his treatment which included for even loss of few teeth and on the aforesaid he had to spend about Rs. 60,000/- on his treatment as well on the treatment of his son Gaurav.

47. During his cross-examination, Sri Radhey Shyam Jawrani admitted that he had not filed any document regarding his treatment or regarding the medication. Thus, since there was no material on record to establish the nature of injuries as sustained by Sri Radhey Shyam Jawrani, it is very difficult to fathom as to how the Tribunal arrived at a conclusion to award a sum of Rs. 40,000/- to Sri Radhey Shyam Jawarani. Apparently, the findings returned by the Tribunal in this regard is based on pure surmise and conjecture. If at all, Sri Radhey Shyam Jawrani had sustained injuries as was stated by him in his examination-in-chief then surely he would have adequate documents including his admission and discharge from the District Hospital, Sitapur as well as from Krishna Medical Center at Lucknow. If he had broken few teeth then naturally, he would have consulted a dentist and there ought to have been some x-ray plates but none of this was available or produced before the Court.

48. Even leaving all these facts behind the screen for the time being yet the record reflects that there is not a single prescription by any doctor or any Medication Practitioner. No medicine prescribed nor any receipt for any medical consultation, radiological assistance or medicine purchased and in absence of such vital and important documents, the contention that the claimant Sri Radhey

Shyam Jawarani received serious injuries does not find corroboration or support from the material on record. Sri Radhey Shyam Jawrani is admittedly an income tax payee and is having a separate business and being a person well acquainted in business and worldly affairs despite the same he did not file such documents on record to substantiate his contentions which leads to an inference against Sri Radhey Shyam Jawarani.

49. This Court thus finds that the amount as awarded by the Tribunal in case of Sri Radhey Shyam Jawrani is excessive and not based on any evidence. Having said that it will also be relevant to notice that on the record, there is a Insurance Surveyor's Report which also annexes certain photographs of the damaged and mangled Fiat Car and looking into the manner in which the accident occurred and that one of the co-traveller/passenger expired as well as the condition of the car definitely some injuries may have occurred to the driver of the car and taking note of the aforesaid facts and on account of absence of evidence on behalf of the claimants, this Court awards a notional amount of Rs. 5,000/- in favour of the claimant Sri Radhey Shyam Jawrani and also noticing that he contributed to the accident, hence, 50% thereof being attributable to his negligence thus he shall be entitled to recover only 50% of the awarded amount from the truck owner i.e. Walliguru Khan.

50. Thus, in view of the aforesaid F.A.F.O. No. 190 of 1993 is partially allowed and a total sum of Rs. 5,000/- is awarded to the claimant Sri Radhey Shyam Jawrani of which only 50% shall be recoverable from the truck owner Walliguru Khan along with interest at the rate of 9% per annum from the date of the application till the date of its actual payment. Accordingly, the award dated 25.05.1993 passed in Claim Petition No. 67 of 1992 shall stand modified to the aforesaid extent and the appellant company shall not be liable to pay in this regard.

51. In light of the findings given herein, there is no question of enhancing the awarded amount and for the aforesaid reasons the F.A.F.O. No. 198 of 1993 filed by Sri Radhey Shyam Jawrani shall stand dismissed.

B:- Claim of Sri Gaurav Jawarani:-

52. Now coming to the case of Sri Gaurav Jawrani again it would be seen that the Tribunal in this claim, as well, has awarded Rs. 40,000/- and apportioning 50% liability on the truck owner and 50% on the Insurance Company, payable along with interest at the rate of 15% per annum and this has been challenged by the Insurance Company on grounds which have been noticed earlier while noticing the contentions of learned counsel for the respective parties.

53. In this regard, this Court finds that the case of Sri Gaurav Jawrani is one of the composite negligence. At the outset, it may noticed that any apportionment made by the Tribunal is only to determine the inter-se liability between the two joint tortfeasor i.e. the car owner as well as the truck owner. Since it is a case of composite negligence, it is open for the appellant to claim or recover the aforesaid full amount from either of the two joint tortfeasor as their liability is joint and several as has been noticed in the former part of this judgment.

54. It will also be relevant to notice that in the preceding paragraphs it has been held that the car driver was also negligent and was also responsible to the accident to the tune of 50% and also the truck owner

for 50% and this Court has also concluded that the findings returned by the Tribunal that it was the sole negligence of the truck owner is not correct. Hence, the case of Sri Gaurav Jawrani being a case of composite negligence and the liability of 50% as ascertained by the Tribunal shall be treated to be the determination of inter-se liability between the two joint tortfeasor.

55. In so far as the contention regarding the quantum awarded is concerned, this Court again finds that there was no material on record to indicate that any injuries was suffered by Sri Gaurav Jawrani. This Court further finds that no reasons have been recorded nor any material has been discussed upon which the Tribunal came to the conclusion that a sum of Rs. 40,000/- is to be paid as compensation to Sri Gaurav Jawarani. For the same reasons, as have been noticed while considering the claim of Sri Radhey Shyam Jawarani in the preceding paragraphs, this Court in the case of Gaurav Jawarani also finds that there is no material to support the amount as awarded. Since he was also travelling in the car and may have sustained some injuries, accordingly, in absence of any documentary evidence or trustworthy evidence of any witness in support of the claim of compensation for injuries suffered to him, this Court grants a notional sum of Rs. 5,000/- to be awarded along with interest at the rate of 9% per annum from the date of the claim application till the date of its recovery. Being a case of composite negligence, Sri Gaurav Jawrani shall be entitled to recover the same from either of the two joint tortfeasor and any of the two joint tortfeasor after satisfying the award shall be entitled to recover 50% from the other in accordance with law as settled by the Apex Court in the case of Khenyei (Supra).

56. In light of the aforesaid discussions and for the reasons aforesaid, the F.A.F.O. No. 191 of 1993 filed by the Insurance Company arising out of Claim Petition No. 68 of 1992 shall stand partly allowed whereas F.A.F.O. No. 196 of 1993 filed by the claimant Sri Gaurav Jawrani for seeking enhancement of the award dated 25.05.1993 shall stand dismissed. The award passed by the Tribunal in Claim Petition No. 68/1992 shall stand modified to the extent as provided herein.

C:- Claim for death of Smt. Janki:-

57. Now, considering the case of Smt. Janki, again it will be seen that it is a case of composite negligence which occurred on account of wrong doing of two joint tortfeasor. It is the case of death which is not disputed and for the reasons as noticed in the preceding paragraphs it has already been held that the car driver was responsible for the accident to the extent of 50% and the Tribunal has erred in not returning a finding of contributory negligence to the above extent.

58. It cannot be disputed by the appellants insurance company that there is nothing to indicate that the deceased had contributed to the accident and as such it was apparently not a case of contributory negligence but is a case of composite negligence.

59. In this context, it would be seen that the claimants had impleaded both Sri Kungoo Mal, the owner of the Fiat Car as well as Waliguru Khan the owner of the truck as the respondents and the Insurance

Company with whom the Fiat Car No. UGC 2184 was insured.

60. It is also found that the purpose of apportioning the liability by the Tribunal between the Insurance Company with whom the Fiat Car was insured and the truck owner was for the purposes of inter-se settlement and apportionment of awarded sum between the insurer of the car and the truck owner.

61. It will also be relevant to notice that Sri Kungoo Mal had filed his written statement and admitted the accident. The Insurance Company has also paid Sri Kungoo Mal the amount towards the damage caused to the car. The surveyor of the Insurance Company had made a detailed report which was also placed on record and thus there can be no doubt that in so far as the manner in which the accident occurred, the damage caused to the vehicle and the death of Smt. Janki is not in dispute and the same has been accepted by the Insurance Company.

62. Now, the only issue that remains to be seen is regarding the claim of the heirs of Smt. Janki regarding the enhancement of the award passed in Claim Petition No. 66 of 1992 which has given rise to F.A.F.O. No. 189 of 1993.

63. Though, it was urged by the Insurance Company that the Tribunal without any basis has awarded a sum of Rs. 1,78,000/ towards non-pecuniary benefits which is contrary to the settled principles as laid down by the Apex Court in the case of ***National Insurance Company Limited vs Pranay Sethi (2017) 16 Supreme Court Cases 680***.On the other hand, the claimants state that the Tribunal has not factored for the future prospects.

64. It is taking note of the aforesaid as well as the dictum of the Apex Court in ***National Insurance Company Ltd. (supra)*** as well as noticing the material available on record, this Court finds that Smt. Janki was an income tax payee. The record further indicates that her last income tax return was also filed. In the evidence led on behalf of the claimants of Smt. Janki, it was stated that Smt. Janki was having her separate business. It was also stated that the income of Smt. Janki was spent on her children and amongst them, one daughter is differently abled.

65. It is also not disputed that Smt. Janki is survived by her husband, three daughters and two sons. She had her income of about Rs. 5,000/- per month from agriculture and business and she also was paying income tax and was about 40 years of age at the time of her death.

66. It will also be relevant to notice that since in a petition under Section 166 of the Motor Vehicles Act, 1988, the Court has to hold an inquiry to determine the just and proper compensation. It is keeping the aforesaid principles in mind also noticing that the accident occurred in the year 1992 and the appeals have been pending and apparently, the Tribunal did not record appropriate findings and did not appreciate the case in its correct perspective, hence, the Court has taken upon itself to consider the case of the claimants of Smt. Janki being the Appellate Court.

67. It is in this regard the Court considering the material on record and the evidence which indicates that Smt. Janki had her separate income and from business and agriculture and Radhey Shyam Jawarani one of the claimants in Claim Petition No. 66 of 1992, Radhey Shyam

Jawarani was not her dependent and one daughter was also married and one was differently abled and thus primarily the income of Smt. Janki was spent on her two daughters out of three and her two sons. Thus, the compensation payable to the legal heirs of Smt. Janki is re-determined as under:-

Income [As per Income Tax Returns]
35,740/- (business)
Add:-20,000/- (agricultural)

55,740/-
Less:-(1,033) Income Tax payable = Rs. 54,707/-annual
Add: Towards Future Prospect @ 25% = Rs. 13,676/-annual
Total Income(54,740+13676/-) = Rs. 68,383 per annum.
Less:- (Since children alone dependents,
hence 1/3rd deducted) = Rs. 45,589 annual
Age = 40 years
Multiplier = 15
Thus compensation payable = Rs. 45,589/- x 15 = 6,83,835/-

Add:- For consortium :- 40,000/-
Loss of Estate :- 15,000/-
Funeral Expenses :-15,000/-
= Rs. 70,000/-

Thus, total compensation
payable shall be = Rs. 7,53,835/-
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68. Thus, the claimants of Claim Petition No. 66 of 1992 shall be entitled to a total compensation of Rs. 7,53,835/- which shall carry interest @ of 9% per annum from the date of application till the date of its actual payment. The claimants of Claim Petition No. 66 of 1992 shall be entitled to recover the total compensation from either of the two joint tortfeasor and any of the two joint tortfeasor who satisfies the award shall be entitled to recover the 50% of the award from the other joint tortfeasor in accordance with law as settled by the Apex Court in Khenyei (supra).

69. Thus, F.A.F.O. No. 189 of 1993 seeking enhancement of the award passed in Claim Petition No. 66 of 1992 is allowed and F.A.F.O. No. 193 of 1993 filed by the Insurance Company is dismissed subject to above modification. The award dated 25.05.1993 passed in Claim Petition No. 66 of 1992 shall stand modified and enhanced to the aforesaid extent.

70. It is also provided that in case any amount paid to Sri Radhey Shyam Jawarani and Sri Gaurav Jawarani by the Insurance Company which is in excess to the amount now determined in their respective claims for injuries, it becomes recoverable, the same can be adjusted from their share as payable to them in terms of compensation payable to them as legal heirs and dependents of Smt. Janki in Claim Petition No. 66 of 1992.

Conclusions:-

71. In light of the detailed discussions:-

A. F.A.F.O. No. 190 of 1993 of the Insurance Company is partially allowed to the extent as detailed hereinabove and F.A.F.O. No. 198 of 1993 filed by Sri Radhey Shyam Jawarani for enhancement of award is dismissed.

B. F.A.F.O. No. 191 of 1993 of the Insurance Company is partly allowed to the

extent as detailed hereinabove and F.A.F.O. No. 196 of 1993 filed by Gaurav Jawarani for enhancement of award is dismissed.

C. F.A.F.O. No. 193 of 1993 of the Insurance Company is dismissed in light of the observations made hereinabove and F.A.F.O. No. 189 of 1993 filed by legal heirs and claimants of Claim Petition No. 66 of 1992 is allowed.

The parties shall bear the respective costs. The records of the Tribunal shall be returned expeditiously.

(2023) 4 ILRA 523
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ Tax No. 31 of 2021

M/s Maa Mahamaya Alloys Pvt. Ltd.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Aloke Kumar

Counsel for the Respondents:
C.S.C.

A. Tax Law – Seizure - GST Act,2017 - Sections 67(1), 67(2), 75(13), 130(4) & 169 - The demand for tax can be quantified and raised only in the manner prescribed in Section 73 or Section 74 of the Act, as the case may be. (Para 11)

As the entire tax has been determined and the penalty has been levied only on the basis of a survey by taking recourse u/s 130 of the GST Act and not taking a recourse to Section 74, the order impugned is clearly unsustainable. (Para 12, 13)

B.(1) The scope of Clause (ii) of sub-section (1) of Section 130 is that any assessee who is liable to pay tax and does not account for such goods, after the time of supply is occasioned, would be liable to penalty under Clause (ii). The liability to pay the tax arises at the time of point of supply, and not at any point earlier than that.

Section 130 of the GST Act contemplates and provides for levy of the penalty, in the event, any of the conditions so mentioned in Section 130(1) are made out. (Para 14)

On a plain reading of the allegations levelled against the petitioner w.r.t. the improper accounting of goods, the only stipulation contained in Clauses (ii) and (iv) of sub-section (1) of Section 130 can at best be invoked by the department, however, in the present case, even assuming for the sake of argument, that the goods were lying in excess of the goods in record, the case against the petitioner would not fall under Clause (ii) of sub-section (1) of Section 130.

B.(2) Penalty can be levied by invoking Clause (iv) only when the department establishes that there was contravention of any provision of the Act or the Rules coupled with the 'intent to evade payment of tax'.

There is no such allegation in the show cause notice or any of the orders. Clause (iv) of sub-section (1) of Section 130 would not be attracted in the present case. (Para 15)

C. Manner of service of notice in certain circumstances - In terms of Clause (a) of Section 169(1), a service would be completed only when it is tendered to the taxable person or on his Manager or authorized representative. (Para 17)

Serving on the Accountant of the firm is neither contemplated nor provided for u/s 169(1)(a) and thus, the service as claimed by the respondent on the Accountant cannot be held to be a valid service, thus, the entire proceedings are liable to be quashed. (Para 18)

D. Determination of value of the goods – In Section 15 or the Rules framed thereunder, there is no prescriptions for valuation of the goods on the basis of eye estimation as has been done by the department and has been repelled by the appellate authority. (Para 19)

Section 15 of the GST Act provides for valuation of the taxable supply. In furtherance of the provisions contained in the Act, Rules have been framed and Rule 27 of the said Rules provides for the manner of valuation of supply of goods or services.

In the present case, the valuation of the goods is required to be done in terms of the mandate of Section 15(1) r/w Section 15(2) and Section 15(3). The appellate authority has erred in repelling the valuation done on the basis of eye estimation, however, has proceeded to value the goods (although differently) at the appellate stage without resorting to the mandate and manner prescribed in Section 15 r/w the Rules. (Para 19)

Writ petition allowed. The amount deposited by the petitioner shall be refunded subject to the outcome of the demand quantified u/s 74 of the Act in accordance with law. (E-4)

Precedent followed:

M/s Metenere Ltd. Vs U.O.I. & anr., Writ Tax No. 360 of 2020 (Para 6)

Present petition challenges the order dated 29.01.2019, whereby tax of Rs. 26,10,000/-, penalty of Rs. 26,10,000/- and further fine of Rs. 25,000/-, total Rs. 52,54,000/- has been assessed against the petitioner as well as the appellate order dated 15.06.2020 whereby the appeal preferred by the petitioner was partly allowed.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Aloke Kumar, learned Counsel for the petitioner and learned Standing Counsel.

2. The present petition has been filed challenging the order dated 29.01.2019 whereby tax of Rs.26,10,000/- has been assessed to be payable by the petitioner and penalty of Rs.26,10,000/- and further fine of Rs.25,000/-, total Rs.52,54,000/- has been assessed against the petitioner as well as the appellate order dated 15.06.2020 whereby the appeal preferred by the petitioner was partly allowed.

3. The facts in brief are that the petitioner is a Company duly registered under the GST Act. It is stated that the material purchased by the petitioner are duly reflected on the portal of the department including the GSTR-3B. It is alleged that on 29.09.2018, the Deputy Commissioner, (SIB), Commercial Tax, Mirzapur Division, Mirzapur in purported exercise of powers under Section 67(1) and 67(2) of the GST Act inspected the registered business premises and drew a Panchanama on 29.09.2018 (Annexure No.1). On the same day, a seizure memo was also prepared, which is contained as Annexure No.2 to the writ petition.

4. It is argued that the petitioner was compelled to deposit an amount of Rs.52,20,000/- for getting the seized goods released. Thereafter, the petitioner was served with summons on 29.09.2018 and the petitioner was called upon to produce the records relating to the purchase for the year 2017-18 and 2018-19. The petitioner was once again issued summons under Section 70 of the Act on 27.12.2018 whereby certain documents were called from the petitioner. The petitioner claims to have produced the documents on the date fixed, however, an order came to be passed thereafter without issuance of any show cause notice to the petitioner levying the tax liability of Rs.26,10,000/- and further

an amount of Rs.26,10,000/- was determined as penalty to be paid by the petitioner and further a fine of Rs.25,000/- was also imposed, thus, a total liability of Rs.52,45,000/- was determined to be payable under Section 130(3) of the GST Act. As the petitioner had paid an amount of Rs.52,20,000/-, the total balance amount payable by the petitioner came to Rs.25,000/-. The said order was challenged by the petitioner by preferring an appeal. The said appeal was partly allowed by means of the order dated 15.06.2020 and an amount of tax assessed against the petitioner was quantified at Rs.7,92,405/- on which a like penalty of Rs.7,92,405/- was imposed and thus, in terms of the appellate order, the petitioner was required to pay a total amount of Rs.15,84,810/-. The amount paid by the petitioner in excess was directed to be refunded in accordance with law.

5. The contention of the Counsel for the petitioner is that the order impugned as well as the appellate order is bad in law for the reasons more than one. He argues that in terms of the mandate of the GST Act, although a power of search and seizure is conferred upon the authorities, the manner in which the goods were held to be in excess of the recorded goods, is wholly arbitrary. He argues that the goods were quantified only on the basis of the eye estimation, which argument of the petitioner was also accepted by the appellate authority, as is clear from the perusal of the appellate order. In the light of the same, he argues that once the appellate authority accepted the contention of the petitioner that the valuation of the goods on the basis of eye estimation was not possible, the entire proceedings ought to have been declared as null and void. He further argues that even otherwise the manner in which the appellate authority has quantified (although reduced), the demand against the petitioner has no foundation whatsoever.

6. The Counsel for the petitioner further argues that in any event while proceeding to pass an order under Section 130 of the GST Act, no power is vested in the authority to undertake the determination of liability of tax, which can only be done by taking recourse to Section 73 or Section 74 of the Act, as the case may be. He draws my attention to the statutory provisions contained in the GST Act and emphasises on the provisions contained and elaborated in Sections 67, 73, 74, 122 and Section 130 of the Act. He places reliance on the judgment of this Court in the case of ***M/s Metenere Limited vs Union of India and another; Writ Tax No.360 of 2020***, decided on 17.12.2020. He further argues that after the passing of the orders, on the same grounds, proceedings have been initiated under Section 74 of the Act and an order has already been passed against the petitioner, against which, the petitioner is availing the remedies. He argues that the same is not the subject matter of the present writ petition and has been brought to the notice of this Court only to apprise that no penalty could have levied in view of the mandatory provisions contained in Section 75 (13) of the GST Act.

7. During the course of the hearing, this Court vide order dated 21.03.2023 had called upon the Counsel for the respondent to inform whether a show cause notice was issued under Section 130(4) of the GST Act or not? In response to the said order, the learned Standing Counsel has produced the instructions and argues that prior to passing of the impugned order, a show cause notice dated 27.12.2018 was issued to the

petitioner, which was served upon the accountant of the firm/ company on 29.12.2018. Learned Standing Counsel has also produced a copy of the show cause notice. The said instruction and show cause notice are taken on record.

8. The learned Standing Counsel argues that the estimation of various goods was done in the manner prescribed. He further argues that at the appellate stage, the contention of the Counsel for the petitioner was partly accepted and with regard to the demand quantified at the appellate stage, the appellate authority had applied its mind and arrived at a conclusion with regard to the goods available and on the said basis, the demand was quantified and substantially released. He thus argues that the writ petition is liable to be dismissed, more particularly because no reply to the show cause notice was given.

9. Considering the rival submissions made at the bar, the following questions which arise for determination;

(I). Whether tax can be assessed/ determined in exercise of powers under Section 130 of the GST Act?

(II). Whether penalty can be levied only on the allegations that at the time of verification of goods, the goods in excess were found at the premises?

(III). Whether the service of notice as claimed by the respondent satisfies the requirement contemplated under Section 169 of the GST Act?

(IV). Whether the valuation of goods can be done on the basis of eye estimation alone and on the basis of production capacity and/ or the consumption of electricity etc?

10. The issue raised in the present writ petition is being decided in view of the fact that the appellate tribunal contemplated under the Act has not yet been constituted.

11. The issue raised herein in Issue no.I is marked resemblance to facts referred in the judgment of this Court in the case *M/s Metenere Limited (supra*) wherein on the basis of a similar search conducted, the demand was quantified. This Court after analysing the provisions of the Act and the Rules applicable held that for the infractions as contained in Section 122 of the GST Act and specified in Column "A' of paragraph 35 of the said judgment *M/s Metenere Limited (Supra)* held that penalty has to be Rs.10,000/- or the amount of tax evaded whichever is higher, whereas for the infractions specified in Column "B' of paragraph 35, the penalty that can be imposed is Rs.10,000/- only. This Court also held that the demand for tax can be quantified and raised only in the manner prescribed in Section 73 or Section 74 of the Act, as the case may be.

12. In the light of what has been decided by this Court in the case of *M/s Metenere Limited (Supra)*, it is clear that the entire exercise resorted to under Section 130 of the GST Act for assessment/ determination of the tax and the penalty is neither stipulated under the Act, nor can be done in the manner in which it has been done, more so, in view of the fact that the department itself had undertaken the exercise of quantifying the tax due, by taking recourse under Section 74.

13. As the entire tax has been determined and the penalty has been levied only on the basis of a survey by taking recourse under Section 130 of the GST Act and not taking a recourse to Section 74, the order impugned is clearly unsustainable.

14. Coming to the Issue no.2, Section 130 of the GST Act contemplates and

provides for levy of the penalty, in the event, any of the conditions so mentioned in Section 130(1) are made out. Section 130(1) reads as under:

"Section 130. Confiscation of goods or conveyances and levy of penalty-

(1) Notwithstanding anything contained in this Act, if any person -

(i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(ii) does not account for any goods on which he is liable to pay tax under this Act; or

(iii) supplies any goods liable to tax under this Act without having applied for registration; or

(iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,

*then, all such goods or conveyances shall be liable to confiscation and the person shall b*e liable to penalty under section 122."

15. On a plain reading of the allegations levelled against the petitioner with regard to the improper accounting of goods, the only stipulation contained in Clauses (ii) and (iv) of sub-section (1) of Section 130 can at best be invoked by the department, however, in the present case, even assuming for the sake of argument, that the goods were lying in excess of the goods in record, the case against the petitioner would not fall under Clause (ii) of sub-section (1) of Section 130 for the simple reason that the liability to pay the tax arises at the time of point of supply, and not at any point earlier than that. On a plain reading, the scope of Clause (ii) of sub-section (1) of Section 130 is that any assessee who is liable to pay tax and does not account for such goods, after the time of supply is occasioned, would be liable to penalty under Clause (ii). Analyzing Clause (iv) of sub-section (1) of Section 130, the contravention of any provision of the Act or the Rules should be in conjunction with an intent to evade payment tax and penalty can be levied by invoking Clause (iv) only when the department establishes that there were a contravention of the Act and Rules coupled with the "intent to make payment of tax'. There is no such allegation in the show cause notice or any of the orders, I have no hesitation in holding that even the Clause (iv) of sub-section (1) of Section 130 would not be attracted in the present case.

16. Coming to the Issue no.3 of determination, Section 169 of the Act provides for manner of service of notice in certain circumstances. Section 169 is quoted hereinbelow:

"Section 169. Service of notice in certain circumstances.-

(1) Any decision, order, summons, notice or other communication under this Act or the *rules made there under shall be served by any one of the following methods, namely:-*

(a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding

authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person; or

(b) by registered post or speed post or courier with acknowledgment due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or

(c) by sending a communication to his e-mail address provided at the time of registration or as amended from time to time; or

(d) by making it available on the common portal; or

(e) by publication in a newspaper circulating in the locality in which the taxable person or

the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or

(f) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence and if such mode is not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision, order, summons, notice or any communication shall be deemed to have been served on the date on which it is tendered or published or a copy thereof is affixed in the manner provided in sub-section (1).

(3) When such decision, order, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by such post in transit unless the contrary is proved."

17. In terms of Clause (a) of Section 169(1), a service would be completed only when it is tendered to the taxable person or on his Manager or authorized representative.

18. Serving on the Accountant of the firm is neither contemplated nor provided for under Section 169(1)(a) and thus, the service as claimed by the Counsel for the respondent on the Accountant cannot be held to be a valid service, thus, on that count also, the entire proceedings are liable to be quashed.

19. Coming to the Issue no.IV with regard to the determination of value of the goods. Section 15 of the GST Act provides for valuation of the taxable supply. In furtherance of the provisions contained in the Act, Rules have been framed and Rule 27 of the said Rules provides for the manner of valuation of supply of goods or services, however, in the present case, the valuation of the goods is required to be done in terms of the mandate of Section 15(1) read with Section 15(2) and read with Section 15(3). In the said Section 15 or the Rules framed thereunder, there is no prescriptions for valuation of the goods on the basis of eye estimation as has been done by the department and has been repelled by the appellate authority. The appellate authority has erred in repelling the valuation done on the basis of eye estimation, however, has proceeded to value the goods (although differently) at the appellate stage without resorting to the mandate and manner prescribed in Section 15 read with the Rules, thus, on that count also, the impugned order is not sustainable.

20. For all the reasons recorded above, the writ petition deserves to be allowed. Accordingly, the impugned order dated 29.01.2019 is set aside and the writ petition is ***allowed.***

21. The amount deposited by the petitioner shall be refunded subject to the outcome of the demand quantified under Section 74 of the Act in accordance with law.

(2023) 4 ILRA 529
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2023

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Special Appeal No. 109 of 2023

Kumari Deepti ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Yogesh Kumar Saxena, Sri Ram Sajivan

Counsel for the Respondent:
C.S.C.

A. Service Law – Selection/Appointment – Reservation – Format of Caste Certificate - Public Service (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 - Certificate produced by a candidate claiming the benefit of reservation available to O.B.C. category candidate should evidence and facts (1) that the candidate who belongs to a group identified, as such, by the State Government and (2) that the candidate is not excluded as per the criteria for the Creamy layer prescribed by the State government of Uttar Pradesh. (Para 22, 30)

Issue before this Court is as to whether by not submitting the caste certificate in the format as prescribed in the advertisement rather submitting the same in the format which has been prescribed by the State of U.P. itself for the purposes of issuing the caste certificate for claiming the benefit of reservation available to O.B.C. category candidates for appointment to the post under the GOI, the Appellant-Petitioner dis-entitled herself for claiming such benefit. (Para 15)

The certificate relied upon and submitted by the Appellant-Petitioner dated 06.03.2021 was issued by the Tehsildar sufficiently certifies and evidences that the Appellant-Petitioner belongs to an O.B.C. group identified and recognised by the State government of Uttar Pradesh and further that she as per the criteria prescribed by the State government of Uttar Pradesh for exclusion under creamy layer does not fall in the creamy layer and hence, she is eligible and entitled to claim reservation available to O.B.C. category candidate. (Para 31)

B. Benefit of the reservation in public employment to different disadvantaged section of the society is permissible under the Constitution of India as an affirmative action. It is not in dispute that the Appellant-Petitioner was given appointment while she claimed the benefit of reservation available to O.B.C. candidates in her selection to the post of Constable (Civil Police) Uttar Pradesh Police Services, **merely because the certificate produced by her was not in (Praroop-1) though the certificate produced by her, clearly evidences that she belongs to an O.B.C. category as identified by the State Government of Uttar Pradesh and also that she does not get excluded as a person belonging to creamy layer in terms of the criteria laid down by the State Government of Uttar Pradesh.** For the said purpose, it should not be taken aid of by the State authorities for denying her otherwise constitutionally guaranteed right of affirmative action. (Para 32)

The order passed by the learned Single Judge cannot be sustained neither on the ground that the caste certificate as submitted by the Appellant-Petitioner was not within the time as

stipulated and extended by the recruitment Board, nor the same was not on prescribed format. (Para 35)

Special appeal allowed. (E-4)

Precedent followed:

1. Gaurav Sharma Vs St of U.P. & ors., Special Appeal No. 156 of 2017, 2017 AIR (Allahabad) 116 (Para 3)

2. Rinki Yadav Vs St. of U.P. & ors., Writ-A No. 4689 of 2022 (Para 4)

3. St. of U.P. Vs Rinki Yadav, Special Appeal Defective No. 274 of 2022, 2022 Law Suit (All) 1900 (Para 5)

4. Surendra Mohan Yadav Vs St. of U. P. & ors., Special Appeal No. 823 of 2018, decided on 05.09.2018 (Para 14)

5. Gaurav Sharma Vs St. of U. P. & ors., 2017 5 ADJ 495; 2017 [35] LCD 1720 (Para 14)

Present special appeal assails the judgment and order dated 04.01.2023, passed by learned Single Judge in Civil Misc. Writ Petition No.17259 of 2022.

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

Order on Civil Misc. Delay Condonation Application No. 1 of 2023.

The delay in filing the appeal has been explained in the affidavit.

Cause shown is found sufficient.
Delay is condoned.
Application is **allowed**.

Order on Appeal.

1. Heard Shri Y.K. Saxena, learned counsel for the appellant, Shri Mohan Srivastava, learned Standing Counsel for the State respondents.

2. The Special Appeal is questioning the validity of the impugned judgment and order dated 04.01.2023 passed by the learned Single Judge in ***Civl Misc. Writ Petition No. 17259 of 2022 (Kumari Deepti versus State of U.P. and others)*** and further prayed that the respondent be directed to accept the claim of the petitioner for appointment in the O.B.C. category in accordance with law during the pendency of this Special Appeal.

3. Learned counsel for the appellant in support of his submission states that while passing the order learned Single Judge has erred and has not considered the Full Bench Judgement of this Court rendered in a bunch of matters, leading being ***Special Appeal No. 156 of 2017-Gaurav Sharma versus State of U.P. Thru Secy. and 3 Others, 2017 AIR (Allahabad) 116.***

4. He submits that in the similar facts and circumstances, the learned Single Judge in ***Writ A No. 4689 of 2022 (Rinki Yadav versus State of U.P. Thru. Addl Chief Secy. Home (Police) Anubhag-6 Lko. And 3 Others)*** wherein she was working on the post of Constable and was a candidate for selection to the post of Sub Inspector (Civil Police) Platoon Commander (PAC) and Second Officer in Fire Brigade in pursuance to the Advertisement issued in February, 2021 her candidature was rejected by the respondent that the selection mode is considering the candidature of the petitioner under the General Category rather than treating her under O.B.C. Category, allowed the similar prayer of the petitioner as prayed in the instant petition.

5. The Rinki Yadav (supra) has challenged the said action in the

aforementioned Writ Petition where the learned Single Judge vide order dated 09.09.2022 had allowed the writ petition and directed the respondents to accept the O.B.C. Certificate submitted by the petitioner and proceeded with the process of selection of the petitioner on the post of Sub Inspector (Civil Police). He submits that the said order was subject matter of the ***Special Appeal Defective No. 274 of 2022 (State of U.P. versus Rinki Yadav 2022 Law Suit (All) 1900.***

6. The present Intra Court Appeal has been filed under Chapter VIII Rule 5 of Court with the prayer to quash & set aside the judgment dated 04.01.2023 passed by learned Single Judge and further direct the State authorities, specifically Uttar Pradesh Police Recruitment and Promotion Board (hereinafter referred as the "Recruitment and Promotion Board") to declare her result treating her candidature belonging to Other Backward Class category, The cause of action arises in favour of the Appellant-Petitioner for filing the writ petition when her result has not been declared in the select list even after securing higher marks than the lowest cut-off marks in the O.B.C. category. The Appellant-Petitioner preferred representation dated 21.08.2022 for seeking declaration of her result under O.B.C. category and the same has not been responded in any manner whatsoever. The learned Single Judge while deciding the petition preferred by the Appellant-Petitioner dismissed the same on the ground that firstly she could not produce the O.B.C. certificate on prescribed format within the time as specified in the advertisement, and thereafter he warranted O.B.C. certificate submitted by the Appellant-Petitioner at highly belated stage.

7. The Recruitment and Promotion Board issued an advertisement in the month of February, 2021 for direct recruitment to the post of Sub-Inspector Civil Police, Platoon Commander P.A.C. and Second Fire Officer. The number of vacancies advertised through the said advertisement were 9534. The Appellant-Petitioner is presently rendering her service as Constable (Civil Police) Uttar Pradesh Police Services and was recruited on the said post under the reserved category of Other Backward Classes. Pursuant to the advertisement in question, she submitted her online application along with other required documents, she also furnished a certificate issued by the Tehsildar Chhibramau, District Kannauj, on 06.03.2021 which is available at page 29 appended to the Appeal as Annexure No.1. By furnishing the said certificate, the petitioner claimed that her candidature for recruitment to the post in question has been considered as a reserve category candidate belonging to Other Backward Class.

8. The Appellant-Petitioner participated in the written examination and also in the physical efficiency test. The final marks obtained by the petitioner on the basis of written examination/physical efficiency test are 291. 32, whereas the last candidate belonging to O.B.C. category selected had secured 285.03 marks. The last candidate in the open category i.e. under the General category selected, has secured 296.5 marks. These marks in different categories are in respect of the female candidates.

9. Due to non-declaration of result related to the Appellant-Petitioner as selected candidate it is the apprehension of the Appellant-Petitioner that at the time of verification of documents, it was discovered that the Certificate submitted by the Appellant-Petitioner for seeking benefit

of reservation for appointment in question was not as per the advertisement pursuant to which selections were made.

10. Accordingly, she has been denied recruitment/appointment on the post of Sub-Inspector or any other equivalent post by treating her to be an open category candidate and also for the reason that since the last open category candidates selected had secured 296.5 marks, whereas the marks obtained by the Appellant-Petitioner were 291.32 hence, she could not get selected in the open category on the basis of merit. It is not denied by the respondents-State Authorities that the only reason for not treating the Appellant-Petitioner's candidature as a reserved category candidate belonging to Other Backward Class is that she did not submit the caste certificate as per the format (Praroop-1) appended with the advertisement.

11. Mr. PK Giri, learned Additional Chief Standing Counsel appearing for the State respondents vehemently argued that as per the notes appended to clause 5.4 of the advertisement, the benefit of reservation to those candidate who belong to Other Backward Classes, but fall in the creamy layer will not be available. Drawing out attention to note 3 appended to clause 5.4 of the advertisement, it has been argued by Ld. Additional Chief Standing Counsel that the said provision in the advertisement which provides that the candidates belonging to Other Backward Classes as mentioned in Schedule-1 of the Public Service (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (hereinafter referred to as the Reservation Act, 1994) will not be entitled to the benefit of reservation if they fall in the creamy layer Category. He has also stated that as per the stipulation made in note 3, caste certificate to be submitted by the candidates claiming the benefit of reservation available to Other Backward Classes shall be in format (Praroop-1) and should have been issued on or after 1 April 2020, but before the last date of making the application. That is to say, the caste certificate to be submitted by the candidate concerned should have been issued between 1.04.2020- 30.04.2021 for the reasons that 30.04.2021 was the last date as per the advertisement to make the application.

12. Caste certificate issued on 06.03.2021 by the Tehsildar certifies that the Appellant-Petitioner daughter of Vimal Kishore, whose mother's name is Aadesh Kumari belongs to Lodhi community which is recognised as the backward class under the Government of India resolution dated 10 September 1993 published in the Gazette dated 13 September 1993. It also certifies that she does not belong to the persons/sections of creamy layer mentioned in the office memorandum issued by the Government of India, Department of Personnel & Training, dated 08.09.1993 as modified by office memorandum dated 09.03.2004 and 14.10.2008 or the latest notification of the Government of India.

13. The sole submission of the Ld. Additional Chief Standing Counsel appearing for the State authorities is that since the Appellant-Petitioner did not furnish the caste certificate as per the requirement of note 3 appended to clause 5.4 of the advertisement and also that since the caste certificate furnished by her was not in the format (Praroop-1) appended to the advertisement as such she has dis-entitled herself to be given the benefit of being considered for the benefit of

reservation available to O.B.C. category candidates.

14. Ld. Additional Chief Standing Counsel also relied upon a Judgment rendered by the Division Bench of this Court in the case of Surendra Mohan Yadav Vs. State of Uttar Pradesh and others decided on 05.09.2018 in Special Appeal No. 823 of 2018, wherein, according to him, it has been held that if a candidate fails to submit O.B.C. certificate as per the format prescribed in the advertisement and rather furnishes the certificate which related to the appointments to the post under the Government of India and not under the State of Uttar Pradesh, then candidature of such a candidate cannot be considered in O.B.C. category. The Division Bench judgement dated 05.09.2018 places reliance on the Full Bench judgement of this Court in the case of Gaurav Sharma Vs. State of Uttar Pradesh and others 2017 5 ADJ 495, equivalent citation of which is 2017 [35] LCD 1720.

15. Issue which has been emerged to be answered by this Court in this case is as to whether by not submitting the caste certificate in the format as prescribed in the advertisement rather submitting the same in the format which has been prescribed by the State of U.P. itself for the purposes of issuing the caste certificate for claiming the benefit of reservation available to O.B.C. category candidates for appointment to the post under the Government of India, the Appellant-Petitioner dis-entitled herself for claiming such benefit.

16. As per clause 5.4 of the advertisement, a candidate claiming the benefit of reservation available to O.B.C. category candidates was required to submit the caste certificate with certification to the facts, (1) that the candidate does not fall foul of creamy layer and (2) that the certificate ought to have been issued by the competent authority between the period 1.04.2020-30.04.2021, whereas, the caste certificate furnished by the Appellant-Petitioner is concerned, it was issued by the competent authority i.e. the Tehsildar concerned on 06.03.2021, which date falls within the period prescribed for obtaining the certificate as per the stipulation made in the advertisement itself i.e. between 1.04.2020-30.04.2021. The certificate relied upon by the Appellant-Petitioner also clearly certifies that she does not fall foul of creamy layer as per the notification issued by the Government of India, Department of Personnel & Training by means of the Office Memorandum dated 08.09.1993 or/and at the latest notifications including the notifications dated 09.03.2004 and 14.10.2008.

17. One of the issues which was considered by the Full Bench in the case of Gaurav Sharma (Supra) was as to whether there exists any irreconcilable difference or repugnancy between the norms fixed by the Union and State Governments with regard to certification of creamy layer? if not, its effect, it is also given to point out that the petitioner in the Gaurav Sharma case had also submitted the certificate certifying that he belonged to the O.B.C. category in the same format in which the appellant-Petitioner obtained the certificate and submitted the same for seeking benefit of the reservation available to O.B.C. category candidates. The format in which the Appellant-Petitioner obtained the said certificate is prescribed by the State of Uttar Pradesh. This fact is not in dispute, however, as stated by the learned Additional Chief standing Counsel, the said

format is for claiming benefit of reservation available to O.B.C. category candidates in relation to employment under the Government of India and not in relation to employment under the State of Uttar Pradesh.

18. The caste certificate relied upon by the candidate in the case of Gaurav Sharma is the same in which the Appellant-Petitioner was issued the certificate by the Tehsildar. The Full Bench in the case of Gaurav Sharma (Supra) has opined that, while it is true that caste certificate is only recognition of an existing status, and O.B.C. candidate necessarily must establish the twin conditions of belonging to an O.B.C. group recognised by the State and also that he does not fall within the creamy layer. In para-26 of the judgement in the case of Gaurav Sharma, the Full Bench has further observed that while it is true that O.B.C. candidate even she produces a certificate which evidences that she does not stand excluded from the benefit of reservation in terms of Office Memorandum dated 14.10.2008, that issue still remain as to whether she is an OBC, as are specified and identified by the State Government of Uttar Pradesh.

19. The Full Bench further observes that although the certificate initially submitted by the OBC, candidates before court did not stand excluded by virtue of his standards fixed by the Office Memorandum dated 14.10.2008, the certificate did not evidence them belonging to an O.B.C., as identified in the State Government of Uttar Pradesh. The Court further goes on to the observation that for the purposes of seeking the benefit of the reservation it is imperative for a candidate to establish that he/she belongs to O.B.C., as recognised and identified by the State concerned and further that he/she does not within the field of exclusion.

20. Finally, answering the issue (C) it has been said by the Full Bench in para-27 of the report that we accordingly answered question number one in the negative and hold that an O.B.C. candidate is not exempt from the rigours of a cut-off or last date prescribed in an advertisement or recruitment notice. We further declared that Arvind Kumar Yadav correctly articulates the law on the issue and over rule Pravesh Kumar and Shubham Gupta. In so far as question No. 3 is concerned, we hold that although, there is no repugnancy the norms fixed by the Union and the State Government, the same would have no favourable impact upon the ability of a candidate unless he/she does not furnish a certificate evidence of her as belonging to O.B.C. category as recognised and identified by the State.

21. Thus, the Full Bench in the case of Gaurav Sharma (Supra) has found that so far as the certification of creamy layer is concerned, there is no repugnancy in the norms fixed by the Union and the State Government. Accordingly, we have no hesitation to hold that insofar as the exclusion under the creamy layer is concerned, the Appellant-Petitioner could not be excluded for the reasons that the certificate furnished by her theory states that she does not stand excluded from the rigours of creamy layer in terms of the notification issued by the Central Government. The Full Bench has already held that so far as the criteria of exclusion under the creamy layer component is concerned there does not exist any repugnancy between the criteria laid down by the State Government and the Central government.

22. We however also notice that the Full Bench has categorically held that even if a candidate produces a certificate evidencing that he/she does not get excluded from the rigours of creamy layer there he/she would still have to possess a certificate evidencing that he/she belongs to an O.B.C. group as identified and recognised by the State Government of Uttar Pradesh. For considering the aforesaid aspect, what we find is that the certificate furnished by the Appellant-Petitioner on 06.03.2021 which was issued by the competent authority i.e. the Tehsildar clearly certifies that she belongs to Lodhi community there does not exist any repugnancy between the specification made for the said purpose by the Government of India as also by the State Government of Uttar Pradesh.

23. We are very clear in our mind that the certificate furnished by the Appellant-Petitioner will clearly suffice to certify that the Appellant-Petitioner belongs to a community identified by the State Government of Uttar Pradesh is an O.B.C. group and accordingly she will be entitled to seek the benefit of reservation available to an O.B.C. category candidate even while seeking employment under the State Government of Uttar Pradesh.

24. By bare perusal of Schedule-1 appended to 1994 Reservation Act which clearly reveals that Entry-8 therein mentions the community Lodhi. Accordingly, as per the identification recognition made by the State Government of Uttar Pradesh for a particular community belonging to Other Backward Class, the entries in Schedule-1 is the only source for determination of such an issue. Admittedly, Lodhi community are identified and recognised for the said purpose.

25. If we examine the notification published in the Gazette of India, extraordinary dated 13.09.1993 which publishes the resolution of the Government of India dated 10.09.1993 what we find is that in the State of Uttar Pradesh Lodhi community is listed at serial No. 8. Accordingly, on examination of the identification made by the Government of India as also by the State Government of Uttar Pradesh for the purposes of inclusion of a particular group or community amongst the Other Backward Classes or Sections entitled to seek benefit of reservation available to them, we find that there does not exist any repugnancy as far as Lodhi community is concerned. The reasons for us to observe that there is no such repugnancy is that Lodhi community finds mention in the notification of the Government of India dated 13.09.1993 which published the resolution of the Government of India dated 10.09.1993 and it is also included at entry 8 of Schedule 1 appended to 1994 Reservation Act passed by the Legislature of the State Government of Uttar Pradesh.

26. Ld. Additional Chief Standing Counsel has also made his submission based on the provisions contained in Section 9 of the Reservation Act, 1984 which provides that for the purpose of reservation provided under the said Act caste certificate shall be issued by such authority or officer in such manner or form as the State Government may by order provide.

27. Ld. Additional Chief Standing Counsel representing the State authorities has not dispute that the authority was issued because certificate dated 06.03.2021 which was furnished by the Appellant-Petitioner claiming the benefit of the

reservation available to O.B.C. category candidates has been issued by the Tehsildar with the competent authority as provided by the State Government for the purpose of issuing certificate. The Schedule appended to the Uttar Pradesh Janhit Guarantee Act of 2011 also prescribes the Tehsildar to be the authority competent to issue a certificate.

28. The only reservation expressed by the Ld. Additional Chief Standing Counsel to the caste certificate issued on 06.03.2021 is that it is not issued in the manner prescribed by the State Government. The basis for such an arguments as advanced by the Ld. Additional Chief Standing Counsel is that the certificate dated 06.03.2021 which had been issued by the Tehsildar clearly mentioned therein that it is a certificate to be produced by Other Backward Classes applying for appointment to the post under the Government of India. His submission is that the information as appended to the advertisement (Praroop-1) is a form prescribed by the Government for issuance of caste certificate to those who apply for appointment to the post under the State Government of Uttar Pradesh.

29. It is also not in dispute that both the formats i.e. the format in which the Appellant-Petitioner had obtained the certificate which was issued to her by the State of the place itself. The first format is for a certificate to be produced by O.B.C. category candidate applying for appointment to the post under Government of India, whereas the format as appended to the advertisement has been prescribed by the State to be produced by the Other Backward Classes candidates who apply for appointment to the post under the State of Uttar Pradesh. The Full Bench of this Court in the case of Gaurav Sharma (Supra) as discussed above, has already found that so far as the criteria for exclusion on account of person belonging to creamy layer is concerned there does not exist any repugnancy between the descriptions made for the said purpose by the Government of India and by the State government of Uttar Pradesh. The issue as to whether there is any repugnancy, so far any person belonging to Lodhi community claiming his/her status as O.B.C., as prescribed by the State of Uttar Pradesh and the Government of India was not an issue before the Full Bench neither has it been discussed and considered. However, if we examine the reasoning given by the Full Bench for recording that no repugnancy exist, so far as the criteria for exclusion of candidate on account of creamy layer is concerned and apply the same for examining as to whether there is any repugnancy between the identification of a particular, category as O.B.C. by the State of Uttar Pradesh and by the Government of India. We find that as far as Lodhi community is concerned, there does not exist any repugnancy. Lodhi community is included as O.B.C., in the notification issued on 15.09.1993 published in the Gazette dated 13.9.1993. Similarly Lodhi community is mentioned at entry 8 of schedule 1 of the 1994 Resolution Act. As there is no discrepancy in inclusion of Lodhi community amongst the Other Backward Class exists in case any person belonging to Lodhi community reservation available to O.B.C. category candidates for appointment or post either under the Government of India or under the State of Uttar Pradesh.

30. We may recreate the basic principle which runs as a common thread throughout the judgement of the Full Bench

of this Court in case of Gaurav Sharma and Others is that certificate produced by a candidate claiming the benefit of reservation available to O.B.C. category candidate should evidence and facts (1) that the candidate who belongs to a group identified, as such, by the State Government and (2) that the candidate is not excluded as per the criteria for the Creamy layer prescribed by the State government of Uttar Pradesh.

31. Applying the reasoning as given by the Full Bench in the case of Gaurav Sharma (supra) we are of the opinion that the certificate relied upon and submitted by the Appellant-Petitioner dated 06.03.2021 was issued by the Tehsildar sufficiently certifies and evidences that the Appellant-Petitioner belongs to an O.B.C. group identified and recognised by the State government of Uttar Pradesh and further that she as per the criteria prescribed by the State government of Uttar Pradesh for exclusion under creamy layer does not fall in the creamy layer and hence, she is eligible and entitled to claim reservation available to O.B.C. category candidate.

32. Before parting with this case, we may observe that benefit of the reservation in public employment to different disadvantaged section of the society is permissible under the Constitution of India as an affirmative action. It is not in dispute that the Appellant-Petitioner was given appointment while she claimed the benefit of reservation available to O.B.C. candidates in her selection to the post of Constable (Civil Police) Uttar Pradesh Police Services, merely because the certificate produced by her was not in (Praroop-1) though the certificate produced by her, clearly evidences that she belongs to an O.B.C. category as identified by the State Government of Uttar Pradesh and also that she does not get excluded as a person belonging to creamy layer in terms of the criteria laid down by the State Government of Uttar Pradesh. For the said purpose, it should not be taken aid of by the State authorities for denying her otherwise constitutionally guaranteed right of affirmative action.

33. The law enunciated in Special Appeal Defective No. 274 of 2022 State of UP versus Rinki And other 2022 lawsuit (All) 1900 relied by the counsel for the Appellant-Petitioner is fully applicable in the instant matter and as such, we are in full agreement of the same. Nothing has been brought to our notice that the judgement of Rinki & others (supra) is being given any indulgence by the Hon'ble Apex Court and as such, the same is confirmed at this stage.

34. The Additional Chief Standing Counsel so far the factual and legal aspect of the matter, the same is not disputed that the order and direction passed in the judgement of Rinki and Other (supra) is not in his knowledge.

35. Considering the facts and circumstances of the case, we find that the case of the petitioner is on similar footings. The order passed by the learned Single Judge cannot be sustained neither on the ground that the caste certificate as submitted by the Appellant-Petitioner was not within the time as stipulated and extended by the recruitment Board, nor the same was not on prescribed format. Accordingly order dated 04.01.2023 is hereby quashed and set-aside.

36. It has been intimated by the learned counsels for the rival parties that

the selection process is going on, and as such, it is hereby directed to the competent authorities to accept the candidature of the Appellant-Petitioner being the candidate of O.B.C. category. After considering her merit points which falls under the cut-off as secured by the lowest merit holder of O.B.C. Category.

37. In the light of above, the instant intra court appeal is hereby allowed. The respondents are directed to accept the O.B.C. certificate submitted by the Appellant-Petitioner and proceed with the process of selection of the Appellant-Petitioner for the post Suitable to the Appellant-Petitioner under the advertisement.

38. Let aforesaid exercise be completed within three weeks from the date of production of certified copy of this order before the competent authority.

(2023) 4 ILRA 538
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.04.2023

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 126 of 2022
alongwith other connected cases

Awadhesh Kumar Singh & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Rakesh Chandra Tewari

Counsel for the Respondents:
C.S.C.

Service Law - Constitution of India, 1950-Article 226 - Uttar Pradesh Industrial Disputes Act, 1947-Bunch of writ petitions filed, the first category of writ petitions have erupted due to the re-fixation of the pay-scale from 31.03.1989 to 18.05.1994, which has resulted in issuance of the impugned notice/order by the respondents/St., second category of writ petition against notice for recovery of this excess salary paid during the period from this part-time tube well operators and coercive steps for recovery like attachment/with-holding of gratuity payment etc.-Impugned order is in violation of the principles of natural justice as no opportunity of hearing been given to the petitioners, before the pay-scale was re-fixed/reduced giving rise to civil consequences-Impugned orders/ notice quashed-Matters remitted to the competent authority to evaluate the claims of the petitioners bearing in mind the various competing factors & observation of the Hon'ble Court-Competent Authority shall give an opportunity of explanation and/or hearing to the writ petitioners before passing a speaking order in the matter. (Para 13, 14, 58, 59, 60)

Petition disposed of. (E-15)

List of Cases cited:

1. (Sanjeevan Lal & ors. Vs Sate of U.P, through Principal Secretary Irrigation Lucknow & ors.) Writ-A- 22586 of 2019

2. Engineer-in-Chief, Irrigation Department, U.P. & ors. Vs Makrand Singh & ors. Writ Petition No. 1502 (S/S) of 1992:

3. Suresh Chandra Tiwari & ors. Vs St. of U.P. & ors.: Writ Petition No.3558 (S/S) of 1992

4. St. of U.P. Vs Mangra Pd. Verma & ors. Special Leave Petition (C) No. 16219 of 1994

5. Rajendra Kumar Tewari & ors. Vs St. of U.P & ors. Writ petition No. 1820/2002

6. St. of U.P Vs Roshan lal & ors. Review petition No. 26/2012 and SLP (C) No. 5283/2011

7. (St. of U.P & ors. Vs Munna Lal Trivedi & ors.) SLP No. 883/2016

8. (Rakesh Kumar & ors. Vs St. of U.P & ors.) SLP(C) No. 348612015

9. (Kamlesh kumar Singh & ors. Vs St. of U.P & ors.) SLP(C) No. 1696-1697/2016

10. (St. of Uttar Pradesh & ors. Vs Irfan Ali & ors.) SLP (CC) No. 1066/2016

11. (Ramesh Chandra Vs St. of U.P. & ors.) Writ Petition No. 31262/2017

12. Babloo Singh & ors. Vs St. of U.P : (2019) 12 SCC 403

13. Pradeep Kumar Maskara Vs St. of U.P. (2015) 2 SCC 653

14. Kalinga Mining Corporation Vs U.O.I., (2013) 5 SCC 252

15. St. of Pun. & ors. Vs Rafiq Masih reported in 2014 (8) SCC 883

16. Jaswant Singh Gill Vs Bharat Coking Coal Ltd. & ors., (2007) 1 SCC 663

17. Netram Sahu Vs St. of Chhattisgarh & anr., (2018) 5 SCC 430.

18. Kunhayammed & ors. Vs St. Of Kerala & anr.: (2000) 6 SCC 359.

19. (Jai Karan Singh & ors. Vs St. of U.P. & ors.) Writ Petition No. 103/1996

20. (St. of U.P & ors. Vs Vinod Kumar & ors.) Special Appeal No. 548 of 2000

21. Kunhayammed & ors. Vs St. of Ker. & anr.(2000(6) SCC 359)

22. Mekha Ram & ors. Vs St. of Raj. & ors. decided on 29/03/2022

23. Smt. Maneka Gandhi Vs U.I.O. & anr., AIR 1978 SC 597

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

(1) Heard Mr. A.M. Tripathi, Mr. R.C. Tiwari, Mr. Y.K. Mishra, learned Counsel for the writ petitioners and Shri Ramesh Kumar Singh, learned Additional Advocate General, assisted by Shri Sanjay Sarin, learned Additional Chief Standing Counsel and Shri Tushar Verma, learned Counsel for the respondents/State.

A. <u>Introduction</u>

(2) The present bunch of writ petitions is a classic example of litigious employment, in as much as the Hon'ble Apex Court and this Court had been flooded with numerous petitions from "Tube Well Operators' in the past on several occasion raising several issues relating to their service conditions. This Court also had an opportunity to deal with an issue relating to regularization of these part time Tube Well Operators and has passed a detailed judgment on 23.01.2023 passed in Writ-A- 22586 of 2019 (*Sanjeevan Lal & 26 Ors. Vs Sate of U.P, through Principal Secretary Irrigation Lucknow and Ors.*) and other connected matters.

(3) Although, the issue engaging the attention of this Court in the present bunch of writ petitions is altogether a different issue as juxtaposed to the issue decided by this court in its earlier judgment (supra), however both the cases have a common history. Broadly, stating, the writ petitioners in this bunch of writ petitions were initially appointed as part time Tube Well Operator between the year 1980 to 1990 and subsequently were regularized in due course and most of them as of now have also been superannuated.

B. <u>Brief Background</u>

(4) The issue raised and agitated in the above-captioned petitions had its beginning in the year 1992, wherein the

State of Uttar Pradesh issued a Government Order dated 20.2.1992, whereby the nomenclature of "Part Time Tube Well Operator" was changed to "Tube Well Assistant" and their honorarium was enhanced from Rs. 299/- per month to Rs. 550/- per month. The other precipitating issue at that point of time had been the decision of the Labour Court in two cases, bearing Case No. 256 of 1988 and Case No. 20 of 1989, which were filed by some "Part Time Tube Well Operators", before the Labour Court claiming pay parity with regular Tube Well Operators under the provisions of U.P. Industrial Disputes Act 1947.

(5) As far as the aforesaid Labour Court cases were concerned, both the aforesaid cases were decided in favour of the "Part Time Tube Well Operators" vide award dated 15.7.1989 and 1.2.1991, respectively, wherein the Labour Court returned a finding that since "Part Time Tube Well Operators" worked just as hard as regular Tube Well Operator, they were entitled to pay parity with regular Tube Well Operators.

(6) Not satisfied with the aforesaid award of the Labour Court, the State of Uttar Pradesh challenged the same by filing Writ Petition No. 1502 (S/S) of 1992: *Engineer-in-Chief, Irrigation Department, U.P. and others Vs. Makrand Singh and others.* Simultaneously, other writ petitions, leading writ petition no. 3558 (S/S) of 1992 : Suresh Chandra Tiwari and others Vs. State of U.P. and others, were also filed before this Court, challenging the aforesaid notification dated 20.2.1992, by which nomenclature of Tube Well Operators was changed to Tubewell Assistants and an honoraria of Rs.500/- per month has been fixed in lieu of pay. A Co-ordinate Bench of this Court has decided the aforesaid writ petitions by a common judgment and order dated 18.5.1994. The operative portion of the order dated 18.5.1994 reads as under :-

"In the result, I allow all the writ petitions except Writ Petition No. 1502 (S/S) of 1992 and quash the Notification dated 20.2.1992 (as contained in Annexure-I to the Writ Petition No. 3558 (S/S) of 1992) by which nomenclature of the petitioners has been changed to that of tubewell assistants and honoraria of Rs.550/- per month has been fixed. The opposite parties are directed to pay all the petitioners the same emoluments i.e. in the same scale of pay in which other regularly appointed tubewell operators are being paid.

Writ Petition No. 1502 (S/S) of 1992 filed by the State, Engineer-in-Chief, Irrigation Department, U.P. and others Vs. Makrand Singh and others, is dismissed."

(7) The aforesaid judgment and order dated 18.05.1994 was challenged by the State of U.P. by filing Special Leave Petition (C) No. 16219 of 19994 : *State of U.P. Vs. Mangra Pd. Verma and others*, before the Hon'ble Supreme Court, which was dismissed by the Hon'ble Supreme Court on 22.03.1995, observing therein that the duties, qualifications, and hours of working of the "Part Time Tube Well Operators" are similar to that of regular Tube Well Operators and thus based on the principal of "equal pay for equal work', the Apex Court dismissed the SLP of the State. Even, the Review Petitions No. 1894 to 1897 of 1992 filed by the State seeking review of the aforesaid judgment and order dated 22.03.1995, was dismissed on 18.10.1995.

(8) In compliance of the aforesaid order of the Hon'ble Supreme Court, the

State of U.P, issued an order on 27.10.1995, followed by another order on 10.11.1995, providing the same emoluments of pay, which were given to the regular Tube Well Operators to a "Part Time Tube Well Operators", who were covered by the said judgment and order dated 18.5.1994 and other similarly situated petitioners. It may be noted that the Government Order dated 27.10.1995 was issued for all those persons who were covered by the judgment and order dated 18.05.1994, whereas Government Order dated 10.11.1995 was issued for persons covered by the order of the Labour Court.

(9) Apparently, Part Time Tube Well Operators, who were covered by the judgment passed in Suresh Chandra Tewari's case, were given regular pay scale as that of a regular part time Tube Well Operator with effect from 18.05.1994, however, as far as the part time Tube Well Operators, who had the award of Labour Court in their favour, were given regular pay scale as that of the regular part time Tube Well Operator from 31.03.1989 or from the date of their respective appointment.

(10) There had been a controversy related to the date from which the regular pay-scale as that of the regular Tube Well Operator was applicable to the part time Tube Well Operators. Some of the part time Tube Well Operators claimed that they were entitled from 31.03.1989 and as such filed writ petition before this court, which was allowed by a Co-ordinate Benche of this Court. Although, the State has filed a review, however during the pendency of the said review petition, these part-time tube well operators filed Contempt petition for compliance of pay-fixation from 31.03.1989, which the contempt court allowed subject to the outcome of the review petition or subsequent appeal of the State Government. Subsequently, the record reveals that, both the review petition as well as the SLP filed by the State against this pay-fixation from 31.03.1989 to this part-time tube well operators failed. Thus, the State Government was obliged to give the pay-fixation of these part time tube well operators similar to that of a regular tube well operators since 31.03.1989 under the orders of this court.

(11) The whole issue relating to the date of applicability of the regular pay scale or pay-parity of part-time tube well operators with regular tube well operators was convoluted with the passing of incongruous judgments by this court over a passage of time and ultimately vide an order dated 22.01.2016, the Hon'ble Apex Court clarified that all the part-time tube well operators (*except those who were parties in the labour court proceedings which culminated in award dated 15/07/1989*), shall be entitled to regular pay scale only with effect from 18.05.1994 in the light of the decision of the High Court in Suresh Chandra Tiwari versus State of UP. (supra).

(12) In view of the aforesaid observation and clarity of the Hon'ble Apex Court, the State Government had started sending notice for re-fixing the pay-scale with effect from 18.05.1994 in place of the earlier date of 31.03.1989, which has triggered various consequences, including filing of the present bunch of writ petitions before this Court. Further, there is a second leg to the issue, wherein the State Government has in furtherance to the aforesaid re-fixing of the pay-scale has sought recovery of salary paid between 31.03.1989 to 18.05.1994 and has also

initiated steps to recover the said amount, including withholding retiral benefits, like gratuity etc.

C. <u>The controversy</u>

(13) Apparently, the controversy in the present bunch of writ petitions can be divided into two categories. The second category being the consequence of the first category. The first category of writ petitions have erupted due to the re-fixation of the pay-scale from 31.03.1989 to 18.05.1994, which has resulted in issuance of the impugned notice/order by the respondents/State. The following writ petitions would come within the "first category":

Sr. No.	**Details of Writ Petitions**	**Date of Impugned Order sought to be challenged**
(i)	Writ Petition-A-No. 5188/2017 (Rajender Kr. Tiwari & 56 others vs. State of U.P. and others)	02.02.2017
(ii)	Writ Petition-A-No. 13913/2017 (Ramesh Chandra & 5 others vs. State of U.P. and others)	02.02.2017
(iii)	Writ Petition-A-No. 13982/2017 (Vijay Shankar & 69 others vs. State of U.P. and others)	19.05.2017 & 26.05.2017
(iv)	Writ Petition-A-No. 14929/2017 (Mithilesh Chandra Pandey & 6 others vs. State of U.P. and others)	08.05.2017
(v)	Writ Petition-A-No. 16920/2017 (Radhey Lal & 11 others vs. State of U.P. and others)	19.05.2017 & 26.05.2017
(vi)	Writ Petition-A-No. 17658/2017 (Shiv Kumar Yadav & 8 others vs. State of U.P. and others)	02.02.2017 & 19.05.2017
(vii)	Writ Petition-A-No. 28446/2017 (Vijay Kr. Singh & 16 others vs. State of U.P. and others)	08.05.2017 & 19.05.2017
(viii)	Writ Petition-A-No.28793/2017 (Mukhu Singh & 12 others vs. State of U.P. and others)	19.05.2017 & 26.05.2017
(ix)	Writ Petition-A-No. 29077/2017 (Ram Achal & 5 others vs. State of U.P. and others)	19.05.2017 & 26.05.2017 & 08.11.2017
(x)	Writ Petition-A-No. 29933/2017 (Anuradha vs. State of U.P. and others)	19.05.2017 & 26.05.2017 & 08.11.2017
(xi)	Writ Petition-A-No. 30199/2017 (Bharat Singh & 23 Others vs. State of U.P. and others)	30.05.2017
(xii)	Writ Petition-A-No.	08.05.2017

	431/2018 (Aas Mohammad & 7 others vs. State of U.P. and others)	& 19.05.2017 & 27.05.2017

(14) Further, since salary had been already disbursed to these part-time tube well operators on a pay-scale as was applicable to regular tube well operator during the duration from 31.03.1989 to 18.05.1994, the State Government after re-fixing the pay-scale as aforesaid and as a consequence to its earlier order (which are impugned in the "first category' of writ petitions) has also sent a further notice for recovery of this excess salary paid during the period from this part-time tube well operators and coercive steps for recovery like attachment/with-holding of gratuity payment etc. has been taken by the Respondent-state. The following writ petitions would come within the "Second Category" :-

Sr. No.	Details of Writ petitions	Date of Impugned Order sought to be challenged
(i)	Writ Petition-A-No. 744/2020 (Wazid Ali & 3 others vs. State of U.P. and others)	11.02.2019
(ii)	Writ Petition-A-No. 126/2022 (Awadhesh Kr. Singh & 3 others vs. State of U.P. and others)	01.10.2021
(iii)	Writ Petition-A-No. 2377/2022 (Bharat Singh & 6 others vs. State of U.P. and others)	18.08.2021

D. <u>Contention of the parties</u>

(15) Since common issue has been raised as far as the "first category" of writ petitions are concerned, the facts of the writ petition, bearing Writ-A No. 5188 of 2017 (Rajender Kr. Tiwari & 56 others and others), is being taken for proper appreciation of the facts in these petitions as this writ petition is the earliest petition filed in this bunch of matters. Apparently, it is available from records that the petitioners in this writ petition have challenged the impugned order dated 02.02.2017, wherein the pay-fixation with effect from 31.12.1989 was cancelled without providing any opportunity of hearing to them.

(16) As per the petitioners, the effect of the said cancellation had led the salary of the petitioners to be reduced by re-fixing the same with effect from 18.05.1994, which has civil consequences and could not had been passed ex parte. The petitioners giving a brief background of the case, contended that they were initially appointed as "part time Tube Well Operators" and vide notification dated 20.02.1992, they were re-designated as "Tube Well Assistant" with a fixed honorarium of Rs. 550/- per month and presently all of them were working in a pay scale, which is Class-III non-gazetted post.

(17) It is the case of the petitioner that some of the part time Tube Well Operators raised an industrial dispute in connection with the payment of wages, which was

awarded in favour of the part time Tube Well Operator by the Labour Court, leading to challenge the same before this Court in Writ No. 1502 (S/S) 1992 by the respondents/State. Number of similar cases came to be filed by other Tube Well Operators before this Court also, challenging the aforesaid notification dated 20.02.1992 and the fixed honorarium and claiming equal pay as that of the regularly appointed Tube Well Operators. These bunch of writ petitions was decided by means of an order dated 18.05.1994 passed in writ petition no. 3558/1992 : *Suresh Chandra Tewai and Others Vs State of U.P & Ors.*, wherein this Court held that part time Tube Well Operators were entitled for equal pay as that of regularly appointed Tube Well Operators and the notification dated 20.02.1992 was also quashed. The respondent/State, although filed special appeal and special leave petition against the said order, however, the same was dismissed.

(18) In the meantime, some part time tube well operators approached this Court and claimed regular pay scale with effect from the date of the Labour Court award and as such claimed the benefit from 31.03.1989 as had been given to some part time tube well operators, which was allowed by a Co-ordinate Bench of this Court.

(19) The petitioners also approached this Court vide writ petition No. 1820/2002 (Rajendra Kumar Tewari & 88 others V/s State of U.P & Others) claiming payment of arrears of salary with effect from 31.03.1989 on the same pay scale as applicable to regular pay scale tube well operators, which was disposed of vide order dated 23.02.2010 on the basis of another order dated 21.12.2000 passed in Writ Petition no. 7489 (S/S)/2000 *(Awadhesh Kr. Singh Case) (hereinafter to be referred as "**secondary order**")*, which in turn was decided on the basis of another order dated 18.05.1994 passed in Writ No. 3558/1992 (SS) (*hereinafter to be referred as "**Primary order**"*).

(20) Since, the order passed by this court was not complied, the petitioner invoked the contempt jurisdiction of this court, wherein the competent authority vide an order dated 06.08.2012 complied with the judgment & order passed by the Hon'ble Court, thereby providing pay scale to the petitioner with effect from 31.03.1989, however the same was subject to final decision of review petition and other similar matters pending before the Hon'ble Supreme Court being review petition No. 26/2012 and SLP (C) No. 5283/2011 (State of U.P Vs Roshan lal & Ors.), filed in similarly circumstanced matter. It is reported that both the review as well as the SLP was dismissed vide order dated 19.11.2013 and 11.08.2014 respectively.

(21) Further, it has been stated by the petitioners that SLP (c) No. 1170/2016, preferred by the State, against order dated 23.02.2010 in Writ Petition No.1820 (S/S) of 2002 (Rajendra Kr. Tiwari vs. State of U.P. and others) was also dismissed vide order dated 22.01.2016, wherein it has been clarified that except for 73 Tube Well Operators covered by the Labour Court award, all other Tube Well Operators shall be entitled for regular pay scale with effect from 18.05.1994 i.e the passing of the order by a Co-ordinate Bench of this Court in Suresh Chandra Tiwari Vs State of U.P. (supra). Thus, it has been submitted by the petitioners that service benefits had been

granted with effect from 31.03.1989 in the aforesaid background.

(22) It has been claimed that the impugned letter dated 12.02.2017 has led to reduction of salary of the petitioners between 2000/- to 3,000/- and are of civil consequences and ought not to have been passed by the respondents without affording an opportunity of hearing. Thus, they claim that the impugned order is in violation of the principles of natural justice.

(23) Counter-affidavit was filed by the State, enumerating the facts leading to the passing of the impugned order. According to them, after the passing of order dated 18.05.1994 in the Suresh Chandra Tewari's case by a Co-ordinate Bench of this Court, the State filed SLP No. 16219/1994, which was dismissed vide order dated 22.03.995, against which a review was also preferred, which was also dismissed vide order dated18.10.1995. Thus, the State, in compliance of the order passed by this Court, issued an order dated 27.10.1995 providing pay scale of tube well operators to all the petitioners covered by judgment and order dated 18.5.1994 from the said date of judgment. Subsequently, another Government Order was issued on 10.11.1995, wherein those persons, who were covered by the award of the Labour Court dated 15.07.1988 were given benefit of regular pay scale of tube well operator w.e.f. 31.03.1989. It is the submission of the respondents/State in their counter-affidavit that subsequently, several litigation came to be filed by various tube well operators, claiming benefit of pay scale of regular tube well operators w.e.f. 31.03.1989 or from the date of their initial appointment, which was allowed by this Court and pursuant to contempt petition filed by some tube well operators, the benefit was given of pay-scale w.e.f. 31.03.1989, subject to the outcome of review and appeal before the Hon'ble Supreme Court.

(24) It has been stated, further by the State that in some cases, appeal filed before the Hon'ble Supreme Court was also dismissed, however, vide order dated 22.01.2016, the Hon'ble Supreme Court, while deciding a bunch of SLP's tagged along with SLP No. 883/2016 (State of U.P & Ors. V/s Munna Lal Trivedi & Ors.), the Apex Court clarified that except for the tube well operators, who are covered by the order of Labour Court, the other tube well operators shall be entitled for regular pay scale with effect from 18.05.1994 only. To the similar effect is the Order dated 04.01.2016 passed in SLP(C) No. 348612015 (Rakesh Kumar & Ors V/s State of U.P & Ors.); Order dated 29.01.2016 passed in SLP(C) No. 1696-1697/2016 (Kamlesh kumar Singh & Ors. V/s State of U.P & Ors.); and Order dated 201.07.2016 passed in SLP (CC) No. 1066/2016 (State of Uttar Pradesh & Ors. V/s Irfan Ali & Ors.).

(25) It is the case of the respondents/State that the payments of the petitioners were made conditionally as per the order of the Court and as such, after passing the judgment and order by the Hon'ble Supreme Court, when the issue stood clarified, their order relating to re-fixing of the pay-scale and consequent recovery is well justified. It was stated that in case recovery was not made from the petitioners, the other similarly situated persons about 14990, would demand payment of salary from the date when the salary was paid to the petitioners and the burden of which would come on the State for about 600 Crores.

(26) In the second set of writ petition, it has been alleged that although the aforesaid interim order was made over to the respondents, however, they ignored the same and passed the impugned order of recovery from pension/gratuity. It is common ground that the said order of recovery has been passed ex parte and without providing any opportunity of hearing to the petitioners in breach of principles of natural justice. It is also alleged that these petitioners are low paid employee and if the aforesaid amount is allowed to be recovered, they would suffer great financial constraint and hardship. They also relied on the order of this Court dated 08.01.2018 passed in Writ Petition No. 31262/2017 (Ramesh Chandra Vs. State of U.P. and others), whereby similar impugned order was set-aside and it was left open to the respondents to pass fresh orders.

(27) Counter-Affidavit was filed on 06.03.2020 by the respondents, narrating the admitted facts and the litigation between the parties. It has been submitted by the respondents that after having been regularized on the post of tube well operators and on attaining the age of superannuation, the petitioners have retired from the services and as such just in order to protect the money of the public exchequer the amount as mentioned in the impugned order has been withheld from the gratuity, although the remaining dues as well as pension was being paid to the petitioners regularly. It has been submitted that the amount has been withheld subject to the decision of the writ petition No. 5188 (S/S) of 2017.

E. Arguments of the parties

(28) Mr. A.M. Tripathi, Mr. R.C. Tiwari, Mr. Y.K. Mishra, Advocates appearing for the writ petitioners in their usual erudite manner submitted that the petitioners were getting their salary in the said pay scale in accordance with the judgments and in compliance of this Hon'ble Court. The petitioners were not heard before any re-fixing of the pay scale by the respondent and since the re-fixing of the salary resulted in civil consequences of reduction of salary and proposed recovery, a chance of hearing was obligatory on the part of the Respondent/state. They have also submitted that in the present cases not only the petitioners have been getting salary from 31-03-1989 to 18-05-1994 under Court's order, but also the Hon'ble Apex Court has not directed recovery of such payments. Further, they were not a party to the Supreme Court order dated 04.01.2016, in which the Hon'ble Apex Court had given clarification relating to the date of applicability of the pay-scale. According to them, the order granting the pay scale with effect from 31.03.1989 by the High Court has merged with the Hon'ble Apex Court in view of the doctrine of merger and in their own case and in any case, the issue relating to the applicability of the pay scale stands settled and the same cannot be re-opened again as the same would be barred by the principles of res judicata. They also relied on the judgment of **Babloo Singh & Ors V/s State of U.P :** (2019) 12 SCC 403 for doctrine of merger and Judgment passed by Apex Court in (i) **Pradeep Kumar Maskara Vs State of U.P.** (2015) 2 SCC 653 & (ii) **Kalinga Mining Corporation Vs. Union of India**, (2013) 5 SCC 252 for principle of *res judicata.*

(29) A second line of argument has also been taken by the learned Counsel for the petitioners that as a consequence to the revision of the pay-scale, the salary of the petitioners have not only reduced but now

the Government has issued notices for recovery of the excess payment made during the period of 31.03.1989 to 18.05.1994 and in that directions has also illegally withheld the gratuity amount payable to them. They have relied on the case of State of Punjab and others Versus Rafiq Masih reported in 2014 (8) SCC 883 to submit that since tube well operators are Class-III employees, the salary paid is not recoverable. Further, according to the learned Counsel, withholding of amount of gratuity is absolutely in violation of provisions of payment of Gratuity Act and even otherwise the gratuity of petitioners cannot be withheld except in accordance with the provisions of Regulation 351A of Civil Services Regulations as the gratuity is treated to be the part of post retiral dues. According to them the respondent has not proceeded to take any action against them as per the said regulations and as such the same was illegal. Thus, the petitioners have relied on the judgment of **Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. & Others**, (2007) 1 SCC 663 and **Netram Sahu Versus State of Chhattisgarh and another,** (2018) 5 SCC 430.

(30) On the other hand, Shri Ramesh Kumar Singh, learned Additional Advocate General, assisted by Shri Sanjay Sarin, Additional Chief Standing Counsel and Shri Tushar Verma, learned Special Counsel led the arguments on the side of the respondent-State. Written submissions, have been also filed by the respondents. In nutshell, it has been submitted that numerous litigations which also includes the litigation of the petitioners in the present bunch of writ petitions have been concluded by the orders passed in the leading SLP no. 186 of 2014 by order dated 22/01/2016 by which the Hon'ble Supreme Court while considering the bunch of SLP's has settled after looking into the entire history of litigation with regard to the dispute being every now and then raised by the part-time tube well operators with regard to the grant of regular pay scale in pursuance of the judgment rendered in the case of **Suresh Chandra Tiwari (Supra)**.

(31) The doctrine of merger as argued by the learned Counsel for the petitioners, have been refuted by the learned Additional Advocate General by referring to the judgment of the Hon'ble Apex Court passed in the case of **Kunhayammed & Ors vs State Of Kerala & Anr** : (2000) 6 SCC 359. It has been argued by him that the doctrine of merger is neither a doctrine of constitutional law nor a doctrine of statutorily recognized as the same could be founded on the principles of proprietary in the hierarchy of justice delivery system. The learned Senior Counsel referred and argued that the SLP filed by the state challenging in the petitioner's case had been dismissed in limine and as such the same does not merge with the order of the Single Judge. He vividly relied on the conclusion part of the said judgment. Thus, it has been argued by the learned Senior Counsel that since the order passed on SLP and relied by the petitioners in their own case had been dismissed in limine without any findings, the doctrine of merger would not apply.

(32) It has been further argued that the reliance of the petitioners on certain dismissal order passed by the Hon'ble Supreme Court in similarly situated writ petitioners would apply with equal force to them is also not correct as it is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The

said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/ benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well.

(33) The learned Additional Advocate General has emphatically tried to bring home the point that since the petitioners have got the benefit of pay scale w.e.f. 31/3/1989 and have now superannuated, thus the respondent/State has withheld the gratuity amount, as it was found that excess payment had been made to the petitioners after passing of the re-fixation/revision order, which was duly intimated to the petitioners. Thus, as such just in order to protect the money of the public exchequer the amount as mentioned in in the impugned orders has been withheld from the gratuity and further whatever the remaining dues were there they have been paid and the regular pension is also being paid to the petitioners.

(34) Further, as to the reliance of the petitioners on regulation 351-A of the Civil Service Regulations relating to the only provisions under the regulations wherein gratuity payable to a retired government servant could be withheld is concerned, the learned Senior Counsel referred to Regulation 922 of the Civil Service Regulations, which entailed that any government dues which can be ascertained can also be recovered from the death cum retirement gratuity and as such it has been argued that withholding of gratuity is legally permissible and in accordance with law.

(35) As to the applicability of the judgment of the Apex Court in the case of State of Punjab vs Rafiq Masih (supra) referred by the petitioners, the learned Senior Counsel submitted that the case of the petitioners is distinguishable and the aforesaid judgment is not applicable in the present cases in view of the judgment recently rendered in Civil Appeal no. 2229 of 2022 (*Mekha Ram & Others v/s State of Rajasthan & Others* decided on 29/03/2022). Thus, it has been argued that these petitions are devoid of any merits and should be dismissed.

(36) This court while issuing notice to the respondents in the lead matter had passed an Interim order dated 08.03.2017, wherein the current salary of the petitioners was made payable in terms of the impugned order, however, no recovery pursuant to thereto of the amount already paid to the petitioner was directed by this court. It was also directed that the said interim order would be subject to further outcome of the writ petition.

F. Discussion & Findings

(37) Having heard the learned counsels for the parties at length, this court is of the view that the main controversy revolves around the factum of applicability and consequences of order dated 04.01.2016 and 22.01.2016 passed by the Hon'ble Apex Court to the present set of petitioners. The issue is no longer *res integra* that with the passing of the judgment and order dated 18.05.1994 in writ petition No. 3558 (S/S) of 1992(Suresh Chandra Tewari and others Vs. State of U.P. and others) and 49 others similar writ petitions, the issue relating to pay parity of part time tube well operators with that of regular part time tube well operators, garnered an impetus and the issue was finally set at rest with the

dismissal of the Appeal filed by the Respondent/State before the Division bench of this Court as well as the Hon'ble Apex Court vide SLP(C) No. 16219/1994 decided on 22.03.1995. Further, even the review petition filed against the said order of the Hon'ble Apex Court stands dismissed vide an order dated 18.10.1995 with the observation of the principal of "Equal pay for Equal Work".

(38) Apparently, the Government of U.P issued an order on 27.10.1995 providing the same pay-scale, which were given to the regular Tube well operators, to all the petitioners (part time tube-well operators) covered by judgment and order dated 18.5.1994 passed by this Hon'ble Court from the date of judgment i.e. 18.5.1994 only. A separate Government order dated 10.11.1995 was also issued, giving same pay-scale, for all those persons, who were covered by the labour court Award.

(39) Further, after the issuance of aforesaid Government orders, several writ petitions including Writ Petition No. 103/1996 (Jai Karan Singh & Others Vs State of U.P. & Others), came to be filed before this court by similarly situated part time tube well operators and their associations, which were all allowed vide an Order dated 25.04.1996 by a single Bench of this court, granting the benefit of pay-parity as that of the Suresh Chand Tiwari case with prospective effect. However, it seemed this part time tube well operators (as well as the association) were not happy with the said judgment of the Single Judge as far as it held the benefit of regular pay-parity prospectively and as such filed appeals before a division bench of this court. The Division bench of this court vide an order 04.12.1998 acceded to the request of these tube well operators and modified the order of the Single Judge to the extent that the benefit of pay-parity would be available from the date of passing of the judgment of the *Suresh Chand Tewari Case*. Thus, regular pay came to be paid to all the similarly situated tube well operators with effect from 18.05.1994 only.

The conundrum relating to the effective date

(40) In view of the Judgment of the Division Bench (mentioned supra), prima-facie it seemed by the year 1999-2000 the issue with regard to the date of applicability of the benefit arising out of the *Suresh Chand Tewari Case* stood settled. However, apparently, the whole confusion started, after some six years, with the filing of a writ petition No. 7489 (S/S) of 2000 (Awadhesh Kumar Singh & Ors Vs State of U.P & Ors.) before this court ("***Secondary Order***"). The said writ petition was decided on the very first date on 21.12.2000, wherein a Single Judge of this court granted the benefit of regular pay scale to the petitioners of the said writ petition with effect from 31.03.1989 and not from 18.05.1994, although the order mentioned that the relief was granted in terms of *Suresh Chand Tewari Case*. The confusion was further aggravated, when the special appeal filed by the State of U.P against the said order of the Single Judge was dismissed vide order dated 22.05.2009 by the Division Bench of this court and even the review order was also dismissed vide order dated 20.07.2010.

(41) Although the State of U.P filed an SLP (Civil) No. 17690/2010 against the orders of Division Bench, however the same was dismissed by the Hon'ble Apex Court vide an order dated 29.11.2010 on

the ground of delay. Even the review preferred before the Apex court was dismissed vide order dated 13.10.2011.

(42) Thus, the confusion which started with the passing of order dated 21.12.2000 in the *Awadhesh Kumar Singh* case reached its zenith with the dismissal of the review order by the Hon'ble Apex Court, however it is apparent from the records that in *Awadhesh Kumar Singh Case*, the Single Bench noted & referred to order/judgment dated 30.05.1997 modified vide order dated 23.03.1999 passed by the Hon'ble High Court at Allahabad in Writ petition No. 2679/1993 (Rajeshwar Prasad Shukla & 47 others V/s State of U.P) ("***primary order"***). In the *Rajeshwar Prasad Shukla case*, it was directed that the payment would be made with effect from the date of payment of similarly situated next junior to the petitioners, however in modification application it was mentioned that in Suresh Chand Tewari Case the benefit of grant of regular pay scale had been given with effect from 31.03.1989 and as such in view of the said the Single Bench modified its earlier order to give effect of pay-parity from 31.03.1989 vide its modification order dated 23.03.1999.

(43) Apparently, the order dated 04.12.1998 passed by a division bench of this court in Jai Karan's Case (supra) was not brought to the notice of the Ld. Single Judge, which led to the passing of the order dated 23.03.1999 (*Rajeshwar Prasad Shukla case)*, which had a chain reaction as Awadhesh Sigh Case was decided on the basis of the said modified order passed in *Rajeshwar Prasad Shukla's case.* Further, the issue got more complicated as eventually **Awadhesh Singh Case** went to the Supreme Court and was dismissed in limine due to delay, although the fact remained that the basis on which Awadhesh Sigh Case was decided was itself overturned subsequently as the State of U.P preferred a special Appeal against the order dated 30.05.1997 & 23.03.1999(passed in Rajeshwar Prasad Shukla's case) before the Division Bench of this court vide Special Appeal No. 548 of 2000(State of U.P & Others V/s Vinod Kumar & Others) and other connected matters which were all allowed vide an order dated 14.07.2000, thereby modifying the order of the Single Judge to the extent that pay parity was given with effect from the date of judgment passed in *Suresh Chand Tewari Case.*

(44) Thus, the very basis of *Awadhesh Kumar Singh's case* stood modified vide an order dated 14.07.2000 by a Division bench of this court and the said fact was not brought to the notice of the Ld. Single Judge of this court, which went on to pass an order dated 21.12.2000, which was in per curium. Since, **Awadhesh Kumar Singh's case** was decided in per curium, the earlier writ petition being Writ Petition (SS) No. 1820 of 2002 (Rajendra Kumar Tewari V/s Sate of U.P) decided on the basis of *Awadhesh Kumar Singh's case* is also in per curium.

(45) To the same effect would be the other two writ petition being No. 2936(S/S) of 2001 (Roshan lal & Others V/s State of U.P) and Writ Petition No. 4383 (S/S) of 2010 (Aas Mohd. & Others Vs State of U.P. & Others), which came to be decided on the very first date i.e 22/06/2001 and 10/08/2010 respectively. Interestingly, both these writ petitions were disposed of on the basis and in terms of order dated 21.12.2000 passed in *Awadhesh Sigh Case*. Even in this both matters, like the earlier *Awadhesh Singh Case*, the respondent/state preferred special Appeals before the

Division bench, which was dismissed vide order dated 18.08.2010 (Roshan Lal) and 15.03.2011(Aas Mohd.) and even the SLP filed against this orders vide SLP (C) No. 5283/2011 & SLP (C) No. 13692-93/2012 were dismissed vide order dated 13.08.2014. The review filed by the State also met the same fate of dismissal vide order dated 18.03.2015 and 01.12.2014 respectively and not to mention the curative preferred by the state in both the matters, which also met with the same result vide order dated 06.08.2015.

(46) If the aforesaid matters were relating to cases, wherein part time tube well operators were granted regular pay-fixation benefit with effect from 31.03.1989, there were several matters wherein the claim of petitioner were declined by this court in the past; to illustrate:

"Writ Petition No. 155 (S/S) of 2001 (Rajendra Prasad Mishra V/s State of U.P. & Others) was filed before this Hon'ble High Court by which the learned single Judge while dismissing the writ petition vide judgment and order dated 26/04/2001 declined to grant the regular pay scale wef. 31/03/1989. The Special Appeal filed by the petitioners in that case was also dismissed by the Division Bench on 23.04.2014.

Although, Writ Petition No. 1818 (S/S) of 2002 (Kamlesh Kumar Singh & Others Vs State of U.P. & Others) came to be decided vide order dated 16/03/2010 along with other writ petitions in favour of granting regular pay-sale with effect from 31.03.1989 and even the review filed by the state was dismissed vide an order dated 23/07/2013. However, on Appeal before the Division bench by the state, the Appeal was allowed vide order dated 12.10.2015 along with 19 other special Appeals.

Apparently, some of the writ petitioners aggrieved by the order of the Division bench preferred various individual SLPS's, which all were dismissed vide order dated 04.01.2016 and even the review filed against the said order was dismissed vide order dated 21.04.2016. Further, identical SLP's including SLP(C) No. 186/2014 came up for hearing before the Hon'ble Apex Court on 22.01.2014, wherein the Hon'ble Apex Court while dismissing the SLP's filed by writ petitioners specifically clarified the entire gamut of confusion and concluded that regular pay scale was liable to be granted only to 73 workmen who initiated proceedings under the Industrial Disputes Act which culminated in award dated 15/07/1989. In the cases of all others, regular pay scale was effective only wef. 18/05/1994 in the light of the decision of the High Court in Suresh Chandra Tiwari versus State of UP. Further, the State was directed to bring this order to the notice of the High Court in the pending cases so that at least in future the High Court be conscientious in such cases."

(47) Pertinently, in the interregnum three more writ petition came to be filed, wherein the Single Judge directed for regular pay-scale with effect from 31.03.1989, which was also upheld by the Division bench, however on Appeal, the Hon'ble Apex Court allowed the Appeal of the respondent/State. These matters being:

Writ No. & details	Single Judge Order	Division Bench order	Hon'ble Apex Cour

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Writ Petition No. 1820 (S/S) of 2002	23/02/2010	Special Appeal Defective No. 12 of 2012 Dismissed vide order dated 19.12.2013	SLP no. 1170 of 2016 Allowed vide order dated 22/01/2016
Writ Petition No. 9138 (S/S) of 2011	20/12/2011	Special Appeal Defective No. 778 of 2012 Dismissed vide order dated 11.09.2014	SLP no. 1069 of 2016 Allowed vide order dated 22/01/2016
Writ Petition No. 631 (S/S) of 2012	02/02/2012	Special Appeal Defective No. 704 of 2012 Dismissed vide order dated 24/03/2015	SLP no. 83 of 2016 Allowed vide order dated 22/01/2016

(48) Thus, this court is of the view that the conundrum relating to the effective date on which a tube well operator would become entitled for regular pay scale i.e whether 31.03.1989 as claimed by the petitioners or 18.05.1994 i.e the date of passing of *Suresh Chand Tewari Case*, came to be settled as on 04.01.2016 and 22.01.2016 by the Hon'ble Apex Court. The Apex Court while dismissing the Appeal categorically held that those tube well operators, who were not a part of the labour court order, shall be entitled to regular pay scale with effect from 18/05/1994 in the light of the decision of the High Court in *Suresh Chand Tewari Case.* Further, the Hon'ble Apex Court clearing the entire air and considering the confusion created in the issue before the High Court, directs the state to bring the said order dated 22.01.2016 to the notice of the High court in all pending cases, so that at least in future the High court be conscientious in such cases.

(49) Apparently, since the confusion created has been settled only on 04.01.2016 and 22.01.2016 by the Apex court, *prima-facie* the writ petitioners who had enjoyed the fruits of earlier litigation cannot be faulted with, especially when the pay-scale having been granted from an anterior date i.e 31.03.1989 was by virtue of a court order. However, the said proposition has a caveat, in as much as this court cannot be oblivious to the fact that the court order by virtue of which *Awadhesh Sigh Case* came to be decided by the Single Judge and upheld till the supreme court, which has resulted in a chain-reaction and had been the basis of various writ petitions thereafter, was passed on the basis of an order which

itself was set-aside by the Hon'ble Division Bench of this court as mentioned supra. Thus, the balance of equity has to be understood and weighed in the aforesaid competing proposition of facts.

(50) However, this court finds that the mere reliance of the writ petitioners on doctrine of merger, to argue that the Respondent/ State could not re-fix the pay-scale on the basis of the clarification order dated 04.01.2016 or 22.01.2016 is not wholly correct, as firstly clarification is always of a proposition which always existed and remained intact. Clarification seems to merely express a view point & meaning thereof in the context of the matter. Secondly, the doctrine of merger would not squarely apply to all those cases decided on the basis of Awadhesh Singh Case, as the SLP'S in each of these cases have been either been dismissed in limine or on the ground of limitation. The Apex Court in Kunhayammed & Ors vs State Of Kerala & Anr (2000(6) SCC 359), in unequivocal terms held that an order refusing special leave to appeal may be a non- speaking order or a speaking one. In either case it does not attract the doctrine of merger and it is only when leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(51) The writ petitioners have vehemently argued that even if some wrong fixation of pay was made while the petitioners were in service, they being Class-III/ IV employees, the same may not be deductible from their post-retirement dues in view of the judgment of Hon'ble Apex Court in the case of **State of Punjab v. Rafiq Masih** : (2015) 4 SCC 334 may also be not correct, because any judgment is an authority on the point it decides. Further, in Rafiq Masih case, the respondents (employees) were given monetary benefits, which were in excess of their entitlement. These benefits flowed to them, consequent upon a mistake committed by the concerned competent authority, in determining the emoluments payable to them. In the present case, in hand, there is no mistake committed by the concerned competent authority, but the excess monetary benefits have been given under a court order or rather under a threat of contempt proceedings. It would be refer to a recent judgment of the Hon'ble Apex Court passed in **Mekha Ram & Others Vs State of Rajasthan & Others** decided on 29/03/2022, wherein the Hon'ble Apex Court vividly held that in case any monetary benefit has been given in view of any court order, the same has to be made good on the principle of restitution as no one shall suffer by an act of the court. The Hon'ble Apex Court in view of the facts & circumstances of that case, granted permission to recovery the monetary benefits accrued due to a court order, however, again there is a Caveat, in as much as in that case the private respondent were still in service and were working in the said organization and the deduction were allowed to be paid in installments. However, in the present case, the petitioners have superannuated and their retiral benefits are sought to be withheld on the name of recovery and protecting public funds. Thus, again a competing proposition has to be determined in the facts of each case, wherein the petitioners although may have superannuated and they belong to class III/IV category, still as to whether the government can go ahead with the recovery of excess payments made to them.

(52) This Court has also considered the fact from a different angle by taking into consideration a holistic view of the notices/orders impugned in these writ petition. It is noted that the Respondent/State, in the first instance issued notice informing the writ petitioners that the excess amount paid to them would be recovered in terms of order dated 22.01.2016 and on the heels of the said information, the Respondent/State pursuant to its aspirations to recover/adjust the excess amount has issued a second notices informing the writ petitioners about withholding the retiral benefits, inspite of interim orders passed by this court. Further, the tearing hurry of the Respondent/state to withhold the gratuity amount cannot be understood in common parlance, especially when the only provision to withhold a gratuity is under regulation 351A of the Civil Services Regulations as applicable to the state of Uttar Pradesh, which prescribes certain stringent conditions, which are not to be found in the present case. Although, the respondent/state has argued that regulation 922 of the civil Service regulations, empowers them to withhold gratuity, however, it appears from the record that the order of recovery/adjustment of the amount from the retiral dues has been passed without resorting to any such rule and in any case, the impugned order of withholding the gratuity amount has not been passed keeping in view the aforesaid regulations as well as the provisions of payment of Gratuity Act.

(53) Thus, the impugned orders passed by the respondent/state has to be tested by this court on the anvil of the aforesaid analysis. However, this court finds that the impugned orders/notice has been passed merely on the basis of order dated 22.01.2016 passed by the Hon'ble Apex Court as mentioned supra.

(54) It is evident from the impugned orders that the very decision of the competent authority to reduce and re-fix the pay-scale of the petitioners have civil consequences as the same has the effect of not only reducing the pay-scale, but also contemplate recovery of any excess amount paid by the respondent. Apparently, these impugned orders have been passed without issuing any notice or seeking any explanation from the writ petitioners. The fact about non-observance of the principle of natural justice cannot be disputed by the learned counsel for the State since no such opportunity of providing hearing to the writ petitions have been appended to the counter affidavits filed on behalf of the respondent State in the writ petition.

(55) It is settled position of law that when a decision is taken which has a civil consequence and would adversely affect the rights of the other party, the bare requirement to follow the principle of natural justice is mandatorily to be followed, but here no such opportunity of seeking explanation or hearing has been provided to the writ petitioners. The opportunity to provide hearing before making any decision was considered to be a basic requirement in the court proceeding. Later on this principle was applied to other quasi-judicial and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary.

(56) Time and again the Hon'ble Supreme Court has observed that the rules of natural justice operate only in areas not

covered by any law validly made. These principles thus supplement the law of the land. In the celebrated case of Smt. Maneka Gandhi v. Union of India and another, AIR 1978 SC 597, it has been observed that even where there is no specific provision for showing cause, yet in a proposed action which affects the rights of an individual it is the duty of the authority to give reasonable opportunity to be heard. This duty is said to be implied by nature of function to be performed by the authority having power to take punitive or damaging action. The writ petitioners obviously have been visited with civil consequences but they had been granted no opportunity to show cause against the reduction of their basic pay. They were not, even put on notice before their pay was reduced by the Authority and the order came to be made behind their back without following any procedure known to law. There, has, thus, been a flagrant violation of the principles of natural justice and the writ petitioners have been made to suffer financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the concerned to notice and giving him a hearing in the matter.

(57) Therefore, this court is of the opinion that the impugned notice/order issued/passed by the Authority for re-fixing the pay-scale fails on the ground of non-compliance of principle of natural justice. Consequently, any decision for recovery of the excess amount re-worked by re-fixing the pay-scale and any action taken by the respondent for withholding the reiral benefits has also to fail.

G. <u>Conclusion</u>

(58) In light of the aforesaid discussion, this Court is of the considered view that since the principle of natural justice has not been followed by the respondent/state as no opportunity of hearing has been given by them to the writ petitioners, before the pay-scale was re-fixed/reduced giving rise to civil consequences, the impugned order/notice issued by the respondent in the first category of writ petitions cannot be sustainable in the eyes of law and as such the same are hereby quashed. Consequently, all orders of recovery impugned in second category of cases also stands quashed as being an off-shoot of the impugned order/notice in the first category of writ petitions. However, it shall be open to the respondent/State to issue fresh notice/order to the writ petitioners and take a decision in accordance with law.

(59) Further, it goes without saying that since all the issues which are noticed and enunciated above would merit consideration before the competent Authority, who shall have to evaluate the claims of the petitioners herein, bearing in mind the various competing factors & observation as has been mentioned herein above, it is directed that the competent Authority shall give an opportunity of explanation and/or hearing to the writ petitioners, before passing a speaking order in the matter.

(60) For the aforesaid purpose, the matters shall stand remitted to the competent authority. The exercise of reconsideration may be concluded as expeditiously as possible, preferably within a period of 3 months of the date of presentation of a duly authenticated copy of this order, keeping in mind that most of the petitioners have already superannuated.

(61) The writ petitions stand **disposed of** in the above terms. There shall be no orders as to cost.

(2023) 4 ILRA 556
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.04.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 2754 of 2023

Union of India & Ors. ...Petitioners
Versus
Jitendra Kumar Bajpai & Anr. ...Respondents

Counsel for the Petitioners:
Varun Pandey, Devrishi Kumar

Counsel for the Respondents:
Praveen Kumar

A. Service Law – Appointment – Eligibility educational qualification - U.P. Board of Secondary Sanskrit Education Act, 2000 (U.P. Act No. 32 of 2000) - U.P. State Universities Act, 1973 - U.P. Madhyamik Sanskrit Shiksha Parishad is a statutory board/body created under the State enactment which clearly empowers the Board to conduct examinations and also grant certificates. To term a statutory Board created under a State enactment to be a Body not recognized, in this case is incorrect. (Para 19, 20)

In view of the scheme of U.P. Act No.32 of 2000, U.P. Madhyamik Sanskrit Shiksha Parishad is not only a body corporate but is clearly empowered by the State Legislature to grant diplomas and certificates to the persons who have pursued the course of study in an institution recognized by the Board or admitted to its privilege by the Board. U.P. Madhyamik Sanskrit Shiksha Parishad is thus statutorily empowered not only to admit the institutions imparting Sanskrit education to the privileges of the Board but also to conduct examinations and grant certificates and diplomas. (Para 17)

Respondent no.1-claimant has to his credit certificate by the U.P. Madhyamik Sanskrit Shiksha Parishad certifying that he had passed U.P. Madhyama Examination conducted by the said Board. Therefore, respondent no.1-claimant fulfills the eligibility educational qualification for appointment to the post in question. (Para 18)

Writ petition dismissed. (E-4)

Present petition challenges judgment and order dated 07.11.2022 whereby application filed by the respondent no.1-claimant has been allowed and the petitioners have been directed to declare the result of respondent no.1-claimant. It has further been directed that in case respondent no.1-claimant is successful in the examination/selection held for appointment to the post of Postal Assistant/Sorting Assistant in the Postal Department, he shall be offered appointment to the post in question.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Om Prakash Shukla, J.)

1. Heard Ms. Alina Masoodi, holding brief of Sri Varun Pandey, learned counsel for the petitioners and Sri Praveen Kumar, learned counsel for respondent no.1-claimant.

2. By instituting these proceedings under Article 226 of the Constitution of India, challenge has been made by the petitioners to the judgment and order dated 07.11.2022 whereby Original Application No. 451 of 2019 filed by the respondent no.1-claimant has been allowed and the petitioners have been directed to declare the result of respondent no.1-claimant. It has further been directed that in case respondent no.1-claimant is successful in the examination/selection held for appointment to the post of Postal Assistant/Sorting Assistant in the Postal

Department, he shall be offered appointment to the post in question.

3. The issue involved in this petition is in a very narrow compass.

4. A notification from the office of the Chief Postmaster General, U.P. was issued on 04.06.2019 whereby limited competitive examination for recruitment to the post of Postal Assistant/Sorting Assistant from amongst Gramin Daak Sewaks was notified for the vacancies pertaining to the years 2015-16, 2016-17, 2017-18 and for some period of the year 2018 as well.

5. Clause 3.4 of the advertisement/notification dated 04.06.2019 prescribed the eligibility conditions, according to which Gramin Daak Sewaks possessed of 10+2 standard educational qualification having passed from a recognized University/Board as on 01.04.2018 were eligible. Gramin Daak Sewaks to be eligible for selection to the post in question for the vacancies of the year 2017-18 ought to be within 30 years of age as on 01.04.2018 if he was a general category candidate and if he was a candidate belonging to reserved category of Scheduled Castes/Scheduled Tribes, he ought to have been within 35 years of age whereas in case of Other Backward Classes, the candidate concerned should have been within 33 years of age. As per provision contained in Clause 3.4 of the said notification, Gramin Daak Sewak having put in minimum five years of service as on 01.04.2016 were eligible for being considered for appointment to the post of Postal Assistant/Sorting Assistant. Clause 3.4 of the notification dated 04.06.2019 is extracted herein below:-

"3.4 Eligibility conditions for the vacancies of year 2018 (01-04-2018 to 31-12-2018)

(i) **Educational Qualification** : 10+2 standard or 12th Class pass from a recognized University/Board as on 01.04.2018.

(ii) **Age** : GDS should be within 30 years of age (35 years for SC and ST communities and 33 years for OBC community) as on 01.04.2018.

(iii) **Service eligibility** : Must have put in a minimum service of 5 years as on 01.04.2018".

6. Similar eligibility conditions were provided for the vacancies of other years as well.

7. Respondent no.1-claimant accordingly considering himself to be eligible made his application, however, when he did not receive admit card for appearing in the written examination, he came to know that he is not being treated to be eligible for making his application for appointment to the post in question which led him to file an Original Application. During pendency of the said Original Application, an interim order was passed by the Central Administrative Tribunal on 11.07.2019 whereby respondent no.1-claimant was permitted to appear in the examination provisionally. In compliance of the said order passed by the Tribunal on 11.07.2019, respondent no.1-claimant was permitted to appear in the examination, however, his result was kept in sealed cover and was not declared.

8. By means of the order under challenge in this petition the Original Application has been allowed by the Central Administrative Tribunal with the directions already noticed above.

9. The sole reason why the Department-petitioners were not treating

the respondent no.1-claimant to be eligible for appointment to the post in question according to them is that he was not having requisite eligibility qualification in terms of Clause 3.4 of the notification dated 04.06.2019. As already noted above, so far as the educational qualification for appointment to the post in question is concerned, in terms of Clause 3.4 of the notification dated 04.06.2019, Gramin Daak Sewak, who had 10+2 standard qualification to his credit from a recognized University/Board as on 01.04.2018, was to be treated to be possessed of requisite eligibility qualification. Thus, the only requirement was that the candidate concerned should have passed 10+2 examination as on 01.04.2018 from the recognized University/Board.

10. It is not a case of the petitioners-Department that the respondent no.1-claimant did not have educational qualification of 10+2 pass on 01.04.2018; rather the entire objection of and the exception taken by the Department is that the respondent no.1-claimant has 10+2 examination pass qualification to his credit from the U.P. Madhyamik Sanskrit Shiksha Parishad, Lucknow which was not a recognized qualification.

11. The Central Administrative Tribunal has, however, held by passing the impugned judgment and order that the respondent no.1-claimant did fulfill the requisite qualification.

12. It has been argued by learned counsel for petitioners that U.P. Madhyamik Sanskrit Shiksha Parishad, Lucknow is not a recognized body and as such it cannot be said that the respondent no.1-claimant was possessed of the requisite educational qualification for appointment to the post in question.

13. The aforesaid submission made by learned counsel for the petitioners is highly misconceived.

14. U.P. Madhyamik Sanskrit Shiksha Parishad, Lucknow has been created by a State Legislation known as "U.P. Board of Secondary Sanskrit Education Act, 2000 (U.P. Act No.32 of 2000)". The said enactment received the assent of the Governor of State of U.P on 31.10.2000 and was accordingly published in U.P. Gazette Extraordinary on 01.11.2000. Sub-section (2) of Section 1 of U.P. Act No.32 of 2000 provides that the Act shall be deemed to have come into force on September 30, 2000. Accordingly, in view of operation of the provision contained in Section 1 (2) of U.P. Act No.32 of 2000, the said Act came into force w.e.f. 30.09.2000.

15. Section 2 (a) defines the Board to mean U.P. Board of Secondary Sanskrit Education to be established under Section 3. U.P. Board of Secondary Sanskrit Education if translated into Hindi is Uttar Pradesh Madhyamik Sanskrit Shiksha Parishad. Section 3 of the Act provides that with effect from such date as the State Government may by notification appoint, there shall be established a Board to be known as the Uttar Pradesh Board of Secondary Sanskrit Education. Section 3 (2) of U.P. Act No.32 of 2000, clearly provides that the Board shall be a body corporate and shall consist of various members with a Director who shall be Chairman of the Board. Notification constituting the Board was issued on 17.02.2001 which has been made effective w.e.f. 01.03.2001.

16. Section 9 of the Act prescribes the functions of the Board which *inter-alia* are to prescribe course of instructions, text books and other instructional material for Prathama, Madhyama and Uttar Madhyama classes in Sanskrit education. Section 9 (c) empowers the Board to grant diplomas or certificates to persons who have pursued a course of study in an institution admitted to the privileges or recognition by the Board and even to those who have studied privately under conditions laid down in the regulations and have passed an examination of the Board. It also empowers the Board to conduct examinations at the end of Prathama, Purva Madhyama and Uttar Madhyama courses. The Board also exercises certain powers to recognize institutions for the purposes of its examination.

17. Accordingly, in view of the scheme of U.P. Act No.32 of 2000, U.P. Madhyamik Sanskrit Shiksha Parishad is not only a body corporate but is clearly empowered by the State Legislature to grant diplomas and certificates to the persons who have pursued the course of study in an institution recognized by the Board or admitted to its privilege by the Board. U.P. Madhyamik Sanskrit Shiksha Parishad is thus statutorily empowered not only to admit the institutions imparting Sanskrit education to the privileges of the Board but also to conduct examinations and grant certificates and diplomas.

18. It is not in dispute that the respondent no.1-claimant has to his credit certificate by the U.P. Madhyamik Sanskrit Shiksha Parishad certifying that he had passed U.P. Madhyama Examination conducted by the said Board.

19. To term a statutory Board created under a State enactment to be a Body not recognized, thus, in this case is incorrect.

20. As already observed above, U.P. Madhyamik Sanskrit Shiksha Parishad is a statutory board/body created under the State enactment which clearly empowers the Board to conduct examinations and also grant certificates.

21. For the aforesaid reasons, we have no doubt in our mind that the respondent no.1-claimant fulfills the eligibility educational qualification for appointment to the post in question.

22. Learned Tribunal while passing the impugned judgment and order has also made a mention of Circular dated 06/10.02.1970, according to which the examinations of Purva Madhyama, Uttar Madhyama and Shastri conducted by Varanaseya Sanskrit Vishwa Vidyalaya, Varanasi have been recognized for the purpose of employment under the Central Government.

23. We may, at this juncture, indicate that prior to creation of U.P. Madhyamik Sanskrit Shiksha Parishad (U.P. Board of Secondary Sanskrit Education), Sanskrit institutions in the State of U.P. used to be affiliated to its privileges by Varanaseya Sanskrit Vishwa Vidyalaya, Varanasi which is a State University formed under the U.P. State Universities Act, 1973. However, after creation of U.P. Madhyamik Sanskrit Shiksha Parishad, all the Sanskrit institutions are now affiliated with this Board and as already observed above, the Board is not only statutory in character but also is clearly empowered (i) to admit Sanskrit institutions to its privileges, (ii) to conduct examinations and (iii) to grant certificate or diploma to the candidates who successful pass the examination conducted by the Board.

24. For the aforesaid reasons, we are not inclined to take any view other than the view taken by learned Central Administrative Tribunal while passing the judgment and order.

25. The writ petition, in our opinion, lacks merit which is hereby **dismissed**.

26. We have been informed that the result of respondent no.1-claimant has been declared wherein he has been declared passed, however, he is not being offered appointment to the post in question. Thus we direct that in case there is no other legal impediment, the respondent no.1-claimant shall be offered appointment to the post in question within a period of three weeks from the date of production of a certified copy of this order.

(2023) 4 ILRA 560
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.04.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 2755 of 2023

Sachin Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Gaurav Mehrotra, Anant Khanna, Harsh Vardhan Mehrotra

Counsel for the Respondents:
C.S.C., Atul Kumar Dwivedi, Lalta Prasad Misra, Rajesh Tewari

Service Law- Constitution of India, 1950- Article 226-Uttar Pradesh Technical University Act, 2000- Sections 7, 8-Writ petition against order of suspension of petitioner who was appointed as Registrar as well order passed by the Chancellor constituting inquiry committee for inquiring into the alleged misconduct of the petitioner- The Chancellor has been vested with the authority to place the officer of the University concerned, in certain circumstances, under suspension and the Chancellor also empowered to order an inquiry which may be thought proper for ascertaining as to whether the officer has misconducted himself within the meaning of 'misconduct' as given in Regulation 2.03 - The proceeding as contemplated in Regulation 2.03 read with Regulation 2.04 are in relation to removal of an officer of the University as defined in Section 7 and that would mean that Chancellor can initiate the proceedings only in respect of his removal from the office of Registrar of the University and not for his removal or for effecting any punishment as a Government servant for which it is only the appointing authority of the petitioner as a Government servant, i.e. the St. Government who can take action and pass appropriate orders-No interference with the order of suspension and the order appointing enquiry committee which are impugned in the writ petition. (Para 2, 11, 15, 16, 17, 28)

Petition dismissed. (E-15)

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Om Prakash Shukla, J.)

1. Heard Shri Gaurav Mehrotra, learned counsel representing the petitioner, learned State Counsel representing the respondent nos.1 and 4, Shri S.K. Kalia, learned Senior Advocate assisted by Shri Rajesh Tiwari for the respondent no.2, Shri L.P. Misra, leaned counsel representing the respondent no.3 and Shri Atul Dwivedi, learned counsel representing the respondent no.5.

2. Proceedings of this petition have been instituted under Article 226 of the Constitution of India assailing the order dated 24.03.2022 passed by the Chancellor of Dr. A.P.J. Abdul Kalam Technical University, Uttar Pradesh, Lucknow (hereinafter referred to as ' the Chancellor'), whereby the petitioner, who was appointed as Registrar of the said University, has been placed under suspension.

Another order which is under challenge in this writ petition is dated 31.03.2023 passed by the Chancellor constituting a three member inquiry committee for inquiring into the alleged misconduct of the petitioner while working as Registrar of the University.

3. It has been argued by Shri Gaurav Mehrotra that the petitioner is a member of Provincial Civil Services and the conditions of his service including disciplinary matters are governed by the provisions contained in the rules made under Article 309 of the Constitution of India, namely, the Uttar Pradesh Civil Service (Executive Branch) Rules, 1982 (hereinafter referred to as 'Rules 1982') and Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to 'Rules 1999'). It has been argued further by Shri Mehrotra that under the Rules 1982, the appointing authority of the petitioner is Hon'ble the Governor and in terms of the Uttar Pradesh Rules of Business, 1975 framed under Article 166 (3) of the Constitution of India, matters relating to disciplinary action etc. of the members of Provincial Civil Service has to go up to Hon'ble the Chief Minister for approval and, accordingly, the Chancellor, not being his appointing authority, is not empowered either to place him under suspension or to constitute any inquiry committee.

4. It has also been argued by the learned counsel for the petitioner that suspension of a government servant can be resorted to in accordance with the provisions contained in Rule 4 of Rules 1999, according to which a government servant can be placed under suspension only at the discretion of the appointing authority and not at the instance of any other authority. His further submission is that disciplinary proceedings under Rules 1999 can be instituted only by the disciplinary authority and not by any other authority. His submission, thus, is that since the Chancellor of the University is not the appointing authority or the disciplinary authority of the petitioner, the order of suspension and the order constituting the inquiry committee, which are under challenge in this writ petition, are completely without jurisdiction.

5. It has further been argued by Shri Mehrotra that the petitioner's appointment as Registrar in the University was made on deputation and as per well settled service jurisprudence governing the disciplinary action against a deputationist, it is the parent department which is empowered to initiate disciplinary proceeding even in a case where the deputationist is said to have misconducted himself while working with the borrowing department. In this view, the submission is that even if the petitioner, who has been working as Registrar in the University which is the borrowing department, was found to have misconducted himself while discharging his functions as Registrar of the University, the authorities of the University including the Chancellor could have apprised the said alleged misconduct on the part of the petitioner to the State Government which is the parent department of the petitioner and it is only in the discretion of the State

Government any disciplinary proceeding could have been instituted. In such a view, the submission is that both the orders, i.e. the order of suspension and the order constituting the disciplinary inquiry committee passed by the Chancellor are completely without jurisdiction and, hence are not sustainable.

6. Per contra, Shri S.K. Kalia, learned Senior Advocate representing the Chancellor has submitted that as a matter of fact though the appointment of the petitioner is on deputation in the University as Registrar, however, such appointment on deputation is not to be construed as appointment on deputation in the usual sense of the phrase "appointment on deputation" for the reason that appointment of Registrar in the University is contemplated under the Uttar Pradesh Technical University Act, 2000 (hereinafter referred to as 'University Act 2000') and accordingly his appointment is to be governed by the provisions of the said Act. Drawing our attention to the provisions contained in Section 7 of the University Act 2000, it has been argued by learned Senior Advocate that the Registrar of the University is an officer of the University in terms of Section 7 (e) and further that the Chancellor, in respect of the University, exercises his authority and power as vested in him under Section 8.

7. According to the learned Senior Advocate sub-section (4) of Section 8 of the University Act, 2000 provides that the Chancellor shall have such other powers as may be conferred on him by or under the Act or the Regulations framed under the said enactment. Our attention has also been drawn to Regulation 2.03 and 2.04 of the Regulations of the University, 2010 which fall in Chapter 2 and deal with the officers of the University. According to the Senior Advocate, Regulation 2.03 clearly empowers the Chancellor to remove any officer (as defined and enlisted in Section 7 of the University Act, 2000) after forming an opinion that the officer concerned has either willfully omitted or has refused to carry out the provisions of University Act, 2000 or he has abused the power vested in him. The emphasis by learned Senior Advocate is on the words "after making such inquiry" occurring in Regulation 2.03 and accordingly it has been stated that removal of an officer of the University by the Chancellor can be made after such inquiry as is thought proper by the Chancellor. He has further stated that in a situation where the appointing authority of such an officer as defined in Section 7 of the University Act, 2000 is Chancellor himself, he can remove the officer by passing an order to that effect and in a situation where the appointing authority of an officer of the University is the State Government, the Chancellor can direct the State Government to remove the officer concerned.

8. We have also been taken to the provisions contained in Regulation 2.04 of the Regulations, according to which the Chancellor possesses the power to suspend such an officer of the University during pendency or in contemplation of any inquiry referred to in Regulation 2.03. On the aforesaid submissions, it has been argued by the learned Senior Advocate representing Hon'ble the Chancellor that the submission of learned counsel for the petitioner that the Chancellor does not have any jurisdiction or authority or power to place the petitioner under suspension or to constitute an inquiry committee is absolutely misconceived for the reason that Chancellor has been vested with adequate

authority not only to pass an order of suspension but also to constitute an inquiry committee in relation to an officer of the University as defined in Section 7 of the University Act, 2000.

9. The arguments made by learned Senior Advocate on behalf of the Chancellor has been reiterated by Dr. L.P. Misra representing the respondent no.3 and Shri Atul Dwivedi learned counsel representing the respondent no.5.

10. We have considered the rival submissions made by learned counsel representing the respective parties and have also perused the records available before us on this writ petition. We have also extensively gone through various statutory provisions contained in Act 2000, the Regulation framed under Act 2000, Rules 1982 and Rules, 1999.

11. The question which falls for our consideration in this case is as to whether Chancellor has been vested with any lawful authority to place an officer of the University under suspension and to constitute an inquiry committee for inquiring into the alleged misconduct on the part of the officer of the University concerned.

12. It is not in dispute that in terms of provisions contained in Section 7(e) of the University Act, 2000, Registrar is one of the officers of the University along with the Chancellor, the Vice-Chancellor, the Pro-Vice-Chancellor, the Finance Officer and the Controller of Examination. Section 7 of the University Act, 2000 is extracted hereinbelow :-

"7. The following shall be the officers of the University-

(a) the Chancellor;
(b) the Vice-Chancellor;
(c) the Pro-Vice-Chancellor;
(d) the Finance Officer;
(e) the Registrar;
(f) the Controller of Examination;
(g) such other officers of the University as may be declared by the regulations to be the officers of the University."

13. The Chancellor, under the University Act, 2000 has been defined in Section 8, according to which the Hon'ble Governor of the State is the Chancellor of the University. It further provides that the Chancellor by virtue of his office shall be the Head of the University. Certain powers have been vested in the Chancellor by Section 8 of the University Act, 2000. Section 8 of the University Act, 2000 reads as under :-

"8. (1) The Governor shall be the Chancellor of the University. He shall by virtue of his office, be the head of the University and shall, when present, preside at any convocation of the University.

(2) Every proposal for the conferment of an honorary degree shall be subject to the confirmation of the Chancellor.

(3) It shall be the duty of the Vice-Chancellor to furnish such information or records relating to the administration of the affairs of the University as the Chancellor may call for.

(4) The Chancellor shall have such other powers as may be conferred on him by or under this Act or the Regulations."

14. As per the aforequoted provision contained in sub-section (4) of Section 8, Chancellor exercises such powers as are conferred on him by or under the

University Act, 2000 or by the Regulations framed under the said enactment. So far as conferment of powers under the Act is concerned, the Chancellor has been vested with the authority for confirming every proposal for conferment of an honorary degree and to call for records and information from the office of the Vice Chancellor of the University. In terms of sub regulation (4) of Regulation 8, Chancellor, as observed above, can exercise such powers which are conferred on him by or under the Regulations. Regulations 2.03 and 2.04 of the Regulations framed under the Gautam Buddh Technical University, 2010 are relevant which are extracted hereinbelow :-

"2.03 If in the opinion of the Chancellor, the Vice-Chancellor or any other Officer of the University willfully omits or refuses to carry out the provisions of the Act, or abuses the powers vested in him and if it appears to the Chancellor that the continuance of such officer in the office is detrimental to the interests of the University, the Chancellor may, after making such inquiry as he deems proper, by order, remove the said Officer in cases where he himself is the appointing authority or where the State Government is the appointing authority, direct such authority to remove the Officers.

2.04 The Chancellor shall have power to suspend such Officer during the pendency or in contemplation of any enquiry referred to in regulation 2.03."

15. When we peruse the aforequoted provisions contained in Regulation 2.03 what we find is that in a situation where the Vice Chancellor or any other officer of the University (including the Registrar of the University as well) is found willfully omitting or refusing to carry out the provisions of University Act, 2000 or he is found to have misused the powers vested in him or if it appears to the Chancellor that continuance of such officer in the University is detrimental to the interests of the University, the Chancellor has been vested with ample powers to remove such an officer. In a case where the Chancellor himself is the appointing authority he can pass the order removing the officer concerned himself, however, where the State Government is the appointing authority, the Chancellor can direct such authority to remove the officer concerned.

16. Regulation 2.04 provides that the Chancellor will have power to suspend such officer during the pendency or in contemplation of inquiry under Regulation 2.03. We may notice at this juncture that any removal of an officer of the University is permissible under Regulation 2.03 only after making an inquiry as may be thought proper by the Chancellor and only once the Chancellor forms an opinion about the misconduct, as detailed in Regulation 2.03, of the officer concerned. Thus, removal of an officer of the University is not permissible without an inquiry which may be thought appropriate to be conducted by the Chancellor. Regulation 2.04 has to be read in conjunction with Regulation 2.03 which provides that in a situation where any inquiry envisaged under regulation 2.03 is either pending or is in contemplation, the Chancellor in his discretion can suspend the officer of the University against whom the inquiry is pending or is in contemplation.

17. Accordingly, we are of the opinion that in respect of an officer of the University as defined in Section 7 of the University Act, 2000, the Chancellor has been vested with the authority to place the

officer of the University concerned, in certain circumstances, under suspension and the Chancellor is also empowered to order for an inquiry which may be thought proper for ascertaining as to whether the officer of the University concerned has misconducted himself within the meaning of 'misconduct' as given in Regulation 2.03 of the Regulations.

18. We may further notice that the Registrar of the University is appointed by the State Government on such terms and conditions as may be prescribed. Section 13 of the University Act, 2000 clearly states that Registrar shall be a full time officer of the University and shall be appointed by the State Government. Section 13 of the University Act, 2000 is extracted hereinbelow:-

"13. (1) The Registrar shall be a whole-time officer of the University.

(2) The Registrar shall be appointed by the State Government such terms and conditions as may be prescribed.

(3) The Registrar shall have the power to authenticate records on behalf of the University.

(4) The Registrar shall be responsible for the due custody of the records and the common seal of the University. He shall be ex-officio Secretary of the Executive Council and shall be bound to place before the Executive Council all such information as may be necessary for transaction of its business. He shall also perform such other duties as may be prescribed or required from time to time, by the Executive Council or the Vice-Chancellor but he shall not, by virtue of this sub-section, be entitled to vote.

(5) The Registrar shall not be offered nor shall he accept any remuneration for any work in the University save such as may be provided by the Regulations."

19. Apart from Section 13 of the University Act, 2000, we may also extract Regulation 2.21 of the Regulations, according to which the Registrar is to be appointed by the State Government on deputation from amongst the members of the Uttar Pradesh Civil Service (Executive Branch). It further provides that in case the office of Registrar is vacant and Registrar is on leave or in a certain other circumstances, the duties of the office of Registrar shall be performed by such person as the Vice Chancellor may appoint for the purpose. The amended Regulation 2.21 of the Regulations is quoted hereinunder:-

"Registrar will be appointed by the State Government on deputation from Uttar Pradesh Civil (Executive Branch) Service. When the office of the Registrar is vacant or when the Registrar is on leave by reasons of illness, absence or due to any other cause is unable to perform the duties of his office, the duties of the office of Registrar shall be performed by such person as the Vice-Chancellor may appoint for the purpose."

20. We may also refer to the provisions contained in Regulation 14.03 which provides that government servants serving the University on deputation shall remain subject to the Government leave rules.

21. Accordingly, as per the scheme of the Act 2000 and the Regulations framed thereunder, though appointment of the Registrar in the University is on deputation, however, this deputation cannot be termed

to be a "deputation" in the traditional sense of the word in which it is generally understood inasmuch as the consent of the University, that of the deputationist and the State Government for placing a member of Provincial Civil Service as Registrar in the University is not required. It is the authority available to the State Government under Section 13 to appoint a member of Provincial Civil Service as Registrar of the University. Accordingly, the general rules or law relating to a deputationist in the matter of disciplinary proceedings will have no application in this case. The State Government under Section 13 places its officer on deputation with a University, however, while he remains posted or placed in the University, he is subject to certain supervision and control of the Chancellor under the Act 2000. One of the supervisions as envisaged under the Regulations read with section 8 of the University Act, 2000 is the proceeding which may be initiated for removal of the Registrar from the University.

22. As already discussed above, we are of the considered opinion that Regulation 2.03 read with Regulation 2.04 empowers the Chancellor to initiate action for removal of the Registrar from his office from the University and in that process, it is not only that Chancellor can order for any inquiry, but he can also place the Registrar under suspension.

23. In the aforesaid view of the matter, we are not convinced by the submissions made by learned Counsel for the petitioner that the order of suspension and the order constituting the inquiry against the petitioner in this case is without jurisdiction.

24. However, we may clarify certain aspects which have cropped up during the course of arguments. As already discussed above, the proceeding as contemplated in Regulation 2.03 read with Regulation 2.04 are in relation to removal of an officer of the University as defined in Section 7 and that would mean that Chancellor can initiate the proceedings only in respect of his removal from the office of Registrar of the University and not for his removal or for effecting any punishment as a Government servant for which it is only the appointing authority of the petitioner as a Government servant, i.e. the State Government who can take action and pass appropriate orders.

25. Having observed as above, we also find that there may be a situation where a Registrar appointed in the University by the State Government is found indulging in gross misconduct and in such a situation it is not that he shall be immune for any such misconduct, however, it is not the Chancellor rather the State Government which is empowered and which will have jurisdiction to take action if it is so warranted in the facts of particular case.

26. Learned counsel for the petitioner at this juncture submits that the petitioner does not have desire any more to continue to remain posted in the University and once the order of suspension was passed and charge of the post of Registrar of the University, by means of an order dated 25.03.2023 passed by Vice Chancellor, was taken over from him and handed over to another officer, he approached the State Government with the prayer to treat the order dated 25.03.2023 as the order of his repatriation to the State Government and accordingly it has been prayed that he may be ordered to be placed at the disposal of the State Government.

27. So far as the aforesaid submission and prayer made by the learned counsel for

the petitioner is concerned, we at this juncture are not in a position to deal with any such prayer for the reason that in the writ petition no such prayer has been made. It is, in fact a matter between the petitioner and the State Government. We thus observe that we have not considered this prayer on merits at this juncture.

28. For the reasons aforesaid, we do not find ourselves to be in agreement with the submissions and arguments made by the learned counsel for the petitioner and thus are not persuaded to interfere with the order of suspension and the order appointing enquiry committee which are impugned in the writ petition.

29. The writ petition is, thus, **dismissed.**

30. However, we may direct that the time period as contemplated in the order passed by Hon'ble the Chancellor for completion of the inquiry against the petitioner, i.e. period of three months shall be strictly adhered to. In case the inquiry is not completed within the aforesaid period, it will be open to the petitioner to approach the Court. The petitioner shall, however, co-operate with the inquiry.

31. No order as to costs.

(2023) 4 ILRA 567
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.04.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 4856 of 2006

Chandra Prakash Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Srivastava, R.V. Singh, Sanjay Kumar

Counsel for the Respondents:
C.S.C., H.S. Jain, Om Prakash Mani Tripathi, Raj Kr Singh Suryavanshi

A. Education/Service Law – Direct recruitment – Promotion - U.P. Intermediate Education Act, 1921 - In view of the schedule of the act and the rules, it is evident that the intention of the legislature is not to give freehand to the Management. It has to send only information to the Inspector and it does not have any authority either in the Principal Act or in the Rules for promotion of a teacher. It is simply duty to send all the information of the teachers who are eligible for promotion irrespective of the fact whether they have applied or not. (Para 18)

The District Inspector of Schools vide letter dated 5.7.2003 asked the Manager of the Institution in regard to position of the sanctioned post of Lecturer in the college in question. Vide letter dated 3.1.2005 the Principal of the institution sent information to the effect that in the college there are five sanctioned post of Lecturer and further the post of Lecturer (Civics) which has fallen vacant is to be filled up by way of promotion by promoting the petitioner. The Manager of the College has sent a letter to the DIOS along with relevant documents as required for purpose of promoting the petitioner. Vide order dated 19.1.2005, the D.I.O.S. Unnao had granted the selection grade to the petitioner on the post of Assistant Teacher. (Para 15)

When the claim of the petitioner was processed and forwarded to the District Inspector of Schools for promotion on the post of Lecturer (Civics) on the recommendation of U.P. Secondary Selection Board, the post was filled by direct recruitment in the year 2006 ignoring the claim of the petitioner for promotion, learned Standing Counsel did not show any documents to establish that claim of the petitioner has been considered. (Para 16)

B. If any vacancy occurs in the promotion quota and any teacher in the institution is eligible for promotion in terms of Rule 14, then he has to be considered for promotion. In case the Management does not send the requisition, there are two options open to the Inspector (i) he can ask the Management to send the information and (ii) in the case it does not send, he can forward the name of the eligible candidates to the Committee u/s 12 of the Act on the basis of the records of the institution as mentioned in Sub-rule (6) of Rule 4 of the Rules, 1998. (Para 19)

Neither the Committee of Management nor the District Inspector of Schools took any decision on the claim of the petitioner. Once the post under 50% promotion quota was vacant, it should have been filled up by promotion. The impugned order passed without considering the claim for promotion under 50% promotion quota is bad in law. (Para 20)

The appointment by way of direct recruitment is devoid of merits in view of the fact that the post of Lecturer in Civics was to be filled up by way of grant of 50 % promotion quota to the petitioner. The promotion is made under the statutory provisions of law u/Rule 14 of the 1998 Rules. Therefore, the direct recruitment to the post in question cannot be made till a candidate for the grant of promotion is available in the institution. (Para 21)

Writ petition allowed. (E-4)

Present petition challenges the order dated 22.04.2006, passed by the Selection Board, letter of the District Inspector of Schools dated 11.05.2006 and resolution of Managing Committee dated 14.05.2006.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Shri Sanjay Kumar, learned counsel for the petitioner, learned Additional Chief Standing Counsel appearing for respondent nos.1, 3 and 4, Shri R.K.S. Suryvanshi, learned counsel for respondent no.2 and Shri O.P.M. Tripathi, learned counsel for respondent nos.5 and 6.

2. By means of the present writ petition, the petitioner is challenging the selection of respondent no.6 on the post of Lecturer (Civic) treating the same to be filled up by way of direct recruitment, inasmuch as consequential orders passed by the District Inspector of Schools and Committee of Management. It has further been prayed that a writ of Mandamus be issued to the respondents to permit the petitioner on the post of Lecturer (Civics) in the College known as P.L.K.P. Inter College, Kalu Khera, Unnao by way of promotion as the same falls under 50 % promotion quota with effect from session 2001-02 with consequential benefits. It has further been prayed that a writ of Mandamus be issued to respondent nos.4 and 5 to restrain the respondent no.6 from functioning and discharging his duties on the post of Lecturer (Civics).

3. Facts of the case are that at Kalu Khera in District Unnao, there is a society registered under Society Registration Act, 1860 which runs and manages as educational institution in the name of P.K.L.P. Inter College. The institution is recognized under the provisions of U.P. Intermediate Education Act, 1921. The provisions of U.P. Highschool and Intermediate (Collage's Payment of Salaries Act of the Teachers and others Employees) Act, 1971, inasmuch as the provisions of U.P. Secondary Education Services Selection Board Act as amended uptodate are applicable to the said institution.

It is the case of the petitioner that there are five sanctioned post of Lecturer in the instutition. Shri Chandra Prakash Tiwari, on attaining the age of superannuation

retired from the post of Lecturer (Civics) creating a substantive vacancy on the post of Lecturer. In view of the fact that the post which came into existence coming under 50% promotion quota, the Principal of the institution sent papers to the District Inspector of Schools for grant of promotion to place the matter before the Regional Level Committee of the petitioner. The District Inspector of Schools vide letter dated 5.7.2003 asked the Manager of the Institution in regard to position of sanctioned post of Lecturer in the college in question. No action whatsoever has been taken on the letter of the District Inspector of Schools by the Committee of Management.

The Principal of the institution vide letter dated 3.1.2005 sent information to the effect that in the college there are five sanctioned post of Lecturer and further the post of Lecturer (Civics) which has fallen vacant is to be filled up by way of promotion by promoting the petitioner.

The Manager of the College has sent a letter to the D.I.O.S. along with relevant documents as required for the purposes of promoting the petitioner to the post of Lecturer (Civics) as the same is to be filled in by way of promotion under promotional quota post.

Vide order dated 19.1.2005, the D.I.O.S., Unnao had granted the selection grade to the petitioner on the post of Assistant Teacher, L.T. Grade. When no action was taken by the D.I.O.S. in the matter of the petitioner for the grant of promotion then the petitioner filed a representation to the D.I.O.S. praying that the petitioner's promotion on the post of Lecturer (Civics) may be kindly considered and necessary order be passed, failing which the present writ petition has been filed challenging the selection and appointment of respondent no.6 by way of direct recruitment.

4. Submission of learned counsel for the petitioner is that the post of Lecturer in Civics comes under 50% promotional quota and it is statutory binding, effect upon the Committee of Management, District Inspector of Schools, Regional Level Selection Committee to fill up the vacancy by granting promotion of the Assistant Teacher in L.T. Grade qualified in the lower pay scale. Requisition if any sent for direct recruitment to the Selection Board through District Inspector of Schools is illegal and contrary to the statutory provisions provided under Rule 14 of the Rules of 1998.

5. He next submits that it is the District Inspector of Schools who has created chaos in the college by sending requisition of the post of Lecturer to the U.P. Secondary Services Selection Board and treating the post of Lecturer in English to be 6 posts sanctioned of the Lecturer.

6. Learned counsel for the petitioner next submitted that there are five sanctioned posts in the institution and at the relevant point of time, three posts were filled by way of 50% promotion and two vacancies were filled by the direct recruitment. He next submitted that the Committee of Management, on consideration of claim of the petitioner, sent papers through District Inspector of Schools to the Regional Level Selection Committee under Rule 14 of the 1998 Rules for the grant of promotion under 50% promotion quota. The consideration of the claim of the petitioner for regular promotion was pending consideration and on requisition sent by the Committee of Management and District Inspector of Schools, the Board selected respondent no.6 as Lecturer in Civics and made

recommendation for appointment to the institution.

7. Learned counsel for the petitioner next submitted that once the post is coming from 50% promotional quota and the claim of the petitioner was pending consideration, the recommendation of respondent no.6 was bad in law and being contrary to Rule 14 of the 1998 Rules.

8. Learned counsel for the petitioner next submitted that there are five posts of Lecturer in the Institution namely, P.L.K.P. Inter College, Kalu Khera, Unnao out of which three posts are fell vacant under the category of promotion and two posts are fell vacant under the category of direct recruitment.

9. Learned counsel for the petitioner next submitted on 30.6.2001 the post of Lecturer (Geography) which was under the quota of direct recruitment, fell vacant on account of superannuation of Sri Siddhi Nath Misra but apparently no action was taken for filling up the said post through direct recruitment. In the meantime, on 30.6.2002 another post of Lecturer under the category of promotion quota fell vacant on account of retirement of Sri Chandra Prakash Tiwari.

10. Learned counsel for the petitioner next submitted that when the claim of the petitioner was processed and forwarded to the District Inspector of Schools for promotion on the post of Lecturer (Civics) on the recommendation of U.P. Secondary Selection Board, both posts were filled by direct recruitment in the year 2006 ignoring the claim of the petitioner for promotion.

11. Per contra, learned Standing Counsel submitted that under the 50% quota for direct recruitment only 01 teacher namely Sri Ravindra Nath Bajpai, Lecturer (Sanskrti) was working under the general category and under 50% promotional quota 3 Lecturers were working as such the promotional quota was fulfilled and therefore, the requisition has been submitted by the Manager for filing up 01 post in reserved category of Scheduled Caste and 01 post in reserved category of O.B.C Class, total 02 of posts of Lecturer under direct recruitment of 50% quota and out of actual created 5 posts of Lecturer 01 post falls under reserved category of Scheduled Caste and 01 post falls under reserved category of O.B.C. Class.

12. Learned Standing Counsel next submitted that the aforesaid requisition submitted by the Manager has been forwarded to Secretary, Secondary Education Service Selection Board, Allahabad by then then District Inspector of Schools and in pursuance of the panel receives from the selection Board the Manager has been directed to allow the joining of the selected candidates. Therefore, the action of the respondents is neither arbitrary nor irrational.

13. I have considered the submissions advanced by learned counsel for the parties and perused the material available on record.

14. Vide order dated 8.2.2021, this Court granted time to learned Standing Counsel to apprise this Court that whether there are six posts of Lecturer or five post of Lecturer. In compliance of the order dated 8.2.2021, learned Standing Counsel filed confidential letter dated 13.9.2022 before this Court, wherein, it has been stated that there are five sanctioned posts of Lecturer.

15. Perusal of the record reveals that there are five sanctioned posts of Lecturer in the institution. On attaining the age of superannuation, Shri Chandra Prakash Tiwari retired from the post of Lecturer (Civics) creating a substantive vacancy on the post of Lecturer. In view of the fact that the post which came into existence coming under 50% promotion quota, the Principal of the institution sent papers to the District Inspector of Schools for grant of promotion to place the matter before the Regional Level Committee of the petitioner. The District Inspector of Schools vide letter dated 5.7.2003 asked the Manager of the Institution in regard to position of the sanctioned post of Lecturer in the college in question.

Vide letter dated 3.1.2005 the Principal of the institution sent information to the effect that in the college there are five sanctioned post of Lecturer and further the post of Lecturer (Civics) which has fallen vacant is to be filled up by way of promotion by promoting the petitioner. The Manager of the College has sent a letter to the DIOS along with relevant documents as required for purpose of promoting the petitioner. Vide order dated 19.1.2005, the D.I.O.S. Unnao had granted the selection grade to the petitioner on the post of Assistant Teacher.

16. In regard to submission advanced by the learned counsel for the petitioner that when the claim of the petitioner was processed and forwarded to the District Inspector of Schools for promotion on the post of Lecturer (Civics) on the recommendation of U.P. Secondary Selection Board, the post was filled by direct recruitment in the year 2006 ignoring the claim of the petitioner for promotion, learned Standing Counsel did not show any documents to establish that claim of the petitioner has been considered.

17. It is pertinent to note that almost all the information are with the inspector of the schools. The Inspector from his records can easily find out about the eligibility of the teachers for promotion, date of vacancy and the vacancies likely to fall in a recruitment year. In additional to above, the Board in respect of the direct recruitment and the joint Director of Education for promotion have the power under the provisions of the Act and the Rules to ask the Inspector of submit additional information, which they need in respect of the direct recruitment and promotion.

18. In view of the schedule of the act and the rules, it is evident that the intention of the legislature is not to give freehand to the Management. It has to send only information to the Inspector and it does not have any authority either in the Principal Act or in the Rules for promotion of a teacher. It is simply duty to send all the information of the teachers who are eligible for promotion irrespective of the fact whether they have applied or not.

19. If any vacancy occurs in the promotion quota and any teacher in the institution is eligible for promotion in terms of Rule 14, then he has to be considered for promotion. In case the Management does not send the requisition, there are two options open to the Inspector (i) he can ask the Management to send the information and (ii) in the case it does not send, he can forward the name of the eligible candidates to the Committee Under Section 12 of the Act on the basis of the records of the institution as mentioned in Sub-rule (6) of Rule 4 of the Rules, 1998.

20. Neither the Committee of Management nor the District Inspector of Schools took any decision on the claim of the petitioner. Once the post under 50% promotion quota was vacant, it should have been filled up by promotion. The impugned order passed without considering the claim for promotion under 50% promotion quota is bad in law.

21. The appointment by way of direct recruitment is devoid of merits in view of the fact that the post of Lecturer in Civics was to be filled up by way of grant of 50 % promotion quota to the petitioner. The promotion is made under the statutory provisions of law under Rule 14 of the 1998 Rules. Therefore, the direct recruitment to the post in question cannot be made till a candidate for the grant of promotion is available in the institution.

22. In view of the above, the writ petition is **allowed**. Order dated 22.4.2006 passed by the Selection Board, letter of the District Inspector of Schools dated 11.5.2006 and resolution of the Managing Committee dated 14.5.2006 are hereby quashed.

23. However, the Regional Level Selection Committee is directed to consider the claim of the promotion of the petitioner under 50% promotion quota within a period of six weeks from the date of production of a certified copy of this order.

24. It is further clarified that the promotion of the petitioner shall be considered from the first day of the year of recruitment and consequential benefits shall also be provided to him.

(2023) 4 ILRA 572
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 31.03.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 4952 of 2007

Rajesh Kumar Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
G.C. Verma

Counsel for the Respondents:
C.S.C., Ashish Mishra, P.K. Khare, R.C. Singh, Raj Deepak Chaudhary

A. Service Law – Promotion/Reservation – Salary – Reservation quota of Scheduled Castes is not applicable against three vacancies available in the institution and in case it is permitted, it will exceed 21% quota of reservation. (Para 14)

In the present case, the committee of management passed a resolution on 19.12.2006 for grant of promotion to the petitioner on the post of Lecturer in Hindi. The papers were duly submitted before the DIOS for its transmission to the Regional Selection Committee constituted u/s 12 of the Relevant Rules. The Regional Level Committee took decision in the matter, which was communicated by the Regional Joint Director of Education vide order dated 25.06.2007, whereby it has been held that the post against which the petitioner has been granted promotion, comes under reserved category of Scheduled caste, as per roster. (Para 4)

The DIOS vide letter dated 05.07.2007 communicated the decision of the Regional Level Committee /Regional Joint Director of Education dated 25.06.2007 and returned the papers of the petitioner for grant of promotion. (Para 5)

The present situation has been dealt with in detail in the Full Bench decision of *Heera Lal* Vs

St. of U.P. & ors. - **There may be cases where there is a rule making provision for different sources of recruitment within the same cadre, then reservation has to be applied to the posts available for being filled up in accordance with the source of recruitment.** This issue may arise in the context where a candidate is not available for filling up the post by way of promotion and the same has to be diverted to be filled up by direct recruitment. Such a situation will arrive in cases where the number of posts may be five or more so as to make the rule of reservation applicable. Taking for instance where there are say 8 posts in a cadre and the rule is, as presently involved, namely that 50% posts have to be filled up by way of promotion, in that event four posts have to be filled up by promotion and four by direct recruitment. The rule of reservation for appointment by way of promotion is available only to scheduled castes in the St. of U.P. and no such rule is available for other backward categories. They are entitled to the benefit of reservation only in the process of direct recruitment.

In the example given above where four posts out of eight are to be filled up by direct recruitment one post will have to be given to the other backward category keeping in view the 27% mandate of reservation in favour of such category under the 1994 Act. Against four posts of promotion quota, reservation to a scheduled caste category cannot be granted as there has to be a minimum of five posts for applying the 21% reservation for promotion. In a given situation where no other candidate of any category is available for promotion against the four posts, then such a vacancy to be filled up by promotion may have to be carried over for direct recruitment. This would bring about a change of strength in the source of recruitment thus fluctuating the strength of the post available by direct recruitment. A scheduled caste candidate would therefore, get the benefit of reservation if the cadre strength is increased to five for direct recruitment, even though the same candidate would not get the benefit of reservation if the promotion quota of 50% is adhered to. It would be appropriate to point out that taking a case where there are five posts for being filled up by promotion and five by direct recruitment in the cadre then in such an event the rule of reservation to the extent of 21% in both the sources can be conveniently made applicable without disturbing the ratio in either of the sources. (Para 13)

In the present case, there are six posts, three posts comes under direct recruitment quota and three posts comes under promotional quota. The quota of reservation shall apply separately to direct recruitment as well as to promotional quota. **There is promotional quota against three posts only, therefore, roster for reservation of Scheduled Castes will not be made applicable.** (Para 7, 16)

Writ petition allowed. The impugned orders dated 25.06.2007 and 05.07.2007 are hereby set aside. The respondents are directed to pay salary to the petitioner w.e.f. 19.12.2006 till date within a period of one month from the date of production of a certified copy of this order. Consequential benefits shall also be provided to the petitioner. (Para 17 to 19) (E-4)

Precedent followed:

Heera Lal Vs St. of U.P. & ors.; (2010) 3 UPLBEC 1761 (Para 7)

Present petition challenge the orders dated 25.06.2007 and 05.07.2007 passed by respondent No.2 & 3 respectively as well as decision dated 23.06.2007 as mentioned in impugned order dated 25.06.2007 with a further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondents to grant approval for promotion of the petitioner w.e.f. 19.12.2006 and to pay salary for the post of Lecturer regularly along with arrears w.e.f. 19.12.2006.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri G.C. Verma, learned counsel for the petitioner, learned Standing Counsel for respondent - State and Sri Raj Deepak Chaudhary, learned counsel for respondent No.5.

2. By means of present writ petition, the petitioner is challenging the orders dated 25.06.2007 and 05.07.2007 passed by respondent No.2 & 3 contained as annexure Nos.1&2 respectively as well as decision dated 23.06.2007 as mentioned in impugned order dated 25.06.2007 with a further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondents to grant approval for promotion of the petitioner w.e.f. 19.12.2006 and to pay salary for the post of Lecturer regularly along with arrears w.e.f. 19.12.2006.

3. Factual matrix of the case is that a post of Hindi Lecturer fallen vacant due to retirement of one Mr. K.K. Misra under under 50% promotion quota. In the institution, there are six sanctioned posts of Lecturers out of which, three posts of Lecturers are to be filled up by way of direct recruitment and three posts are to be filled up by way of promotion. Out of six posts, one post of Lecturer was already filled up from Scheduled Caste Category and one Mr. Parmeshwar Deen Chaudhary was working on the said post.

4. The committee of management passed a resolution on 19.12.2006 for grant of promotion to the petitioner on the post of Lecturer in Hindi. The papers were duly submitted before the District Inspector of Schools (DIOS) for its transmission to the Regional Selection Committee constituted under Section 12 of the Relevant Rules. The Regional Level Committee took decision in the matter, which was communicated by the Regional Joint Director of Education vide order dated 25.06.2007, whereby it has been held that the post against which the petitioner has been granted promotion, comes under reserved category of Scheduled caste, as per roster.

5. The DIOS vide letter dated 05.07.2007 communicated the decision of the Regional Level Committee / Regional Joint Director of Education dated 25.06.2007 and returned the papers of the petitioner for grant of promotion. The petitioner, feeling aggrieved, filed the present writ petition before this Court, wherein following interim order was passed on 20.08.2007:

"Notice on behalf of opposite parties no.1 to 3 has been accepted by the learned Standing Counsel, who prays for and is granted four weeks time to file counter affidavit. Two weeks thereafter is allowed to the counsel for the petitioner to file rejoinder affidavit. List thereafter.

In the meantime, operation of the impugned orders dated 25.6.2007 and 5.7.2007, contained in Annexure nos. 1 and 2 to the writ petition, shall remain stayed so far as it related to the petitioner and with respect to the post of Lecturer in Hindi in R.B.S.B., Singh Inter College Kamlapur, Sitapur."

6. In pursuance to the order passed by this Court, the petitioner was permitted to continue on the post of Lecturer in Hindi and operation of the impugned orders dated 25.06.2007 & 05.07.2007 was stayed.

7. Submission of learned counsel for the petitioner is that there are six posts of Lecturers duly sanctioned in the institution and under 50% promotion quota, there are only three posts, which is less than 5, therefore, in view of decision of the Full Bench in the case of **Heera Lal Vs. State**

of U.P. and others;(2010) 3 UPLBEC 1761, there shall be no reservation against three vacancies in existence. His next submission is that in case reservation to the scheduled castes is permitted, which is 21%, it will exceed 25%. In support of his submissions, he placed reliance upon paragraph 32 of the judgment in the case of **Heera Lal (Supra)**.

9. On the other hand, learned counsel for the respondents submitted that there are six posts and roster will apply against them. In view of above, one post shall be reserved for Scheduled Castes Category. Their next submission is that the impugned orders passed by Regional Level Committee as well as by the DIOS do not suffer from any infirmity or illegality and are just and valid.

10. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

11. To resolve the controversy involved in regard to applicability of roster of reservation against three vacancies available in the institution, relevant paragraph of the judgment in the case of **Heera Lal (Supra)** is being quoted below:

"12. The main plank of the argument on behalf of those opposing the application of the roster, rests on the ratio of the Division Bench decision in the case of Dr. Vishwajeet Singh (supra), contending that there is no occasion for the applicability of the rule of reservation with the help of any roster for scheduled caste candidates, as the percentage of reservation for scheduled castes which is 21%, envisages the existence of a minimum of total number of five posts in the cadre strength for calculating and applying the said percentage. It is urged by them that 21% can be calculated only if there are a minimum number of five posts for offering 21% reservation as it is only then that one post can be reserved for scheduled castes. It is submitted that if the posts are less than five, as in the present case which is three, the mathematical percentage as prescribed i.e. 21% is beyond calculation and there cannot be a fraction available amongst three posts for applying the said percentage."

12. The question referred to the larger Bench in the case of **Heera Lal (Supra)** is also being quoted below:

"9.....A perusal of the said two Division Bench judgements in the case of Vishwajeet Singh (Supra) and Smt Pholpati (Supra) indicate that the applicability of the roster can be implemented wherever there are five or more than five posts to be filled up where reservation is being claimed under the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994.

The said decision clearly lays down : that there has to be existence of more than five posts for the purpose of applying roster otherwise it would violate the law in Indira Sahani's Case as reservation will then be in excess of 50%. Having perused the ratio of the two division Bench judgements it appears that the same has not been noticed in the decision in Mahendra Kumar Gond's case. The decision in the case of Dr. Vishwajeet was rendered on 20th April 09 whereas decision in the case of Pholpati Devi was rendered prior to that.

10. Both these decisions appear to have escaped the notice of the court and

the applicability of the roster in the situation where there are only three posts available.

11. In this view of the ratio laid down in the two judgements of Dr Vishwajeet Singh and Smt. Pholpati Devi(Supra) there appears to be a contradictory position indicated in Mahendra Kumar Gond's case and as such the same deserves to be resolved by reference to a larger Bench.

12. Accordingly, in exercise of the powers conferred under Chapter 5 Rule 6 of the Allahabad High Court Rules, the following questions deserve to be referred to a larger Bench, in view of the position indicated above.

1. Whether the roster in respect of reservation can be applied with regard to the promotion in respect of class class III posts in Intermediate College, where the number of posts is less than five?

2. Whether there is a conflict between the ratio of the two Division Bench judgements of Mahendra Kumar Gond (Supra) and Dr.Vishwajeet Singh (Supra) as referred to herein above, and if so, then which of the decisions lay down the law correctly ?"

13. The question, which was considered by the Full Bench in the case of **Heera Lal (Supra)** is also being quoted below:

"32. There may be cases where there is a rule making provision for different sources of recruitment within the same cadre, then reservation has to be applied to the posts available for being filled up in accordance with the source of recruitment. This issue may arise in the context where a candidate is not available for filling up the post by way of promotion and the same has to be diverted to be filled up by direct recruitment. Such a situation will arrive in cases where the number of posts may be five or more so as to make the rule of reservation applicable. Taking for instance were there are say 8 posts in a cadre and the rule is, as presently involved, namely that 50% posts have to be filled up by way of promotion, in that event four posts have to be filled up by promotion and four by direct recruitment. The rule of reservation for appointment by way of promotion is availably only to scheduled castes in the State of U.P. and no such rule is available for other backward categories. They are entitled to the benefit of reservation only in the process of direct recruitment. In the example given above where four posts out of eight are to be filled up by direct recruitment one post will have to be given to the other backward category keeping in view the 27% mandate of reservation in favour of such category under the 1994 Act. Against four posts of promotion quota, reservation to a scheduled caste category cannot be granted as there as to be a minimum of five posts for applying the 21% reservation for promotion. In a given situation where no other candidate of any category is available for promotion against the four posts, then such a vacancy to be filled up by promotion may have to be carried over for direct recruitment. This would bring about a change of strength in the source of recruitment thus fluctuating the strength of the post available by direct recruitment. A scheduled caste candidate would therefore, get the benefit of reservation if the cadre strength is increased to five for direct recruitment, even though the same candidate would not get the benefit of reservation if the promotion quota of 50% is adhered to. It would be appropriate to point out that taking a case where there are five posts for being filled up by promotion and five by direct recruitment in the cadre then in such

an event the rule of reservation to the extent of 21% in both the sources can be conveniently made applicable without disturbing the ratio in either of the sources."

14. On perusal of the Full Bench judgment, it is evidently clear that reservation quota of Scheduled Castes is not applicable against three vacancies available in the institution and in case it is permitted, it will exceed 21% quota of reservation.

15. The argument advanced by learned counsel for the petitioner has merit and the writ petition deserves to be allowed, however, the arguments advanced by learned counsel for the respondents that the quota of reservation will apply against six available vacancies is erroneous in nature under Rule 10 of Rules of 1998. In the case in hand, 50% posts are to be filled up by way of direct recruitment and 50% posts shall be filled up by grant of promotion.

16. In view of the fact that there are six posts, three posts comes under direct recruitment quota and three posts comes under promotional quota. The quota of reservation shall apply separately to direct recruitment as well as to promotional quota. There is promotional quota against three posts only, therefore, roster for reservation of Scheduled Castes will not be made applicable.

17. In view of the reasons recorded above, the writ petition succeeds and is **allowed**.

18. The impugned orders dated 25.06.2007 and 05.07.2007 are hereby set aside.

19. The respondents are directed to pay salary to the petitioner w.e.f. 19.12.2006 till date within a period of one month from the date of production of a certified copy of this order. Consequential benefits shall also be provided to the petitioner.

20. Parties shall bear their own costs.

(2023) 4 ILRA 577
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 5335 of 2023

Smt. Pinki Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sheikh Mozzam Inam, Sri S.C. Dwivedi

Counsel for the Respondents:
C.S.C.

A. Service Law – Inquiry – Loss, misappropriation and misuse of funds - Uttar Pradesh Panchayati Raj Act, 1947: Section 27(2); Panchayat Raj Rules, 1947: Rules 256 and 257.

Jurisdiction - A perusal of Section 27 of the Act of 1947 r/w Rule 256 of the Rules of 1947 clearly shows that surcharge was leviable on an enquiry which was conducted by the Chief Audit Officer and which had to be forwarded to the District Magistrate in the case of Pradhan, Up-Pradhan and Members of Gram Panchayat and to the District Panchayat Raj Officer in the cases of officers and servants of the Gaon Sabha. (Para 9)

Therefore, it was the Chief Audit Officer of the Cooperative Societies and Panchayat who was

the officer authorized to conduct the enquiry for the purposes of the imposition of surcharge. **If the enquiry was not conducted by the Chief Audit Officer then the enquiry as had been done in this case by the Deputy Director (Agriculture) Basti, was without jurisdiction. When there was no Prescribed Authority as has been referred to in Section 27(2) of the Panchayat Raj Act then the District Magistrate had no jurisdiction to impose the surcharge.** (Para 10, 12)

It is undisputed fact that the inquiry as conducted which initiated the entire proceedings against the petitioner whereupon the District Magistrate (respondent no. 3) relied upon and the entire determination has been fastened against the petitioner has been conducted by the authorities other than the Chief Audit Officer or by the District Audit Officers, and as such, the respondent no. 3 exceeded its jurisdiction specifically w.r.t. determining the liability against the petitioner. (Para 18)

It is apparent from the order which impugned the present petition that in spite of taking the specific grounds at the time of preferring the Appeal before the Commissioner Basti, Region Basti (respondent no. 2) there is hardly any discussion available w.r.t. the competency of the respondent no. 3 while determining the loss which has been attributed to the petitioner and as such, the same is liable to be set aside. (Para 19)

The instant matter is hereby decided without calling the counter affidavit from the respondents since the action of the responding authorities are contrary to the settled provisions of the U.P. Panchayati Raj Act, 1947 which have been broadly discussed in the judgment dated 16.12.2022 passed in Writ C No. 28230 of 2022 (*Dinesh Kumar And 4 Others* versus *St. of U.P. And 3 Others*). (Para 20)

Orders dated 29.08.2022 and 06.03.2023 passed by the respondent Nos. 3 and 2 respectively is hereby quashed and set aside.

Writ petition allowed. (E-4)

Precedent followed:

1. Smt. Shyam Wati Vs St. of U.P. & ors., 2013 (6) AWC 6339 (Para 12)

2. Uday Pratap Singh @ Harikesh Vs St. of U.P. & ors., 2019 (10) ADJ 443 (Para 12)

3. Ram Vilas Vs Commissioner Devi Patan Mandal Gonda & ors., 2022 (1) ADJ 1 (Para 15)

4. Dinesh Kumar & ors. Vs St. of U.P. & ors., Writ-C No. 28230 of 2022 (Para 16)

Present petition challenges order dated 29.08.2022 passed by respondent no. 3 (District Magistrate, Basti) as well as order dated 06.03.2023 passed by the respondent no. 2 (Commissioner Basti, Region Basti).

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

1. Heard Shri S.C. Dwivedi assisted by Shri Sheikh Moazzam Inam, learned counsel for the petitioner and Shri Satyendra Kumar Tripathi, learned Standing Counsel appearing on behalf of the respondents.

2. Present petition has been filed seeking the following reliefs:-

"i) Issue a writ, order or direction in the nature of certiorari to quash the order dated 29.08.2022 passed by respondent no. 3 as well as order dated 06.03.2023 passed by the respondent no. 2.

ii) Issue a writ, order or direction in the nature of mandamus commanding/directing the respondent no. 3 not to take any action in pursuance of the impugned orders."

3. It is the case of the petitioner that inquiry has been conducted with regard to certain loss, misappropriation and misuse of the funds which has to be utilized for the public cause under the supervision of Gram Vikas Adhikari, Block Bahadurpur,

District-Basti and the petitioner was rendering her services over the same post.

4. The said inquiry has been conducted by the Committee comprises of District Horticulture Officer, Tehsildar, Sadar, District Basti and Assistant Engineer, D.R.D.A. for ascertaining the fact which is specifically with regard to the irregularities while performing the public work under the supervision of the petitioner as well as Gram Pradhan of the concerned Village.

5. On the basis of inquiry report as submitted by the Inquiry Committee, the District Magistrate i.e. respondent no. 3, determined the loss of Rs. 3,52,083/- and the same has been fastened in equal proportion to be recovered from the petitioner, Ex-Gram Pradhan along with Assistant Engineer, Bahadurpur, District-Basti vide order dated 29.08.2022.

6. Having being aggrieved by the order dated 29.08.2022 passed by the respondent no. 3, the petitioner challenged the same before the respondent no. 2 who has been designated as Appellate Authority in pursuance to the judgment and order dated 06.12.2022 and as such, the same has been adjudicated by the respondent no. 2 under the strict compliance of the directions passed in Civil Misc. Writ Petition No. 18959 of 2022 (Smt. Pinki Devi versus State of U.P. and Others).

7. While preferring the Appeal before the respondent no. 2, the specific stand taken up by the petitioner regarding the competency of the Committee constituted by the District Magistrate for Enquiry as well as the respondent no. 3 being the District Magistrate which is contrary to the Section 27(2) wherein the prescribed authority who is competent to fix the amount of the surcharge according to the procedure has been defined only in the case where the responsibility is fastened against the Pradhan or other member of the Gram Panchayat or Joint Committee or any other Committee constituted under this Act and as such, being the Village Development Officer/Village Secretary, the respondent no. 3 proceeded against the petitioner under the statutory provisions as defined under the Uttar Pradesh Panchayati Raj Act, 1947, for better appreciation of legal issues defined under Section 27 of the Act of 1947 and the Rules 256 and 257 of the U.P. Panchayat Raj Rules, 1947 (hereinafter referred to as "the Rules of 1947") the same are being reproduced hereinbelow:-

*"27. Surcharge. - (1) Every Pradhan or [***] of a [Gram Panchayat], every member of a [Gram Panchayat] or of a Joint Committee or any other committee constituted under this Act [shall be liable to surcharge for the loss, waste or misapplication of money or property belonging to the Gram Panchayat, if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan or Member].*

Provided that such liability shall cease to exist after the expiration of ten years from the occurrence of such loss, waste or misapplication, or five years from the date on which the person liable ceases to hold his office, whichever is later.

(2) The prescribed authority shall fix the amount of the surcharge according to the procedure that may be prescribed and shall certify the amount to the Collector who shall, on being satisfied that the amount is due, realise it as if it were an arrear of land revenue.

(3) Any person aggrieved by the order of the prescribed authority fixing the

amount of surcharge may, within thirty days of such order, appeal against the order of the State Government or such other appellate authority as may be prescribed.

(4) Where no proceeding for fixation and realization of surcharge as specified in sub-section (2) is taken the State Government may institute suit for compensation for such loss, waste or misapplication, against the person liable for the same."

CHAPTER XIII
SURCHARGE RULES

"256. (1) In any case where the Chief Audit Officer, Co-operative Societies and Panchayats, considers that there has been a loss, waste or misuse of any money or other property belonging to a Gaon Sabha as a direct consequence of the negligence or misconduct of a Pradhan, he may call upon the Pradhan, Up-Pradhan, Member, Officer or servant should not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gaon Sabha or to its property and such explanation shall be furnished within a period not exceeding two months from the date such requisition is communicated to the person concerned.

Provided that an explanation from the Pradhan, Up-Pradhan or member of the Gaon Panchayat shall be called for through the District Magistrate and from the officer or servant through the Panchayat Raj Officer:

Provided also that no explanation shall be called for from any member who is recorded in the minutes of the Gaon Panchayats or any of its committee as having been absent from the meeting at which the expenditure objected to was sanctioned or who voted against such expenditure.

Note. - Any information required by the Chief Audit Officer, Co-operative Societies and Panchayats or any officer subordinate to him not below the rank of auditor, Panchayats for preliminary enquiry, shall be furnished and shall be connected papers and records shall be shown to him by the Pradhan immediately on demand.

(2) Without prejudice to the generality or the provisions contained in sub-rule (1) the Chief Audit Officer, Co-operative Societies and Panchayats, may call for the explanation in the following cases:

(a) where expenditure has been incurred in contravention of the provisions of the Act or of the rules or regulations made thereunder;

(b) where loss has been caused to the Gaon Sabha by acceptance of a higher tender without sufficient reasons in writing;

(c) where any sum due to the Gaon Sabha has been remitted in contravention of the provisions of the Act or the rules or regulations made thereunder;

(d) where the loss has been caused to the funds or other property of the Gaon Sabha on account of want of reasonable care for the custody of such money or property.

(3) On the written request of the Pradhan, Up-Pradhan, Member, Officer or servant from who an explanation has been called for, the Gaon Panchayat shall give his necessary facilities for inspection of the records connected with the requisition for surcharge. The Chief Audit Officer may, on application from the person surcharged allow a reasonable extension of time for submission of his explanation if he is satisfied that the person charged has been unable, for reasons, beyond his control, to

consult the record for the purpose of furnishing his explanation.

Explanation. - Making of an appointment in contravention of the Act, the rules or the regulations, made thereunder shall amount to misconduct or negligence and payments to employees of salaries and other dues on account of such irregular appointments shall be deemed to be a loss, waste or misuse of Gaon Fund.

257.(1) After the expiry of the period prescribed in sub-rule (1) or (3) of Rule 256, as the case may be, and after examining the explanation, if any, received within time, the Chief Audit Officer shall submit the papers along with his recommendations to the District Magistrate of the district in which the Gaon Sabha is situated in case of Pradhan, Up-Pradhan and Members and to the District Panchayat Raj Officer of the district in which the Gaon Sabha is situated in case of officers and servants.

(2) The District Magistrate or the District Panchayat Raj Officer as the case may be, after examining and after considering the explanation, if any, shall require the Pradhan, Up-Pradhan, Member, Officer or servant of the Gaon Panchayat to pay the whole or part of the sum to which such Pradhan, Up-Pradhan, Member, Officer or servant is found liable:

Provided, firstly, that no Pradhan, Up-Pradhan, Member, Officer or servant of a Gaon Panchayat would be required to make good the loss, if from the explanation of the Pradhan, Up-Pradhan, Member, Officer or servant concerned or otherwise the District Magistrate of the District Panchayat Raj Officer, as the case may be, is satisfied that the loss was caused by an act of the Pradhan, Up-Pradhan, Member, Officer or servant in the bona fide discharge of his duties.

Provided, secondly, that in case of loss, waste or misuse occurring as a result of a resolution of the Gaon Panchayat or any of its committees the amount of loss to be recovered shall be divided equally among all the members including Pradhan and Up-Pradhan, who are reported in the minutes of the Gaon Panchayat or any of its committee as having voted for or who remained neutral in respect of such resolution:

Provided, thirdly, that no Pradhan, Up-Pradhan, Member, Officer or servant shall be liable for any loss, waste or misuse after the expiry of four years from the occurrence of such loss, waste or misuse or after the expiry of three years from the date of his ceasing to be a Pradhan, Up-Pradhan, Member, Officer or servant of the Gaon Panchayat whichever is later."

8. After considering the grounds as taken up by the petitioner in the memo of Appeal presented before the respondent no. 2 for challenging the order dated 29.08.2022 passed by the respondent no. 3 the vital submission in shape of legal issues has never ever been discussed or determined by the Appellate Authority who was exercising power under the orders passed by Coordinate Bench in ***Civil Misc. Writ Petition No. 18959 of 2022 (Smt. Pinki Devi versus State of U.P. and Others)***.

9. Learned counsel for the petitioners submitted that a perusal of Section 27 of the Act of 1947 read with Rule 256 of the Rules of 1947 clearly shows that surcharge was leviable on an enquiry which was conducted by the Chief Audit Officer and which had to be forwarded to the District Magistrate in the case of Pradhan, Up-Pradhan and Members of Gram Panchayat and to the District Panchayat Raj Officer in

the cases of officers and servants of the Gaon Sabha.

10. Learned counsel for the petitioners, therefore, submitted that it was the Chief Audit Officer of the Cooperative Societies and Panchayat who was the officer authorized to conduct the enquiry for the purposes of the imposition of surcharge.

11. He further submitted that after the report was submitted to the District Magistrate, the order ought to have been passed by the Competent Authority and the learned counsel for the petitioners submitted that since there was yet no competent authority appointed, the order of the District Magistrate was also beyond jurisdiction.

12. To bolster his argument, learned counsel for the petitioners relied upon the judgement of this Court in ***Smt. Shyam Wati vs. State of U.P and others*** reported in ***2013 (6) AWC 6339***. This judgement was cited to show that if the enquiry was not conducted by the Chief Audit Officer then the enquiry as had been done in this case by the Deputy Director (Agriculture) Basti, was without jurisdiction. He further submitted that when there was no Prescribed Authority as has been referred to in Section 27(2) of the Panchayat Raj Act then the District Magistrate had no jurisdiction to impose the surcharge. For this purpose, learned counsel for the petitioner relied upon ***Uday Pratap Singh @ Harikesh vs. State of U.P. and others reported in 2019 (10) ADJ 443***.

13. Per contra, learned Standing Counsel vehemently opposed the prayer as made in the petition and supported the order dated 06.03.2023 passed by the respondent no. 2 by way of raising his argument that the prescribed authority as defined under the Act of 1947 is not defined, but the same has been answered in the verdict pronounced by this Hon'ble Court.

14. Learned counsel for the petitioner while making the submissions very fairly conceded that as far as the jurisdiction with the Deputy Director (Agriculture), Basti, was concerned, it was only the Chief Audit Officer who was authorized to conduct the enquiry. He, however, submitted and also placed a written submission that now when the Panchayat had attained constitutional status and as per Article 243, 243(A) to 243(O) of the Constitution of India there were provisions in the Constitution to provide for a three tier Panchayat system such as the Village Panchayat, Kshetra Panchayat and the District Panchayat instead of the Chief Audit Officer, some more powerful body should be brought into existence. He submitted that further since as per Article 243(I) of the Constitution, a Finance Commission to review the financial position of Panchayats had been formed, on which there was the duty to enquire into the financial deals of the Panchayat then the finances of a gram panchayat should be monitored by a much more powerful body. While making his submissions, he also submitted that under Article 243 (G), there were various powers, authorities and responsibilities bestowed upon the Panchayat, so much so that under Article 243 (H) even powers to impose taxes had been given to the panchayats. He submits that though various amendments had been made in the Panchayat Raj Act, the provision for enquiry for the purposes of surcharge had remained only with the Chief Audit Officer. He submits that the various Panchayat work had to be

supervised and had to be audited and there were times that even before the audit could take place after the completion of work, the responsibilities had to be fixed for the works which had commenced and which were not being done properly.

15. Learned Standing Counsel for the respondents however, submitted that so far as the jurisdiction under Section 27(2) of the 1947 Act for imposing the surcharge with the District Magistrate had been questioned, the question was no longer res intergra as now a Division Bench of this Court in the case of Ram Vilas vs. Commissioner Devi Patan Mandal Gonda and others reported in 2022 (1) ADJ 1 had decided that the District Magistrate could impose the surcharge.

16. For substantiating the arguments as raised above, the learned counsel for the petitioner has relied upon the judgment and order dated 16.12.2022 passed in Writ C No. 28230 of 2022 (Dinesh Kumar And 4 Others versus State of U.P. And 3 Others), wherein it is crystal clearly defined and discussed while arriving over the issue with regard to the competency of the District Magistrate to specifically proceed against the officer or servant as prescribed under the U.P. Panchayati Raj Act, 1947.

17. The operative portion of the judgment is reproduced hereinbelow:-

"Having heard the learned counsel for the parties, there is not an iota of doubt that the enquiry which was conducted by the Deputy Director (Agriculture), Basti, was an enquiry which was without jurisdiction. In fact, as per Rules 256 and 257 of the 1947 Rules, the enquiry ought to have been conducted by the Chief Audit Officer and now as per the order of delegation made by the Chief Audit Officer by the District Audit Officers.

Under such circumstances, the impugned order dated 29.8.2022 passed by the District Magistrate, Basti, is quashed and is set aside.

However, the Court suggests that the Law Commission may take up the matter and as per the conditions prevailing now i.e. as per the various powers which have been bestowed upon the Panchayats after the amendment of the Constitution of India by the 73rd Amendment by which Articles 243(A) to 243 (O) have been added in the Constitution of India and the Panchayats have attained constitutional status, a body which has powers to supervise the working of the Pradhans and its officials should be constituted for monitoring of the Panchayats and for supervising the work which is being done by them.

For the reasons stated above, the writ petition stands allowed.

A copy of this order be sent by the Registrar General of this Court to the State Law Commission."

18. It is undisputed fact that the inquiry as conducted which initiated the entire proceedings against the petitioner whereupon the respondent no. 3 relied upon and the entire determination has been fastened against the petitioner has been conducted by the authorities other than the Chief Audit Officer or by the District Audit Officers, and as such, the respondent no. 3 exceeded its jurisdiction specifically with regard to determining the liability against the petitioner.

19. It is apparent from the order which impugned the present petition that inspite of taking the specific grounds at the time of preferring the Appeal before the respondent no. 2 there is hardly any

discussion available with regard to the competency of the respondent no. 3 while determining the loss which has been attributed to the petitioner and as such, the same is liable to be set aside.

20. The instant matter is hereby decided without calling the counter affidavit from the respondents since the action of the responding authorities are contrary to the settled provisions of the U.P. Panchayati Raj Act, 1947 which has been broadly discussed in the judgment dated 16.12.2022 passed in Writ C No. 28230 of 2022 (Dinesh Kumar And 4 Others versus State of U.P. And 3 Others) and after footing the action of the respondents in the litmus of the judgment as mentioned above, the same seems to be illegal.

21. In the above mentioned facts and circumstances, the orders dated 29.08.2022 and 06.03.2023 passed by the respondent nos. 3 and 2 respectively is hereby quashed and set aside.

22. The writ petition stands **allowed** accordingly.

(2023) 4 ILRA 584
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.04.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 6585 of 2021

Divakar Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh, Sri Adarsh Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – House Rent Allowance – A judicial officer who is not provided residential accommodation is obliged to go in for rented accommodation. In view of the prevailing rate of rent, the smallest accommodation that can be taken may often cost 75 per cent to 100 per cent of the monthly salary, a situation which cannot be countenanced by any logic. It is absolutely necessary that appropriate conditions should be provided for the judicial officer and he should have reasonable mental peace in order that he may perform his duties satisfactorily. Rendering justice is a difficult job. It is actually a divine act. Unless the judicial officer has a reasonably worry free mental condition, it would be difficult to expect unsoiled justice from his hands. (Para 16)

Provision of an official residence for every Judicial Officer should be made mandatory. A Judicial Officer to work in a manner expected of him has to free himself from undue obligations of others, particularly owners of buildings within his jurisdiction who ordinarily may have litigation before him. This is mostly the case in rural areas where outstation judicial courts are located. (Para 16)

Supreme Court has directed that **until adequate government accommodation is available, it should be the obligation of the State at the instance of the High Court to provide requisite accommodation for every judicial officer.** (Para 17)

B. As per **GO dated 27 July 2006**, **in case of non-availability of government accommodation, the concerned judicial officer may himself/herself arrange for an accommodation on rent, in accordance with law, stature/class of the post held by him/her. The difference of money beyond the prescribed H.R.A. shall be borne by the State Government.** It is further stated that issuance of Rent Justification Certificate is for

non-residential buildings and not for residential houses/accommodations. (Para 11)

The conduct and approach of the State-respondents in withholding the rent and compelling the judicial officer from repeatedly approaching the district authorities for accommodation not only tantamounts to harassment, but also makes a serious dent upon the constitutional principle of separation of powers between the executive and judiciary. (Para 12)

C. Shetty Commission Report dated 11 November 1999, while dealing with house rent allowance and other related issues observed that housing is a basic need, next only to food and clothing. (Para 16)

D. The State Government vide **GO dated 5 October 2020**, issued directions to all the District Magistrates w.r.t. **allotment of government accommodation to the judicial officer by granting them first preference as against the Executive Officers/Magistrates.** (Para 18)

Accordingly, as per GO dated 27 July 2006, petitioner is entitled to actual rent of the rented accommodation. In any case, by the subsequent GO dated 5 October 2020, a judicial officer posted at Allahabad (Prayagraj) is entitled to minimum Rs. 20,000/-over and above the admissible H.R.A. or 18 percent of his basic/level of pay whichever is higher. The arrears claimed by the petitioner would also be covered by the subsequent Government Order. The case of the petitioner, however, is covered by the earlier GO dated 27 July 2006, i.e., actual rent of the rented accommodation minus the H.R.A. (Para 19)

Writ petition allowed. Rent Justification Certificate is set aside and quashed. (E-4)

Precedent followed:

All India Judges Association Vs U.O.I. (2002) 4 SCC 247 (Para 11)

Present petition challenges the Rent Justification Certificate (of the flat rented by the petitioner) dated 21.06.2019, issued by fifth respondent (Additional District Magistrate (Civil Supply), Prayagraj, at Rs. 6,820/-arbitrarily treating the rate of rent at Rs. 10 per square feet.

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

1. Heard Shri Adarsh Singh, learned counsel for the petitioner and Learned Standing Counsel for the State.

2. Petitioner is a judicial officer of the Higher Judicial Services of the rank of Additional District Judge.

3. On 4 June 2018, petitioner was sent as Legal Advisor to the Excise Commissioner, U.P. Allahabad (Prayagraj).

4. Petitioner applied to the second respondent-District Magistrate, Prayagraj, for allotment of a suitable residential quarter commensurate to his position, rank and post. The second respondent vide communication dated 13 July, 2018, expressed his inability to provide residential government quarter to the petitioner. Accordingly, petitioner was compelled to rent a three bedroom accommodation (flat) at Rs. 26,000/- per month.

5. The fifth respondent-Additional District Magistrate (Civil Supply, Prayagraj), vide communication dated 14 March 2019, directed the petitioner to obtain Rent Justification Certificate of the rented flat.

6. Aggrieved, petitioner submitted an application against the aforenoted communication, further, an application dated 26 April 2019, was submitted before the Chief Secretary, Government of Uttar Pradesh.

7. It appears that a government quarter being No. 469/4, Park Road Colony, Prayagraj, was allotted to the petitioner, but, the earlier allottee refused to vacate the accommodation which was duly informed to the respondent by the petitioner. Similar was the case with government quarter No. 199/4, Mission Road, Prayagraj, the previous allottee also declined to vacate the government quarter. Thereafter, it appears that the fifth respondent issued the impugned Rent Justification Certificate of the flat rented by the petitioner at Rs. 6,820/- arbitrarily treating the rate of rent at Rs. 10 per square feet.

8. It appears that a complaint came to be filed before the Lokayukt, Uttar Pradesh, thereafter, government quarter No. 199/4, Mission Road Prayagraj, came to be allotted to the petitioner in May 2020.

9. Grievance of the petitioner is that he has not been paid the rent of the flat at Rs. 26,000/- per month from July 2018 till 15 November 2019, thereafter, enhanced rent at Rs. 27,300/- from November, 2019 till March 2020, aggregating at Rs. 5,28,850/-. Petitioner was paid at Rs. 9,018 per month towards House Rent Allowance (HRA), totaling at Rs. 1,89,378/-. In other words, petitioner had to bear Rs. 3,39,472/- from his pocket being the arrears of rent of the rented accommodation. Petitioner claims refund of the amount.

10. In this backdrop, it is submitted that petitioner being a Senior Judicial Officer, was subjected to harassment and had to suffer monitory loss at the hands of the State-respondent. The conduct of the State-respondent is in contravention of the Government Order dated 27 July, 2006, as well as, the judgment rendered by the Supreme Court in **All India Judges Association Vs. Union of India**1, as the respondents failed to pay the actual rent paid by the petitioner for the rented accommodation.

11. In the counter affidavit, filed on behalf of the second to sixth respondents by the Additional City Magistrate (II), District Prayagraj, it has been admitted that as per Government Order dated 27 July 2006, in case of nonavailability of government accommodation, the concerned judicial officer may himself/herself arrange for an accommodation on rent, in accordance with law, stature/class of the post held by him/her. The difference of money beyond the prescribed H.R.A. shall be borne by the State Government. It is further stated in paragraph 8 of the counter affidavit that issuance of Rent Justification Certificate is for non-residential buildings and not for residential houses/accommodations.

12. In the earlier counter affidavit, district authorities have justified their conduct, when, admittedly, as per the Government Order, judicial officer was entitled to the entire rent of the rented accommodation in the event government accommodation was not available. The conduct and approach of the State-respondents in withholding the rent and compelling the judicial officer from repeatedly approaching the district authorities for accommodation not only tantamounts to harassment, but also makes a serious dent upon the constitutional principle of separation of powers between the executive and judiciary.

13. The State Government issued a Government Order dated 7 July 2006, addressed to the Registrar General, High Court, Allahabad, in compliance of the

recommendations made by the Shetty Commission, modifying the earlier Government Order dated 27 January 2006. The Government Order, inter alia, provided that in the event the State is unable to provide government accommodation to the judicial officer commensurate to his status and the officer rents an accommodation, the additional expenses towards the rent would be borne by the State Government. The subject and the amendment reads thus:

"नियुक्ति अनुभाग-4 लखनऊः दिनांकः 27 जुलाई, 2006

विषयः- प्रथम राष्ट्रीय न्यायिक वेतन आयोग (शेट्टी आयोग) की संस्तुति के अन्तर्गत राज्य की न्यायिक सेवा/उच्चतर न्यायिक सेवा के सदस्यों को भत्ते एवं सुविधाएं प्रदान किये जाने विषयक शासनादेश दिनांक 27 जनवरी, 2006 में आवास/मकान किराया भत्ते की उल्लिखित व्यवस्था का आंशिक संशोधन।

संशोधित व्यवस्था

समस्त न्यायिक अधिकारी अपनी पात्रता के आधार पर निःशुल्क सरकारी अथवा सरकार द्वारा लीज पर लिया गया आवास आवंटित करवाने के हकदार होंगे। सरकार द्वारा आवास उपलब्ध न करवा पाने की स्थिति मे शासन के संगत आदेशों के अनुसार सम्बन्धित न्यायिक अधिकारी को मकान किराया भत्ता देय होगा, परन्तु यदि न्यायिक अधिकारी द्वारा स्वयं के प्रयास से अपनी पात्रता के अनुसार किराये पर लिये गये आवास का वाजिब प्रमाणित किराया, उसे अनुमन्य मकान किराया भत्ता से अधिक है, तो अन्तर की धनराशि का व्यय भी राज्य सरकार द्वारा सुसंगत लेखा शीर्ष के अन्तर्गत वहन किया जायेगा।

14. Subsequently, the aforenoted Government Order came to be amended/modified vide Government Order dated 31 August 2021, wherein, the provision of providing Rent Justification Certificate was done away with.

15. Further, upper limit was prescribed towards maximum rent admissible to the judicial officer on renting accommodation in the event government accommodation was not available. The Government Order provides for determining actual rent admissible on the basic/level salary of the judicial officer which would vary from region to region. The relevant portion of the Government Order dated 31 August 2021, is extracted :

"3(1)(ग) उपर्युक्त मूल वेतन के आधार पर किसी न्यायिक अधिकारी को लखनऊ, मुरादाबाद, मेरठ, गाजियाबाद, अलीगढ़, आगरा, बरेली, कानपुर, इलाहाबाद, गोरखपुर, वाराणसी, सहारनपुर, फिरोजाबाद एवं झांसी शहर में तैनाती की स्थिति में उसे सरकारी आवास उपलब्ध न कराये जा सकने की स्थिति में उसके स्वयं के प्रयास से लिये गये आवास के वाजिब किराये की अधिकतम सीमा उसके मूल वेतन का 18 प्रतिशत होगी।

3(1)(घ) लखनऊ, मुरादाबाद, मेरठ, गाजियाबाद, अलीगढ़, आगरा, बरेली, कानपुर, इलाहाबाद, गोरखपुर, वाराणसी, सहारनपुर, फिरोजाबाद एवं झांसी शहर के अतिरिक्त राज्य के अन्य किसी भी नगर में तैनाती की स्थिति में किसी न्यायिक अधिकारी को सरकारी आवास उपलब्ध न कराये जा सकने की स्थिति में उसके स्वयं के प्रयास से लिये गये आवास के वाजिब किराये की अधिकतम सीमा वह धनराशि होगी जो उसके मूल वेतन का 09 प्रतिशत एवं उसे राज्य सरकार के नियमों के अनुसार अनुमन्य मकान किराये भत्ते के योग के बराबर हो। नोएडा में तैनाती की स्थिति में किसी न्यायिक अधिकारी को सरकारी आवास उपलब्ध न कराये जा सकने की स्थिति में उसके स्वयं के प्रयास से लिये गये आवास के वाजिब किराये की अधिकतम सीमा वह धनराशि होगी जो उसके मूल वेतन का 18 प्रतिशत एवं उसे राज्य सरकार के नियमों के अनुसार अनुमन्य मकान किराये भत्ते के योग के बराबर हो।

3(1)(च) उक्तवत (ग) एवं (घ) की निर्धारित सीमा के अन्तर्गत किसी न्यायिक अधिकारी के किराये के मकान का जो वाजिब किराया निर्धारित होगा एवं जिसका वास्तविक रूप में भुगतान किया जायेगा उसमें से उसे राज्य सरकार के नियमों के अनुसार अनुमन्य हो रहे मकान किराये भत्ते की धनराशि को घटाकर शेष धनराशि की प्रतिपूर्ति कर दी जायेगी।

3(1)(छ) यह भी निर्देशित किया जाता है कि किसी भी न्यायिक अधिकारी जिनको सरकारी आवास न उपलब्ध कराये जाने के स्थिति में किराये का मकान लेकर आवासित होना पड़ रहा है उनके लिये वाजिब किराया नोएडा, लखनऊ, मुरादाबाद, मेरठ, गाजियाबाद, अलीगढ़, आगरा, बरेली, कानपुर, इलाहाबाद, गोरखपुर, वाराणसी, सहारनपुर, फिरोजाबाद एवं झांसी शहर में रू०

20,000 की सीमा के अधीन एवं अन्य शहरों में रू० 15,000 की सीमा के अधीन अथवा उपर्युक्त प्रस्तरों में निर्धारित अधिकतम सीमा के अधीन, दोनों में जो अधिक हो, निर्धारित किया जा सकेगा।"

16. Shetty Commission Report dated 11 November 1999, while dealing with house rent allowance and other related issues observed that housing is a basic need, next only to food and clothing. Supreme Court in "**All India Judges**' case2, in paragraph 33 and 34, observed that provision of an official accommodation for every judicial officer should be made mandatory. The relevant portion of paragraph 33 and 34 is extracted:

"33. Provision of an official residence for every Judicial Officer should be made mandatory. A Judicial Officer to work in a manner expected of him has to free himself from undue obligations of others, particularly owners of buildings within his jurisdiction who ordinarily may have litigation before him. This is mostly the case in rural areas where outstation judicial courts are located.

34. ....A judicial officer who is not provided residential accommodation is obliged to go in for rented accommodation. In view of the prevailing rate of rent, the smallest accommodation that can be taken may often cost 75 per cent to 100 per cent of the monthly salary, a situation which cannot be countenanced by any logic. It is absolutely necessary that appropriate conditions should be provided for the judicial officer and he should have reasonable mental peace in order that he may perform his duties satisfactorily. Rendering justice is a difficult job. It is actually a divine act. Unless the judicial officer has a reasonably worry free mental condition, it would be difficult to expect unsoiled justice from his hands."

17. Further in paragraph 36, Supreme Court directed that until adequate government accommodation is available, it should be the obligation of the State at the instance of the High Court to provide requisite accommodation for every judicial officer.

18. The State Government vide Government Order dated 5 October 2020, issued directions to all the District Magistrates with regard to allotment of government accommodation to the judicial officer by granting them first preference as against the Executive Officers/Magistrates. The relevant portion of the Government Order reads thus:

"3- अतः इस सम्बन्ध में पुनः मुझे यह कहने का निदेश हुआ है कि जिन न्यायिक अधिकारियों को उनकी कॉलोनियों में आवास उपलब्ध नहीं हो पा रहे , उन न्यायिक अधिकारियों को जनपद में जिलाधिकारी के नियंत्रणाधीन उपलब्ध कॉलोनियों में से उनकी पात्रता के अनुरूप आवास प्रथम वरीयता के आधार पर आवंटित करने का कष्ट करें।"

19. Accordingly, as per Government Order dated 27 July 2006, petitioner is entitled to actual rent of the rented accommodation. In any case, by the subsequent Government Order dated 5 October 2020, a judicial officer posted at Allahabad (Prayagraj) is entitled to minimum Rs. 20,000/- over and above the admissible H.R.A. or 18 percent of his basic/level of pay whichever is higher. The arrears claimed by the petitioner would also be covered by the subsequent Government Order. The case of the petitioner, however, is covered by the earlier Government Order dated 27 July 2006, i.e., actual rent of the rented accommodation minus the H.R.A.

20. In the circumstances, the writ petition is **allowed**.

21. The impugned Rent Justification Certificate dated 21 June, 2019, is set aside and quashed.

22. The respondents are directed to pay/refund Rs. 3,39,472/-, towards the arrears of rent paid by the petitioner along with interest at the rate of 7% per annum from the due date till the date of payment. The amount shall be released by the competent authority of the State within four weeks from the date of service of this order upon the second respondent-District Magistrate, District Prayagraj.

23. Registry to ensure compliance.

24. No cost.

(2023) 4 ILRA 589
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.04.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 6907 of 2004

Brijendra Pal Singh ...Petitioner
Versus
U.P. Sahkari Gram Vikas Bank & Ors. ...Respondents

Counsel for the Petitioner:
R.B.S. Rathore, D.K. Singh Chauhan, Surendra Pratap Singh

Counsel for the Respondents:
Balram Yadav, N N Jaiswal, Rakesh Chaudhary, S.N. Shukla

A. Civil Law - Disciplinary proceedings - Rules of Natural Justice - Rules of natural justice require that a party must be given the opportunity to adduce all relevant evidence upon which he relies - the evidence of the opposite party should be taken in his presence and that he should be given the opportunity of cross-examining the witnesses examined by that party - Not providing the opportunity to cross-examine the witnesses, would violate the principles of natural justice - *Reasoned and Speaking order* - an order passed by an authority should be a reasonable one and the objection taken by a person should be dealt with - If no reasons are given in the impugned order then it will not be possible to know as what was going in the mind of the decision making authority on the basis of which he come to the conclusion and passed the impugned order - *Disciplinary proceedings after retirement* - there is no provision for conducting a disciplinary enquiry after retirement nor any provision stating that in case misconduct is established, a deduction could be made from the retiral benefits (Para 23, 24)

B. Petitioner was initially appointed as Accountant in U.P. Sahkari Gram Vikas Bank - While working at Jhinjhak Branch, he committed certain irregularities - petitioner was issued charge sheet - Enquiry officer prepared the enquiry report without giving any opportunity of personal hearing to the petitioner and without giving him any opportunity to prove his innocence by means of various documents as also to cross examine the witnesses which were sought to be relied upon in support of the charges - Reply submitted by the petitioner was not considered by the respondent before passing the impugned order - Respondent fixed 28.7.2004 as the date for personal hearing and for cross examination by the petitioner, which was sent by letter dated 13.7.2004 – the said letter was not conveyed to the petitioner prior to the date fixed i.e. 28.7.2004 and it was conveyed only on 9.8.2004 through registered letter dated 4.8.20224 much after date fixed for personal hearing and for cross examination - Held - impugned order passed by the respondent in utter disregard of principles of natural justice - As the Petitioner retired from service on 29.7.2004 and that there was no provision

for conducting disciplinary enquiry after retirement - respondents directed to release all post retiral benefits to the petitioner (Para 21, 23, 24)

Allowed. (E-5)

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Shri D.K. Singh Chauhan, learned counsel for the petitioner and Shri Balram Yadav, learned counsel for the respondents.

2. By means of the present writ petition, the petitioner has prayed for issuance of a writ, order or direction in the nature of Certiorari quashing the impugned order dated 29.9.2004 as contained in Annexure No.1 to the writ petition with further prayer to issue a writ in the nature of Mandamus commanding the respondents to release all post retiral benefits to the petitioner, admissible to him as per law.

3. Factual matrix of the case is that the petitioner was initially appointed in the year 1969 as Accountant in U.P. Sahkari Gram Vikas Bank (hereinafter referred to as 'Bank'), joined the said post and continued to work on the post and thereafter, from time to time he was transferred at various places. In the year 1973, the petitioner was promoted to the post of Field Officer. Since 1973, the petitioner is continuously working on the post of Field Officer and at the relevant time the disciplinary proceedings were initiated against the petitioner while working on the post of Officiating Manager in the aforesaid Bank at Jhinjhak Branch. The petitioner worked in the said Branch as officiating Manager from June, 2003 to January, 2004.

While working at Jhinjhak Branch, it is said that certain irregularities were deducted against the petitioner on which the petitioner had been placed under suspension inter alia on frivolous charges vide order dated 14.5.2004. After passing of the suspension order, the petitioner was issued a charge sheet on 25.6.2004 which was received by the petitioner on 9.7.2004. The charge-sheet contained six charges. With every charges certain amount of evidence in the form of documentary evidence was also mentioned in the charge-sheet. The charge-sheet inter-alia stated six charges with respect to various irregularities being committed by the petitioner.

The petitioner was asked to give reply to the said charge-sheet latest by 10.7.2004 although the petitioner received the charge sheet on 9.7.2004. The petitioner by means of letter dated 12.7.2004 demanded time from the respondents for inspecting the documents which were relevant and genuinely needed for submitting an effective reply in order to establish his innocence. The documents of various nature were voluminous also and the petitioner also wanted to see various objections raised by the Jhinjhak Branch for justification of alleged charges and to what extent the petitioner was liable and reasonable in the matter.

By means of letter dated 14.7.2004, the petitioner was informed that he was being supplied Annexures 2,3 and 4 of the preliminary report of the Regional Manager and in addition thereto the petitioner was asked to inspect the documents at Jhinjhak Branch and to obtain the certified copies of the required documents and after doing all this exercise the petitioner was asked to submit his reply to the chargesheet latest by 25.7.2004.

Although the time was granted to the petitioner to inspect the documents by means of letter dated 14.7.2004 and the said permission was granted in pursuance of the letter of the petitioner dated 12.7.2004 and knowingfully well that the documents are to be supplied to the petitioner and that the petitioner has also not filed reply to the charge sheet uptil now and had demanded time for missing documents alongwith the charge sheet, the Bank proceeded to fix the date for personal hearing and for cross examination by the petitioner by means of letter dated 13.7.204.

In the said letter the date for personal hearing and examination and cross examination was fixed as 28.7.2004 but this letter dated 13.7.2004 was never conveyed to the petitioner at any point of time and false averment has been made in the dismissal order to the said effect that the said letter was shown to the petitioner on 14.7.2004 and that he refused to receive the same. The above averment has been made in the dismissal order only with a view to fill in the lacuna in the enquiry proceedings with oral averment, although the letter dated 13.7.2004 was never shown to the petitioner.

The letter dated 13th July, 2004 was conveyed to the petitioner by means of registered letter dated 4.8.2004 and the said letter was dispatched by the Regional Office. The letter dated 13th July, 2004 was received by the petitioner through registered post on 9th August, 2004. On 14.7.2004, the petitioner has been supplied certain documents and in addition thereto he was asked to inspect the documents at Jhinjhak Branch to obtain certified copies of the documents asked for submitting reply by the petitioner.

On 28.7.2004, the respondents fixed the date for personal hearing and cross examination through the aforesaid letter dated 13.7.2004, but the said letter has never been conveyed to the petitioner at any point of time and false averment has been made in the dismissal order that the said letter was shown to the petitioner on 14.7.2004 but he refused to receive the same and the petitioner filed reply to the charge sheet which was received by the office of the respondents on 2nd August, 2004.

The letter dated 13.7.2004 was conveyed to the petitioner by means of registered letter dated 4.8.2004 which was dispatched by the Regional office and received by the petitioner on 9th August, 2004. The petitioner by means of the letter dated 22.7.2004 asked from the respondents the time upto 10.8.2004 for submitting reply to the charge-sheet and for personal hearing as well as to cross examine the witnesses said to have been replied upon by the respondents.

The petitioner waited for opportunity of personal hearing but the respondents without fixing any date, time and place for enquiry proceeded exparte and concluded the entire enquiry knowingfully well that the petitioner is to retire on 30th September, 2004. On 20.9.2004, the petitioner received a show cause notice along with the copy of the enquiry report and the proposed punishment of dismissal from service which was received by the petitioner on 25th September, 2004 giving time to the petitioner to submit his reply to the said show cause notice upto 28th September, 2004.

The petitioner any how submitted reply to the show cause notice by 28.9.2004 denying all the allegations made against him inter alia stating that the petitioner was not given reasonable and proper opportunity nor the enquiry has been conducted in its true sense even he was not

permitted to cross examine the witnesses said to have been relied upon by the respondents, thus the entire proceedings vitiated for non-observance of the principles of natural justice.

The respondent vide impugned order dated 29.9.2004 proceeded to dismiss the petitioner only a day before his retirement without considering the reply given by the petitioner in which to the charge sheet, with a view to satisfy their whims and capricious in a most illegal and arbitrary and also without application of mind as the dismissal order itself indicated that the petitioner did not submit any reply to the show cause, whereas the said reply has been filed by the petitioner in the Camp Office of the Managing Director, on 28.9.2004 in a routine and mechanical manner, thus the impugned order against the petitioner suffers from the vice malice and non-observance of the principle of natural justice, as such the same is not tenable in the eye of law and deserves to be quashed.

The petitioner has been retired from service and because of the dismissal from service vide impugned order dated 29th September, 2004, the petitioner has not paid his post retiral dues admissible to him under law and the petitioner is suffering without there any fault on his part as none of the charges levelled against the petitioner are of such nature which causes any loss to the Bank in question.

4. Learned counsel for the petitioner submitted that the respondents have not fixed any date, time or place for holding enquiry and nor any date for personal hearing was fixed as demanded by the petitioner in the reply to the charge sheet itself, thus the entire enquiry initiated against the petitioner is vitiated and is no enquiry in the eye of law, as such the same deserves to be ignored and rejected.

5. Learned counsel for the petitioner next submitted that the enquiry officer, suo mottu, prepared the enquiry report without giving any opportunity of personal hearing to the petitioner and without giving him any opportunity to prove his innocence by means of various documents as also to cross examine the witnesses which were sought to be relied upon in support of the charges, thus the enquiry is vitiated and is a nullity in the eye of law.

6. Learned counsel for the petitioner next submitted that in spite of submission of reply to show cause notice, in the dismissal order a specific finding has been recorded to the effect that the petitioner has not submitted reply to the show cause and the dismissal order has been passed on 29th September, 2004 whereas the petitioner has submitted his reply to the show cause notice on 28th September, 2004, thus the impugned order has been passed without application of mind and without giving any weightage to the reply to the petitioner.

7. Learned counsel for the petitioner next submitted that the petitioner received show cause notice of proposed dismissal only on 25th September, 2004 from the Region Office and he submitted reply to the show cause notice in the Camp Office of the Managing Director on 28th September, 2004 but the same has not been considered at all while passing the impugned order, thus the impugned order is illegal, invalid and has been passed without application of mind.

8. Learned counsel for the petitioner next submitted that the Disciplinary Authority in a hurried manner and rather in a mechanical manner and without considering the reply of the petitioner to the show cause notice as well as the charge-sheet proceeded to dismiss the petitioner agreeing with the finding of the Enquiry Officer with regard to the five charges and with respect to one charge the petitioner was not found guilty or responsible with a view to satisfy his whims to punish the petitioner any how before a day of his retirement i.e. 29.9.2004.

9. Learned counsel for the petitioner next submitted that all the charges which have been levelled against the petitioner are in the nature of supervisory jurisdiction and it has been stated in the charge-sheet as well as in the dismissal order of that the petitioner has not supervised and performed his duties well as required under the Rules.

10. Learned counsel for the petitioner next submitted that the dismissal order has been passed in hurried manner and the reply of the petitioner to the show cause notice has not been considered and denied to have been received by the respondents is a sheer violation of the principle of natural justice and also established the malice of the authority concerned.

11. Learned counsel for the petitioner next submitted that the enquiry held in the case of the petitioner is no enquiry in the eye of law and is a nullity and a sham enquiry and is liable to be ignored and rejected in the interest of justice.

12. Learned counsel for the petitioner lastly submitted there has been total non-application of mind and without observing the principle of natural justice the impugned order has been passed in a most illegal, arbitrary and malafide manner which is not sustainable in the eye of law.

13. On the other hand, learned Standing Counsel submitted that the inquiry officer directed to the petitioner to present himself on 28.7.2004 at 11.00a.m. in the Headquarter of the U.P. Sahakari Gram Vikas Bank Ltd, Lukcnow for personal hearing as well as for examination/ cross examination of the evidences. The inquiry officer provided him the said letter on 14.7.2004 at Headquarter of the Bank and after reading the same, the petitioner refused to receive the same. Thereafter, the inquiry officer sent the said letter dated 13.7.2004 at the relevant place where the petitioner was attached. He received the letter but on 28.7.2004 he had not appeared before the inquiry officer concerned.

14. Learned Standing Counsel next submitted that the petitioner has been provided due opportunity of hearing to place his facts before the competent authority, but intentionally he failed to choose to submit the reply at the relevant time after having proper notice, as well as choose not to appear, and at the later stage he cannot be permitted to say that he had not been given a fair opportunity of hearing.

15. Learned Standing Counsel next submitted that all the proceedings against the petitioner have been initiated under the provisions of law and there has been no question of any biaseness against him.

16. Learned Standing Counsel next submitted that the principles of natural justice cannot be put into a straitjacket formula. Its application will depend upon

the facts and circumstances of each case. It is also well settled that if a party having proper notice choose not to appear, he at a later stage cannot be permitted to say that he had not been given a fair opportunity of hearing.

17. I have considered the submissions advanced by learned counsel for the parties and perused the material available on record.

18. Perusal of the material reveals that the petitioner was initially appointed in the year 1969 as Accountant in the Bank and joined the said post. In the year 1973 the petitioner was promoted to the post of Field Officer. The petitioner worked in the said Branch as officiating Manager from June, 2003 to January, 2004. During the said period, certain allegations had been levelled against the petitioner on which the petitioner had been placed under suspension. Thereafter, a charge sheet mentioning six charges was issued on 25.6.2004 and received by the petitioner on 9.7.2004 wherein the petitioner was directed to file reply to the said charge sheet latest by 10.7.2004.

19. It is also evident that the petitioner demanded time for inspecting the documents. Vide letter dated 14.7.2004 the petitioner was informed that he was being supplied Annexures 2,3 and 4 of the preliminary report of the Regional Manager. Thereafter, the petitioner was asked to submit his reply to the charge-sheet latest by 25.7.2004. The Bank proceeded to fix 28.7.2004 as the date for personal hearing and for cross examination by the petitioner by means of letter dated 13.7.2004.

The letter dated 13th July, 2004 was conveyed to the petitioner by means of registered letter dated 4.8.2004 and the said letter was dispatched by the Regional Office. The said letter was received by the petitioner through registered post on 9th August, 2004. The petitioner by means of the letter dated 22.7.2004 asked from the respondents the time upto 10.8.2004 for submitting reply to the chargesheet and for personal hearing as well as cross examine the witness. On 20.9.2004 the petitioner received show cause notice along with the copy of the enquiry report and the proposed punishment of dismissal from service which was received by the petitioner on 25th September, 2004 giving time to the petitioner to submit his reply to the said show cause notice upto 28th September, 2004.

The petitioner submitted reply to the show cause notice by 28.9.2004 denying all the asllegations made against him inter alia stating that the petitioner was not given reasonable opportunity of hearing. Vide order dated 29.9.2004 the respondent proceeded to dismiss the petitioner.

20. It is well settled that the disciplinary proceedings breaks into two stages. The first stage commences when the disciplinary authority arrives at its conclusion on the basis of evidence, the enquiry officer's report and the delinquent employee relied to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusion.

It is also well settled that an order passed by an authority should be a reasonable one and the objection taken by a person should be dealt with because reasons are like a live wire which connects the mind of the decision making authority and the decision given by him and if this wire/ link is broken i.e. to say no reasons

are given in the impugned order then it will not be possible to know as what was going in the mind of the decision making authority on the basis of which he has come to the conclusion and passed the impugned order.

21. But in the present case, letter of the respondent dated 13.7.2004 regarding fixing of a date as 28.7.2004 for personal hearing and for cross examination by the petitioner, was not conveyed to the petitioner prior to the date fixed i.e. 28.7.2004 and it was conveyed only on 9.8.2004 through registered letter dated 4.8.20224 much after date fixed for personal hearing and for cross examination.

Thereafter, the enquiry officer prepared the enquiry report without giving any opportunity of personal hearing to the petitioner and without giving him any opportunity to prove his innocence by means of various documents as also to cross examine the witnesses which were sought to be relied upon in support of the charges. Even the reply submitted by the petitioner has not been considered by the respondent before passing the impugned order. Perusal of the record produced before this Court on 30.10.2022 establishes that no documentary evidence is available in regard to service of notice dated 13.7.2004 to the petitioner. In this view of the matter, there is utter disregard of principles of natural justice in the matter and the impugned order passed by the respondent is bad in law and is in violation of principles of natural justice.

22. The rules of natural justice require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that the evidence of the opposite party should be taken in his presence and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine the witnesses, would violate the principles of natural justice.

23. It is admitted position that the petitioner retired from service on 29.7.2004 and therefore, there is no provision for conducting a disciplinary enquiry after his retirement nor any provision stating that in case misconduct is established, a deduction could be made from the retiral benefits.

24. Considering in totalities of facts and circumstances of the case as also the fact that after retirement of an employee, no disciplinary proceeding can be continued, the order dated 29.9.2004 is quashed. The respondents are directed to release all post retiral benefits to the petitioner admissible to him as per law within a period of of six weeks from the date of production of a certified copy of this order.

25. In the result, the writ petition is **allowed**.

(2023) 4 ILRA 595
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2023

BEFORE

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

Writ A No. 10004 of 2021
with other connected cases

Mohd. Mustaqueem ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Pundir

Counsel for the Respondents:
Sri M.C. Chaturvedi, Addl. Advocate General, with Sri Ramanand Pandey and Sri Ankit Gaur, Standing Counsel

A. Service Law- U.P. Urdu Translator-cum-Junior Clerk Service Rules, 1994-Rule 5-Transfer-Validity- Urdu Translator-cum-Junior Clerk /Petitioner was appointed to a service, where is the District Magistrate was the appointing authority-The Medical Service Rules, 1994 which govern the service of the petitioner by virtue of the Rules, 1994 , provides that service under the Medical Service Rules, 1994 means the Uttar Pradesh Medical Health and Family Welfare Department (Subordinate Office) Clerical Cadre Service-The Rules clearly make the petitioner part of a State Level Service and not a District Cadre Service-Thus, there is no impediment in transferring the petitioners in terms of the orders impugned dated 15 July 2021 under challenge.(Para 1 to 61)

The petition is disposed of. (E-6)

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

ORDER

1. This order will answer the question referred to us by the learned Single Judge in Writ-A Nos. 11430 of 2021, 10004 of 2021 and 10365 of 2021 vide order dated October 26, 2021. In Writ-A No. 11378 of 2022, the same question arises as that in the above writ petitions, which the learned Single Judge has adjourned awaiting our answer vide order dated August 4, 2022. The answer to the question in the three writ petitions, first mentioned, would also serve the purpose of Writ-A No. 11378 of 2022. After answering the question posited to us by the learned Single Judge, the writ petitions would have been placed on board before the learned Single Judge, holding determination over writ petitions of this nature along with our answer. But, what we find is that there are also under challenge before us judgments of the two learned Single Judges of this Court deciding the same issue, with reference to which the question has been referred to us in the three writ petitions, already mentioned. A challenge to the judgments of the learned Single Judge in two writ petitions has been laid by the unsuccessful writ petitioners vide Special Appeal No. 52 of 2022 and Special Appeal Defective No. 97 of 2022. Since we would be required to decide those writ petitions finally, the result whereof would depend upon the answer to the question referred to us in the writ petitions by the learned Single Judge, we are of opinion that no useful purpose would be served by sending our answer to the learned Single Judge, pursuant to the order of reference in the three writ petitions. It would only entail avoidable wastage of time and resource.

2. We, therefore, propose to dispose of writ petitions as well by this judgment, in accordance with our answer to the question referred. Special Appeal Nos. 522 of 2022 and 523 of 2022 arise out of orders of the learned Single Judge proposing to frame charges for violation of the orders passed by the Single Judge on the writ side. Those appeals too would be disposed of recording our reasons by this common judgment and order.

3. Since common questions of fact and law are involved in all the four writ petitions and the four special appeals, we proceed to notice relevant facts and the essence of lis between parties giving rise to all these matters from the records of Writ-A

No. 10004 of 2021. This course of action has been adopted because parties have copiously exchanged affidavits in the said petition. Accordingly, Writ-A No.10004 of 2021, which has indeed been heard as the leading case, shall be treated as such. Nevertheless, in order to appreciate the individual facts leading to the writ petitions and the appeals, arising out of judgments of the learned Single Judges on the writ side and in the exercise of contempt jurisdiction, a summary of the nature of proceedings involved in each cause, the grievance and the relief sought are being shown in tabular form:

Sr. No.	**Case Details**	**Arises out of**
1	Writ-A No. 10004 of 2021	Transfer order dated 15.07.2021 passed by the Director (Administration), Medical & Health Services, U.P. at Lucknow
2	Writ-A No. 10365 of 2021	Transfer order dated 15.07.2021 passed by the Director (Administration), Medical & Health Services, U.P. at Lucknow
3	Writ-A No. 11430 of 2021	Transfer order dated 15.07.2021 passed by the Director (Administration), Medical & Health Services, U.P. at Lucknow
4	Writ-A No. 11378 of 2022	Transfer order dated 28.06.2022 passed by the Additional Director of Education (Basic), U.P. Prayagraj and the relieving order dated 25.07.2022 passed by the District Basic Education Officer, Basti
5	Special Appeal (D) No. 97 of 2022	Writ-A No. 11560 of 2021 filed against the transfer order dated 15.07.2021 passed by the Director (Administration), Medical & Health Services, U.P. at Lucknow
6	Special Appeal No. 52 of 2022	Writ-A No. 10088 of 2021 filed against the transfer order dated 15.07.2021 passed by the Director (Administration), Medical & Health Services, U.P. at Lucknow
7	Special Appeal No. 522 of 2022	Contempt Application (Civil) No. 1452 of 2022 filed for non-compliance of orders dated 07.09.2021, 14.09.2021 and 08.10.2021 passed in Writ-A No. 10004 of 2021, which has been filed against the transfer order dated 15.07.2021 passed by the Director (Administration), Medical & Health Services, U.P. at Lucknow
8	Special Appeal No.	Contempt Application (Civil) No. 1453 of

	523 of 2022	2022 filed for non-compliance of orders dated 18.08.2021, 14.09.2021 and 08.10.2021 passed in Writ-A No. 10365 of 2021, which has been filed against the transfer order dated 15.07.2021 passed by the Director (Administration), Medical & Health Services, U.P. at Lucknow

The Question Referred

4. In the leading case and in connected Writ-A Nos. 10365 of 2021, 11430 of 2021 and 11378 of 2022, by an order recorded in Writ-A No. 11430 of 2021, the following question of law has been referred to us by the learned Single Judge:

"Whether the post of Urdu Translator-cum-Assistant Clerk is a District Level Cadre Post and, therefore, its incumbent can not be transferred out side the District?"

Submissions on behalf of the petitioner

5. The petitioner is an Urdu Translator-cum-Junior Clerk posted in the office of Chief Medical Officer, Muzaffar Nagar. Vide the order impugned dated July 15, 2021 passed by the Director (Administration), Medical and Health Services, U.P., Lucknow, the petitioner was transferred from the office of the Chief Medical Officer, Muzaffar Nagar to the office of the Chief Medical Officer, Shahjahanpur. The order dated July 15, 2021 (Annexure No. 1) to the writ petition, orders transfer of various employees, such as Store Keepers, Stenographers, Urdu Translators-cum-Junior Clerks, from one district to another. The total number of employees transferred by the said order were 984. The petitioner's name figures at serial No. 980 of the impugned order dated July 15, 2021.

6. The short case of the petitioner is that he holds a District Level Cadre Post and, therefore, cannot be transferred outside the district, where he has been selected and appointed. The posts of Urdu Translators-cum-Junior Clerks were created by Government Order No. 80सीएम/47-का-4-94-15-10-1994 dated August 20, 1994, issued in the name of the Governor by a Secretary to the State Government. Service rules were made by the Governor for these Urdu Translators under the proviso to Article 309 of the Constitution, known as The Uttar Pradesh Urdu Translator-cum-Junior Clerk Service Rules, 1994 (for short, 'the Rules of 1994'). The petitioner has drawn the attention of the Court to the Government Order dated August 20, 1994, which created a total of 5061 posts of Urdu Translators-cum-Junior Clerks at three levels i.e. the State Headquarters, the Commissionerate and the District Headquarters. Para No. 4 of the Government Order indicates that the appointing authority for the newly created post of Urdu Translators shall be the same at the relevant level as that for a Junior Clerk. Para No. 5 of the Government Order shows that for appointments made at the State Headquarters, the appointing authority would be the Secretary to the Government in the Department of Personnel. The appointments at the level of the Commissionerate would be made by the

Commissioner as the appointing authority, and at the level of District Headquarters, by the District Magistrate.

7. Along with the Government Order, there are lists, appended as Annexures I, II, III and IV, describing the Head of the Department/ Head of Office together with their Establishment, where posts of Urdu Translators were sanctioned. At the State Headquarters, the Establishments along with Head of the Department/ Office are detailed in a list carried in Annexures I and II to the Government Order. Likewise, at the Commissionerate, the Establishments, where posts of Urdu Translators have been created, have been detailed in Annexure III to the Government Order. In Annexure IV to the Government Order, the Establishments at District Level, where posts of Urdu Translators were created, have been mentioned. At the District Headquarters, there is a list of 37 such Establishments and offices, besides the Collector's office, the Tehsil, the Block and each Police Station. It is one or the other Establishment or office detailed in the three lists appended to the Government Order that an Urdu Translator-cum-Junior Clerk can be appointed. After creation of posts of Urdu Translators-cum-Junior Clerks by the Government Order dated August 20, 1994, the Governor made the Rules of 1994, that were published in the Official Gazette on September 9, 1994.

8. It is the petitioner's case that an Advertisement No. 309 dated September 25, 1994 was issued by the District Magistrate, Muzaffar Nagar inviting applications from eligible persons for appointment to posts of Urdu Translator-cum-Junior Clerk with the number of posts being specified as 79. The petitioner applied in response to the said Advertisement and appeared in the written examination held for the purpose. He was selected by the Selection Committee headed by the District Magistrate, Muzaffar Nagar as envisaged under Rule 17 of the Rules of 1994. The petitioner being found fit for selection, a Memo No. 487/ Samanya Sahayak, dated April 3, 1995 was issued by the office of the District Magistrate, which the petitioner says gave him appointment on the post of an Urdu Translator-cum-Junior Clerk in the office of the Chief Medical Officer, Muzaffar Nagar. The said appointment order, according to the petitioner, directed him to join services at the office of the Chief Medical Officer, Muzaffar Nagar.

9. It is argued on behalf of the petitioner that the procedure prescribed for filling up vacancies under the Rules of 1994 shows that the post held by the petitioner is a Group-C post, of which the District Magistrate, where the petitioner was selected, is the appointing authority. The service to which the petitioner has been appointed is a District Level Cadre and members of the said service, according to the strength of the Cadre, are to be allocated to different offices and Establishments mentioned in Annexure 3 to the Government Order dated August 20, 1994. The petitioner, therefore, cannot be transferred outside the district.

10. The learned Counsel for the petitioner has emphasized on the definition of the term 'service' defined under Clause (f) of Rule 5 of the Rules of 1994, which says that "service" means the service of Urdu Translator-cum-Junior Clerk in a Government Department or office, constituted under relevant service rules or executive instructions, as the case may be. The submission of the learned Counsel is

that by appointment to a particular Government Department or office, the Urdu Translators do not become part of the Cadre of Junior Clerks in that office. They do not get the benefit of promotion under the relevant service rules applicable to the Department or office, to which they are appointed as Urdu Translators-cum-Junior Clerks. It is emphasized that the identity of the service of Urdu Translators-cum-Junior Clerks is distinct and different from the other Junior Clerks, who may be part of that Cadre in a Government Department or office. The service of the petitioner is that of Urdu Translators-cum-Junior Clerk, but not a Junior Clerk in the office or the Government Department, where he/ she has been appointed. This, he submits, is evident from the definition of service, found in Clause (f) of Rule 5 of the Rules of 1994. It is also emphasized that Rule 6 shows that the strength of service, that is to say, of Urdu Translators-cum-Junior Clerks in each Department or office, has to be determined by the State Government from time to time under the relevant service rules or executive instructions. This is a clear indicator, according to the learned Counsel for the petitioner, that the petitioner or for that matter any Urdu Translator-cum-Junior Clerk is very different from a Junior Clerk in the regular Cadre in a Government Department or office. The submission, therefore, is that the petitioner's appointment being one made to a District Level Cadre post by the District Magistrate, Muzaffar Nagar, he cannot be transferred to any other district. He may be transferred to any Establishment of the Chief Medical Officer within the district. In support of his contention, the learned Counsel for the petitioner has placed reliance on the decision of a learned Single Judge in **Trabuddin and others v. Chief Secretary, U.P. Shasan Secretariat and others 2014 (11) ADJ 318**, where this Court, after noticing the Rules of 1994 and the Government Order dated August 20, 1994, held as under:

"17. With respect to transferability of post, it is not disputed that Rules, 1994 do not contemplate any such thing. State Government has clarified vide order dated 25.8.2006 that neither the posts nor the personnels, working as Urdu Translators-cum-Junior Clerk, are transferable or should normally be transferred. In view of this specific stand taken by respondent State of U.P., I do not find as to how Police Headquarters can take upon itself the task of laying down conditions of service or policy decision with respect to service matters of petitioners, contrary to the decision taken by State Government, who is principal body having legislative power to lay down conditions of service of these personnel. A transfer policy with respect to Urdu Translators-cum-Junior Clerk, no doubt is within the realm of State Government. If it decides to make it non transferable, U.P. Police Headquarters, in my view, does not possess any power and none has been shown by respondents-learned Standing Counsel whereby it can take a contrary policy decision. The decision taken in respect of Police personnel, is by virtue of power specifically conferred under Act, 1861 and rules and regulations framed thereunder but no such power has been conferred with respect to civilian staffs and unless such power is vested with them (U.P. Police Headquarter), I do not find that such a policy decision can be taken by it (Police Headquarters) in respect of transfer of persons working as Urdu Translators-cum-Junior Clerk. The Police Headquarters' circular dated 28.7.1997 is clearly unauthorised, without jurisdiction and

illegal, particularly when State Government has already made it clear that posts and personnels making as Urdu Translator cum Junior Clerk are not transferable."

11. The learned Counsel for the petitioner has further placed reliance upon a decision of the Uttarakhand High Court in **Ramesh Chandra Joshi & another v. Iqbal Ahmad & others, 2016 SCC OnLine Utt 1943**. Attention of the Court has been drawn to Paragraph Nos. 26 and 27, which read as under:

"26. Now, we may notice some of the Government Orders, which came to be passed. Before the 1994 Rules were framed, order dated 20.08.1994 was passed. Reliance is placed on the said order by the writ petitioners and the intervener. We have already extracted the said order. The order was passed at a time when the Rules were not enacted. The order, apparently, came to be passed in the context of the decision of the Government to link Urdu with the livelihood and to create a post of Urdu Translator in the offices at the district level inter alia as per the details, which were mentioned. Number of posts were created. Further one post was created in each of the offices mentioned in the enclosed list. In short, it contemplated appointments being made in vacant posts of Junior Clerks by converting the same to the posts of Urdu Translator-cum-Junior Clerk in the mentioned pay-scale. This is seized upon by the writ petitioners and the intervener to contend that the persons were appointed as Urdu Translator-cum-Junior Clerk in the vacant posts of Junior Clerk and, from this, an inference is sought to be drawn that they were inseparably interconnected. It is true that a question may arise that, when the vacant post of Junior Clerk is not filled-up by appointing a Junior Clerk but by appointing an Urdu Translator-cum-Junior Clerk, who would discharge the functions of the Junior Clerk. Could it not be said that the Urdu Translator-cum-Junior Clerk would be expected to carry out the work of Junior Clerk besides, of course, doing translation work and, therefore, he should be treated as a Junior Clerk? At first blush, the argument appears to be impressive; but, there is another way of looking at it. What was intended by the Government having regard to its declared intention to provide for Urdu Translators, it was sought to be done by converting the vacant posts of Junior Clerk and by appointing Urdu Translators-cum-Junior Clerks, as provided in the enclosed list, in each of the offices. This could be treated as a method of making the appointments. That is to say, instead of creating new posts for Urdu Translators-cum-Junior Clerks, Government decided to convert the vacant posts and to appoint them as Urdu Translators-cum-Junior Clerks. Had it been the intention of the Government that the post of Urdu Translator-cum-Junior Clerk would be treated as Junior Clerk, nothing stood in the way of the Government amending the 1980 Rules and providing for the post of Urdu Translator-cum-Junior Clerk also within its ambit. This not being done, it let the state of the law remain unamended, under which law, only the Junior Clerks and other ministerial staff could be considered for promotion to the post of Senior Clerk. The mere fact that the vacancies held by Junior Clerks were made use of for appointing Urdu Translators-cum-Junior Clerks cannot be the basis for treating them as part of the same cadre. Equally bereft of merit is the argument based on clause (2) of the order dated 20.08.1994, which also contemplates appointment of Urdu Translator-cum-Junior Clerk being made to the first vacancy,

where the post of Junior Clerk is not vacant. It is also contemplated, no doubt, that the appointing authority for the post of Junior Clerk will be the appointing authority for the post of Urdu Translator-cum-Junior Clerk; but, we have already noticed that, even in the Rules, the same provision has been incorporated and it may not advance the case of the writ petitioners and the intervener. We find from Clause (7) of the said order that the rules to be enforced regarding conditions of service/selection procedure for the posts of Urdu Translator-cum-Junior Clerk was to be issued separately. It is, thereafter, that the 1994 Rules, which we have already noticed, came into being.

27. The next order, which is produced, is order dated 30.09.1995. It is an office order. It indicates certain candidates being selected and being appointed to the posts of Urdu Translator-cum-Junior Clerk and the same being filled-up, apparently, in terms of order dated 20.08.1994."

12. Reliance has next been placed on behalf of the petitioner on the decision of the Supreme Court in **Som Raj and others v. State of Haryana and others, (1990) 2 SCC 653.** Attention of this Court has been drawn to Paragraph No. 5, which reads as under:

"6. A resume of these rules clearly shows that for the appointment of all the posts including Junior Clerks in the Head Office, the appointing authority is the Director. All appointments to the post of Junior Clerks other than Head Office shall be by the concerned Head Office. As per the appendix, the staffing pattern in the office of the Director of Agriculture and the Subordinate Offices is entirely different. The only common element is the Senior Clerks. The seniority is to be maintained on the basis of the substantive appointment to the respective cadres. The seniority of the members of the service shall, in each class of appointment shown in the appendix be determined by the date of their substantive appointments or promotion or otherwise to permanent vacancies in such a class. The method of appointment has been adumbrated under Rule 7(1)(I) to (L) by promotion from amongst the persons working in the respective subordinate posts in the respective offices in the first instance, or by selection from amongst persons working in the government offices including Subordinate Offices and in some cases by the direct recruitment. Thereby it is clear that for filling up the vacancies arising in the post of Superintendent, Assistants and Senior Clerks, the persons working in the Subordinate Offices or the government offices are the feeder channels, or in some case by direct recruitment. Sub-rule (2) of Rule 7 makes the matter clear that they have got right to be considered, but it is strictly by selection and they have no claim to the appointment as of right. It is open to the government to constitute different cadres in any particular service as it may choose according to its administrative convenience and expediency. The office of the Director is the apex office obviously to control and oversee the functioning of the Subordinate Offices and the other allied departments under his control monitoring the implementation of the government's agricultural programmes. It may not be necessary to maintain a common cadre of the employees of the Directorate and the Subordinate Offices. Each cadre is a separate service or a part of the service sanctioned for administrative expediency. Therefore, each may be a separate unit and the posts allocated to the cadre may be permanent or temporary. It is seen from the

appendix that in the office of the Directorate there is one Superintendent, three Head Assistants, four Assistants, two Stenographers, seven Senior Clerks, and twelve Junior Clerks. In the Subordinate Offices, there is one Superintendent, seven Head Clerks and two Senior Clerks. This is obviously on the basis of administrative need. No doubt the office of the Directorate and the Subordinate Offices have been compendiously shown in Section 6 of the Appendix. That does not by itself mean that office of the Directorate and Subordinate Offices are treated under the Rules as one unit or at par, as contended for by Shri P.P. Rao. As pointed out in the beginning, the Director had committed some irregularities at the time of initial appointments in the year 1973 when he picked up five persons out of the select list of the candidates and appointed them in the Directorate of Haryana Government deviating from the order of merit prepared by the Board. They were selected at a common selection by the Recruitment Board along with other candidates who stood higher in the order of merit prepared by the Selection Board. But this was done in the year 1973 and the appointments have not been challenged till date of filing of the writ petition in 1979. Even in the writ petition no challenge was made. This is pressed into service only to show that the appellants are similarly situated with them. After the appointments were made and the candidates joined in the respective posts for consideration for promotion the Rules occupy the field and the claims are to be considered according to Rule 7. Therefore, though we may not agree with the learned counsel for the State that the Director had absolute discretion to pick and choose arbitrarily and make appointment of the posts, yet undoubtedly, he had power to appoint them. Normally the order of appointment would be in the order of merit of candidates from the list and must be in accordance with rules. His exercise of power should not be arbitrary. The absence of arbitrary power is the first postulate of rule of law upon which our whole constitutional edifice is based. In a system governed by Rule of Law, discretion when conferred upon an executive authority must be confined within clearly defined limits. The Rules provide the guidance for exercise of the discretion in making appointment from out of selection lists which was prepared on the basis of the performance and position obtained at the selection. The appointing authority is to make appointment in the order of gradation, subject to any other relevant rules like, rotation or reservation, if any, or any other valid and binding rules or instructions having force of law. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of Rule of Law. Discretion means sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority. We refrain from going into the correctness of the choice made by the Director due to laches in not assailing the correctness of the appointment for well over six years. The validity of the rules have not been questioned. The only question is, as stated earlier, whether the employees working in the Head Office and the Subordinate Offices are entitled to common seniority. The Rules themselves made a distinction between the persons appointed in the Directorate and the Subordinate Offices as separate cadres and the subordinate cadre in some cases is the feeder cadre for promotion to the post in the Head Office. In this view, by no stretch of imagination, the appellants can be considered to be equally placed for treating them at par with the

Directorate employees for being treated as being in a common cadre. There is reasonable nexus to differentiate the two cadres. Therefore, the classification cannot be said to be arbitrary violating Articles 14 and 16 of the Constitution."

13. It is submitted by the learned Counsel for the petitioner on the strength of the aforesaid decision in **Som Raj** *(supra)* that though Junior Clerks in that case for posts in the Head Office, that is, the Directorate of Agriculture and those in the subordinate offices of the Directorate were selected through a common selection by the Recruitment Board along with other candidates, but those appointed to the Head Office of the Directorate were held not to constitute a single cadre with the Clerks appointed to the subordinate offices. It was held that in the same service, it is open to the Government to constitute different cadres as it may choose according to its administrative convenience and expedience. It is urged on the basis of the said holding that here the definition of service to be found in the Rules of 1994 is with reference to each Government Department or office and where the Establishment to which an Urdu Translator has been appointed, is a District Level Establishment or office, the post held by the Urdu Translator is a District Level Cadre Post notwithstanding that the service of Urdu Translators-cum-Junior Clerks, according to Rule 6 of the Rules of 1994, in each Government Department or office under the relevant service rules applicable to that Department or office, may be a State service permitting transfer from one district to another for other incumbents governed by the service rules in that Department or office. The Urdu Translators, according to the learned Counsel for the petitioner, are a distinct or different class and they are not entitled to many other benefits such as promotions, etc., as the other Junior Clerks in the regular Cadre of particular Government Departments or offices. It is in that context that the decision of the Division Bench of the Uttarakhand High Court in **Ramesh Chandra Josh**i (*supra*) has been emphasized.

Submissions on behalf of the respondents

14. Mr. M.C. Chaturvedi, learned Additional Advocate General assisted by Mr. Ramanand Pandey and Mr. Ankit Gaur, learned Standing Counsel appearing on behalf of the State, have submitted that the petitioner's case that he is a member of a District Level Cadre Post under the Rules of 1994, is based on a complete misreading and misunderstanding of the Rules of 1994. According to the learned Additional Advocate General, the District Magistrate, under the Rules of 1994, is not at all the petitioner's appointing authority. He is only the Chairman of the Selection Committee, comprising five Members, including the District Magistrate envisaged under Rule 17. It is argued that the appointing authority would be an authority in one Government Department or the other or one office or the other, where an Urdu Translator is appointed. The Government Departments and offices are varied and different under the Government Order dated August 20, 1994, whereby specified number of posts have been created for Government Departments and offices at the Headquarters, the Divisional Headquarters of the Commissionerate and the District Level. To each of such posts, according to the learned Additional Advocate General, selections have to be made by the Statutory Selection Committee constituted under Rule 17 of the Rules of 1994. Post selection

by the Statutory Selection Committee, the appointing authority in a particular Government Department or office would offer appointment to the selected candidate and issue an appointment letter to him. The candidate once appointed in a particular Government Department or office as an Urdu Translator-cum-Junior Clerk would be governed by the service rules applicable to the Cadre of Junior Clerks there. In the submission of Mr. Chaturvedi, if the Government Department or office happens to be governed by Rules, where employees holding a Group-C post in the Cadre of a Junior Clerk are transferable, an Urdu Translator-cum-Junior Clerk appointed to such a Government Department or office, would be liable to be transferred like any other holder of a Group-C post, or more particularly, a Junior Clerk.

15. In the present case, the learned Additional Advocate General has submitted that the petitioner was appointed as an Urdu Translator-cum-Junior Clerk vide order dated May 31, 1995 issued by the Director (Administration) in the office of the Director General, Medical Health and Family Welfare, Government of U.P. at Lucknow, acting on the recommendation of the Statutory Selection Committee as an Urdu Translator-cum-Junior Clerk in the office of the Chief Medical Officer, Muzaffar Nagar. A copy of the said appointment letter is annexed to the Supplementary Affidavit-II dated September 28, 2021, filed on behalf of respondent No. 3. It is submitted by the Additional Advocate General that this appointment letter was deliberately not brought on record by the petitioner in the writ petition as it would indicate that the petitioner's appointing authority is the Director (Administration), Medical and Health Services, U.P., Lucknow and not the District Magistrate, Muzaffar Nagar. It is urged that the petitioner's appointment as an Urdu Translator-cum-Junior Clerk is governed by Rule 3-Ka of the U.P. Medical Health and Family Welfare Department (Subordinate Office) Clerical Cadre Service Rules, 1994 (for short, 'the Medical Service Rules, 1994) read with Rule 5(a) of the Rules of 1994.

16. A third Supplementary Affidavit dated October 4, 2021 has also been filed on behalf of respondent No. 3, bringing on record a xerox copy of the petitioner's service-book, which shows that vide order dated August 18, 2008 passed by the Director General, Medical and Health Services, U.P., Lucknow, the petitioner has been promoted to the post of Urdu Translator-cum-Senior Clerk, with his post, in the pay scale of 4000-100-8000. It is urged on the basis of service rules applicable to the petitioner that he is an Urdu Translator-cum-Senior Clerk in the Establishment of the Director General, Medical and Health Services, U.P., Lucknow. His appointing authority is the Director (Administration), Medical and Health Services, U.P., Lucknow. The petitioner's service, which is a clerical cadre post governed by Medical Service Rules, 1994, cannot be said to be a District Level Cadre Post.

17. In support of his contention, the learned Additional Advocate General appearing for the respondents has placed reliance upon an unreported decision of the learned Single Judge in **Akeel Ahmad v. State of U.P. and others, Writ - A No. 14945 of 2018,** decided on **July 17, 2018**, where it has been held:

"6. Petitioner in the present case appears to be working in the office

concerned for the last more than 10 years. His appointment is to the post of Urdu Translator-cum-Junior Clerk and he has been transferred against a specific post of Urdu Translator-cum-Junior Clerk existing in the same department i.e. the Transport Department of the State.

7. The order of transfer has been passed after obtaining approval from the State Government, which otherwise has jurisdiction in terms of Rules of 1994. There is nothing in the rules, which may prohibit a transfer of Urdu Translator-cum-Junior Clerk to another post existing in the cadre itself. The petitioner cannot insist that he has to be posted in the same region where he was initially appointed. Argument advanced in that regard is not sustainable in terms of the specific provisions of the rules itself. It is otherwise settled that transfer is an exigency of service, and unless it is shown to be violative of any provisions of the statutory rules or is otherwise found to be mala fide, no interference with it is called for. Challenge laid to the order of transfer, therefore, fails."

The Rules applicable

18. It would be gainful to refer to Rules governing the conditions of service of the petitioner. The foremost to be noticed are the Rules of 1994. The Rules aforesaid, as already said, have been made by the Governor in exercise of powers under the proviso to Article 309 of the Constitution. Clauses (a), (e) and (f) of Rule 5 of the Rules of 1994 are relevant and quoted below:

"5. In these rules, unless there is anything repugnant in the subject or context-

(a) "appointing authority" means an authority empowered to make appointment to a post of Junior clerk in a Government Department or office, under relevant service rules or executive instructions, as the case may be;

(b)-(d) x x x x

(e) "member of the service" means a person substantively appointed under these rules or the rules or orders in force prior to the commencement of these rules to a post in the cadre of the service;

(f) "service" means the service of Urdu Translator-cum-Junior Clerk in a Government Department or office, constituted under relevant service rules or executive instructions, as the case may be;"

(emphasis by Court)

19. Again, under Part-II of the Rules of 1994 vide Rule 6, the cadre of service or the strength of service has been defined as follows:

"6. The strength of the Service in each Government Department or office shall be such as may be determined by the Government from time to time under the relevant service rules or executive instructions, as the case may be."

(emphasis by Court)

20. It is further relevant to refer Rules 16, 17(1) and 18 of the Rules of 1994, which read as follows:

"16. The appointing authority shall determine and intimate to the District Magistrate the number of vacancies to be filled during the course of the year as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under Rule 8. The District Magistrate shall notify the vacancies to the Employment Exchange. He shall also invite applications directly from the persons who have their

names registered with the Employment Exchange. For this purpose the District Magistrate shall issue an advertisement in daily newspapers of Hindi and Urdu language besides pasting the notice for the same on the notice board.

17. (1) For the purpose of recruitment, there shall be constituted a Selection Committee comprising-

(i) The District Magistrate — Chairman

(ii) An officer belonging to the Scheduled Castes or Scheduled Tribes nominated by the District Magistrate if the District Magistrate does not belong to Scheduled Caste or Scheduled tribe. If the District Magistrate belongs to the Scheduled Castes or Scheduled Tribes an officer other than belonging to Scheduled Castes or Schedule Tribes to be nominated by District Magistrate. — Member

(iii) two officers nominated by the District Magistrate of the whom shall be an officer belonging to the Minority Community and the other belonging to the other Backward Classes. — Member Member

(iv) An expert in Urdu Language nominated by the District Magistrate. — Member Member

(2) x x x x
(3) x x x x

18. The appointing authority shall make appointment by requisitioning the Appointment names of candidates from the District Magistrate who shall provide the names of candidates in order in which they stand in the list prepared under Rule 17."

21. The relevant part of the Medical Service Rules, 1994 are quoted below:

"(3) जब तक विषय या संदर्भ में कोई प्रतिकूल बात न हो इस नियमावली में:

(क) नियुक्त प्राधिकारी का तात्पर्य निदेशक, प्रशासन, चिकित्सा, स्वास्थ्य एवं परिवार कल्याण विभाग, उत्तर प्रदेश से है,

(ख) - (च) x x x x

(छ) "सेवा का सदस्य" का तात्पर्य सेवा के संवर्ग मे किसी पद पर इस नियमावली के प्रारम्भ होने के पूर्व प्रवृत्त नियमों या आदेशों के अधीन मौलिक रूप से नियुक्त व्यक्ति से है,

(ज) 'सेवा' का तात्पर्य उत्तर प्रदेश चिकित्सा स्वास्थ्य एवं परिवार कल्याण विभाग (अधीनस्थ कार्यालय) लिपिक वर्गीय सेवा से है,"

22. It must be mentioned here that the petitioner of Writ-A No. 11378 of 2022 after selection as an Urdu Translator-cum-Junior Clerk in accordance with the Rules of 1994 has been appointed to the office of the District Basic Education Officer, Basti. A different set of rules would be applicable to him, to which allusion would be made later in this judgment.

Findings

23. Upon hearing learned Counsel for parties and carefully perusing the Rules of 1994 and the Medical Service Rules, 1994, in our opinion we need to look into the general scheme of the Rules of 1994 as well as the Medical Service Rules, 1994. The consideration of these two Rules would suffice, so far as all the Writ Petitions and the Special Sppeals being disposed of by this judgment are concerned, except Writ-A No. 11378 of 2022. In case of the writ petition last mentioned, the Rules of 1994 would have to be considered together with the Uttar Pradesh Adhinasth Shiksha Lipik Varg Sewa Niyamawali, 1985 (for short, 'the Rules of 1985').

24. A perusal of the Rules of 1994 shows that these have brought into existence a new class of employees called Urdu Translators-cum-Junior Clerks. The posts have been created under the Government Order dated August 20, 1994. Shortly thereafter, the Rules of 1994 were

made by the Governor in exercise of powers conferred by the proviso to Article 309 of the Constitution. The object of enacting the Rules is regulation of recruitment and conditions of service of persons appointed to the Uttar Pradesh Urdu Translators-cum-Junior Clerks Service. Thus, these Rules do not constitute the service, but regulate recruitment and conditions of service to the post of Urdu Translators.

25. The posts of Urdu Translators have been created vide Government Order dated August 20, 1994 by the State Government in the exercise of its executive powers. The number of posts sanctioned, are clearly stipulated to be a figure of 5061. The pay scale is also specified by the Government Order under reference. The creation of posts, against which an Urdu Translator would be appointed, is also given out by the Government Order. The Government Order dated August 20, 1994 specifies as its object the making of Urdu Language a medium to secure one's livelihood and refers to an earlier Government Order dated March 24, 1994 on the subject. The order then proposes to create posts of Urdu Translators-cum-Junior Clerks in the classes of offices that are eight in number, where one post each in the offices of the specified class stands created. Each of the eight classes of offices have been allocated a particular number of posts (class-wise) mentioned in the opening paragraph. There are three annexed lists of offices at the level of State Headquarters, the Commissionerate and the District Headquarters, which would each have an Urdu Translator.

26. The Government Order provides that the posts of Urdu Translators would be created in the manner that in the specified offices, where the post of a Junior Clerk in the pay-scale of 950-1500 is vacant, would be converted to that of Urdu Translator-cum-Junior Clerk in the pay-scale of 950-1500 and an incumbent appointed thereagainst. In the event a post is not available, the Government Order specifies the manner in which the appointment has to be made. In Paragraph No. 4 of the Government Order, it is stipulated that the appointing authority of the newly created posts of Urdu Translator-cum-Junior Clerk would be the same authority, who is competent to appoint Junior Clerks. The appointments are to be made at three levels of offices i.e. State Headquarters, the Commissionerate and the District Headquarters. The appointing authorities at the three levels have been indicated to be different in the Government Order. The Rules that have been enforced w.e.f. September 9, 1994, apparently do not create the posts, but override the Government Order as regards the definition of service of Urdu Translators-cum-Junior Clerks, the Rule governing their service, their appointing authority, the mode of selection and prescribe a cadre strength in each Government Department or office that may be varied and determined by the Government.

27. The Rules of 1994 regulate recruitment and conditions of service of Urdu Translators. Since the Rules are ones made in exercise of the powers under Article 309 of the Constitution, anything to the contrary in the Government Order dated August 20, 1994 would stand effaced. It is evident from a perusal of the Government Order dated August 20, 1994 that to start with posts of Urdu Translators-cum-Junior Clerks were to be created by utilizing in the specified offices, the one available post of Junior Clerk and converting it to an Urdu

Translator in the same grade and scale of pay. No fresh posts of Urdu Translators had been created in the sense that the posts have not been added to the existing strength of Junior Clerks in various Departments of the Government or offices, where the posts of Urdu Translators were created, but the existing posts of Junior Clerks in various Departments and offices, wherein Urdu Translators were to be appointed, have been created by converting existing posts of Junior Clerks.

28. The origin and creation of the post of Urdu Translators-cum-Junior Clerks would show that though a new post is brought into existence by the Government Order dated August 20, 1994, it is not generically different from a Junior Clerk's post. The appendage in the designation 'cum-Junior Clerk' is no vestige of the post's origin, but shows Establishment of a specialized cadre amongst Junior Clerks, who are otherwise essentially the same as any Junior Clerk. Of course, they are to have special qualifications and knowledge in the Urdu language, which is to be employed in the translation work.

29. The Rules of 1994 have constituted the post of Urdu Translators-cum-Junior Clerks vide Rule 2 into a non-Gazetted service comprising Group-C post. The scheme of the Rules of 1994 would, however, show that beyond the description of these Urdu Translators being members of the Uttar Pradesh Urdu Translators-cum-Junior Clerks Service, they are not a centralized service, the incumbents whereof may be moved from one Government Department or office to another. Rule 5(a) defines the appointing authority to mean "the authority empowered to make appointment to a post of Junior Clerk in a Government Department or office, under relevant service rules or executive instructions. ....." Service has been defined under Rule 5(f) to mean "the service of Urdu Translator-cum-Junior Clerk in a Government Department or office, constituted under relevant service rules or executive instructions, ...". Rule 6 of the Rules of 1994 deals with the cadre and stipulates that "strength of the Service in each Government Department or office shall be such as may be determined by the Government from time to time under the relevant service rules or executive instructions, ...".

30. Likewise, Rule 16, which occurs in Part V of the Rules of 1994, provides that "the appointing authority shall determine and intimate to the District Magistrate the number of vacancies to be filled during the course of the year". The District Magistrate has to invite applications through the Employment Exchange and also through advertisement in daily newspapers of Hindi and Urdu language. A Selection Committee headed by the District Magistrate has been provided under Rule 17(1). A competitive examination is envisaged under Rule 17(2), which is a written examination with three papers, marks whereof, including the papers, are specified under sub-Rule (3) of Rule 17. The Selection Committee is entrusted with the task of securing evaluation of the answer-books through persons well versed in Hindi and Urdu Languages. The Selection Committee has further been tasked with preparing a select list of candidates in order of merit going by the aggregate of marks secured by them in the written examination. The number of candidates selected is to be larger than the posts requisitioned, but not larger than by 25%. Under Rule 18, the appointing authority is obliged to make appointment

out of the names received from the District Magistrate by adhering to the order in which they stand in the list prepared under Rule 17.

31. The Medical Service Rules, 1994 have also been made by the Governor under the proviso to Article 309 of the Constitution. Part I Rule 2 of the Medical Service Rules, 1994 stipulate that all Group-C posts in the clerical cadre in Uttar Pradesh Medical Health and Family Welfare Department governed by these Rules, would be Group-C Posts. Rule 3(a) of Part I of the Medical Service Rules, 1994 defines the appointing authority as the Director (Administration), Medical Health and Family Welfare, Uttar Pradesh. Part III spells out the various cadres of employees, who are part of the service created under the Medical Service Rules, 1994. There are 11 cadres of employees, amongst whom, Junior Clerks figure under Rule 8 of Part III. There, the nomenclature given to the Junior Clerks is Junior Division Clerks. In this cadre, 85% are to be selected through direct recruitment, whereas the remainder 15% are to be promoted from amongst Class IV employees, working with the Department of Medical Health and Family Welfare, who are Matriculates.

32. Other conditions of eligibility for appointment to the service governed by the Medical Service Rules, 1994 is given out by Part IV, Rule 7 and the educational qualifications in Rule 8 of Part IV. Rule 14, that is to be found in Part V, speaks about the determination of vacancies occurring during the course of a year. It obliges the appointing authority to determine the total number of vacancies occurring during the recruitment year and also those that are required to be filled up in the Reservation Categories of SC, ST and OBC. Those of the vacancies that are to be filled up through the Commission, would be notified to them. The Commission is defined under Rule 3-Ga of the Medical Service Rules, 1994 as the Uttar Pradesh Subordinate Services Selection Commission. Rule 15 of the Rules speaks about direct recruitment. The selections are to be made by the Commission through a written examination, who would draw up a merit list based on marks secured by candidates. The number of candidates in the list drawn up by the Commission would not be more than the 25% of the vacancies. The lists, thus, drawn up by the Commission would be forwarded to the appointing authority. Rule 18 of the Medical Service Rules, 1994 provides for appointment, probation, confirmation and seniority.

33. Shorn of much detail, it is evident that direct recruitment or for that matter promotion to the post of a Junior Clerk governed by the Medical Service Rules, 1994 is to be made by the specified appointing authority, who is the Director (Administration), Medical Health and Family Welfare, Uttar Pradesh. It is, thus, evident from a perusal of the Medical Service Rules that the Uttar Pradesh Medical Health and Family Welfare Subordinate Clerical Grade is a Group-C service, whose appointing authority is the Director. It is a State Level service with subordinate offices and Establishments under the Department of Medical Health and Family Welfare spread across the State.

34. By contrast, the Rules of 1994, under which Urdu Translators-cum-Junior Clerks are appointed, define by Rule 5(a) the appointing authority as the authority empowered to make appointment to the post of Junior Clerk in a Government Department or office. Rule 5(f) of the Rules

of 1994 defines the services of Urdu Translators-cum-Junior Clerks as one in a Government Department or office, constituted under the relevant service rules or executive instructions. Under Rule 6 of the Rules of 1994, the strength of service of Urdu Translators has been specified with reference to each Government Department or office, which shall be determined by the Government from time to time under the relevant service rules or executive instructions.

35. The crux of the matter, therefore, is that Urdu Translators-cum-Junior Clerks, though part of a service, called the Uttar Pradesh Urdu Translators-cum-Junior Clerks created under the Rules of 1994, are in fact appointed to a particular Government Department or office by the appointing authority to the cadre of Urdu Translators-cum-Junior Clerks in that Government Department or office. Their service conditions are to be governed by the Service Rules applicable to Junior Clerks working in that Government Department or office, except to the extent that the Rules of 1994 provide otherwise. The Rules of 1994 may be utilized to determine the number of posts of Urdu Translators-cum-Junior Clerks in a Government Department or office by the Government and selection to the post by the Selection Committee, envisaged under those rules. To that extent, the procedure for recruitment may differ from other Clerks recruited under the Medical Service Rules, 1994. But, it is the appointing authority in the concerned Government Department or office, who would send a requisition in case of an Urdu Translator to the District Magistrate, who would make a selection through the Selection Committee envisaged under Rule 16 of the Rules of 1994 and forward the list of candidates in order of merit to the appointing authority.

36. In case of appointment of Urdu Translators-cum-Junior Clerks in the Department of Medical Health and Family Welfare, the mode of recruitment and conditions of service would be governed generally by the Medical Service Rules, 1994, except to the extent that a different procedure or mode is prescribed by the Rules of 1994. So is the case with all other Government Departments or offices, wherein Urdu Translators are to be appointed. The same would be the case with Urdu Translators-cum-Junior Clerks to be appointed to the service known as the Uttar Pradesh Adhinasth Shiksha Lipik Varg Sewa under the Rules of 1994, which is a service under the Department of Basic Education of the Government. This would be dealt with in some more detail a little later.

37. Thus, so far as Junior Clerks, functioning in the subordinate offices of the Department of Medical Health and Family Welfare are concerned, they are appointed by the Director (Administration), Medical Health and Family Welfare of the State. They are clearly a part of State Level Cadre and it does not matter to which subordinate office they are posted or even appointed initially. Their appointment initially made would be no more than posting to a particular subordinate office. Likewise, is the case with Urdu Translators-cum-Junior Clerks. There might be some issue about whether the appointment is one made to an office or Establishment of a Government Department at the State Headquarters, the Divisional Headquarters at the Commissionerate or the District

Headquarters. But, that does not arise in this case. Assuming that the petitioner has been appointed to a District Level Office or a subordinate office in the Establishment of the Director General, Medical Health and Family Welfare, U.P., Lucknow, it does not mean that he has been appointed to a particular District or a District Level Cadre in that sense of the term. He can be transferred to any District Level Office across the State that is under the administrative control of the Director General, Medical Health and Family Welfare, U.P., Lucknow and has a sanctioned post.

38. Reverting to the facts of the petitioner's case, it is his stand that being found fit for selection, a Memo dated April 3, 1995 was issued to the petitioner by the office of the District Magistrate, which the petitioner asserts offered him appointment on the post Urdu Translator-cum-Junior Clerk in the office of the Chief Medical Officer, Muzaffar Nagar. The said appointment order, according to the petitioner, directed him to join services at the office of the Chief Medical Officer, Muzaffar Nagar.

39. This Court must remark here that the aforesaid stand of the petitioner is incorrect. A perusal of Memo No. 487/ *Samanya Sahayak,* dated April 3, 1995 issued by the office of the District Magistrate, a copy whereof is annexed as Annexure No. 5 to the writ petition, shows that the memo is a certification of the fact that the Selection Committee constituted under the Rules of 1994, after selecting the petitioner to the post of Urdu Translator-cum-Junior Clerk, recommended him for appointment. The petitioner was directed to contact the office of the Chief Medical Officer, Muzaffar Nagar for the purpose. There is no quarrel that the petitioner was appointed to the post of an Urdu Translator-cum-Junior Clerk in the office of the Chief Medical Officer by the competent appointing authority.

40. A perusal of the appointment letter relating to Mohd. Mustaqueem indicates that he has been appointed by the Director (Administration), Medical Health and Family Welfare, U.P. *vide* order dated May 31, 1995 to the office of the Chief Medical Officer, Muzaffar Nagar, which is a subordinate office under the control of the Director General, Medical Health and Family Welfare, Uttar Pradesh, and ultimately, a part of the Department of the Medical Health and Family Welfare of the State. It is nobody's case that Junior Clerks in the office of the Chief Medical Officer, initially appointed to a particular CMO's office are appointed there for life. The Junior clerks governed by the Medical Service Rules, 1994 hold a transferable post and they can be transferred from one subordinate office in the State to another, wherever there is an office or establishment under the control of the Director General, Medical Health and Family Welfare, U.P., Lucknow.

41. There is no reason, therefore, to infer on the basis of the Rules of 1994 that Urdu Translators-cum-Junior Clerks selected through a Selection Committee under the Chairmanship of the District Magistrate, Muzaffar Nagar and subsequently appointed to the office of the Chief Medical Officer, Muzaffar Nagar under orders of the Director (Administration), Medical Health and Family Welfare, U.P., hold a District Level Cadre Post. The appointing authority is a State Level Authority, that has got subordinate offices or Establishments all

across the State. The posts of Urdu Translators-cum-Junior Clerks have been created by the Government Order dated August 20, 1994, no doubt in the office of the Chief Medical Officer amongst others, but there is nothing to show that it is a District Level Cadre Post. The Urdu Translators, like any other Junior Clerk, are to be appointed by a State Level Authority, that is to say, the Director (Administration), Medical Health and Family Welfare, U.P., Lucknow, who is the appointing authority of Urdu Translators-cum-Junior Clerks, in whichever Establishment or subordinate office of the Director (Administration), Medical Health and Family Welfare, U.P., they might be appointed. The fact, that Urdu Translators are not occupants of a District Level Cadre Post, is indicated by Rules 5(a), 5(f) and 6, amongst others, of the Rules 1994.

42. Rule 5(a) of the Rules of 1994 defines the appointing authority to mean the authority empowered to make appointment to a post of Junior Clerk in a Government Department or office, under relevant service rules or executive instructions, which clearly shows that the Urdu Translators-cum-Junior Clerks, though governed for some purposes by the Rules of 1994, are not to be appointed under the Rules 1994, but under some other Rules, called "relevant service rules or executive instructions'. They are to be appointed by the appointing authority under those "relevant rules or executive instructions'. Again, Rule 5(f) of the Rules of 1994 defines the services of Urdu Translators-cum-Junior Clerks in a Government Department or office as a service constituted under the relevant service rules or executive instructions.

43. Rule 6 of the Rules of 1994 stipulates that the strength of service in each Government Department or office, shall be such as may be determined by the Government from time to time under the relevant service rules or executive instructions. The common factor amongst all these provisions of the Rules of 1994 show that once selected under the said Rules, the nature of Urdu Translator-cum-Junior Clerk's Cadre as a District Level Cadre or State Level Cadre, would depend upon the Government Department or office, to which he/ she is appointed after selection. If for example, after selection under the Rules of 1994, the Urdu Translator-cum-Junior Clerk is appointed to a post in the Establishment of the Collectorate, governed by the Uttar Pradesh District Offices (Collectorate) Ministerial Service Rules, 1980 (for short, 'the Rules of 1980'), where the appointing authority is the District Magistrate, except in the case of Office Superintendent, for whom the appointing authority is the Commissioner of the Division, the Urdu Translator-cum-Junior Clerk would be governed by the Rules of 1980. In that case, the incumbent would be a part of a District Level Cadre, like any other Junior Clerk in the Establishment of the Collectorate. But, if appointed to a Government Department or office, that has its Establishments and subordinate offices throughout the State, the conditions of service of such an Urdu Translator-cum-Junior Clerk would be governed by the service rules of that Government Department or office referred to in the Rules of 1994 as the relevant service rules or executive instructions.

44. We are in respectful agreement with the opinion in this regard expressed by the learned Single Judge in **Jahid Mohammad v. State of U.P. and others, Writ-A No. 10088 of 2021, decided on August 13, 2021.**

45. The learned Counsel for the petitioner has particularly relied upon the decision of this Court of this Court in **Trabuddin's case** *(supra)* in support of the submission that the post of Urdu Translators-cum-Junior Clerks are not transferable. Attention of this Court has been drawn to the holding in **Trabuddin's case** *(supra)*, which together with the contextual background reads:

"16. From the pleadings of the parties, it is not in dispute that respondents themselves do not treat petitioners as members of U.P. Police Force enrolled under Section 2 of the Act, 1861. In the Government Order dated 17.4.1995 also, it was clearly stated that posts of Urdu Translators-cum-Junior Clerk are outside the police rank posts. It thus cannot be doubted that petitioners are not members of U.P. Police force. Therefore, provisions and special provisions, as the case may be, which are applicable to the members of U.P. Police Force, who are governed by Act, 1961 and rules and regulations and orders issued thereunder, would not be applicable to petitioners. They are simply civilian, non Police personnel staff, posted in Police Department. They would be governed by rules and regulations framed under proviso to Article 309 of the Constitution and executive orders issued by State Government in purported exercise of power under Section 162 read with 166 of the Constitution.

17. With respect to transferability of post, it is not disputed that Rules, 1994 do not contemplate any such thing. State Government has clarified vide order dated 25.8.2006 that neither the posts nor the personnels, working as Urdu Translators-cum-Junior Clerk, are transferable or should normally be transferred. In view of this specific stand taken by respondent State of U.P., I do not find as to how Police Headquarters can take upon itself the task of laying down conditions of service or policy decision with respect to service matters of petitioners, contrary to the decision taken by State Government, who is principal body having legislative power to lay down conditions of service of these personnel. A transfer policy with respect to Urdu Translators-cum-Junior Clerk, no doubt is within the realm of State Government. If it decides to make it non transferable, U.P. Police Headquarters, in my view, does not possess any power and none has been shown by respondents-learned Standing Counsel whereby it can take a contrary policy decision. The decision taken in respect of Police personnel, is by virtue of power specifically conferred under Act, 1861 and rules and regulations framed thereunder but no such power has been conferred with respect to civilian staffs and unless such power is vested with them (U.P. Police Headquarter), I do not find that such a policy decision can be taken by it (Police Headquarters) in respect of transfer of persons working as Urdu Translators-cum-Junior Clerk. The Police Headquarters' circular dated 28.7.1997 is clearly unauthorised, without jurisdiction and illegal, particularly when State Government has already made it clear that posts and personnels making as Urdu Translator cum Junior Clerk are not transferable."

46. We have carefully considered the rules that were under consideration in **Trabuddin's case** *(supra*) and the principles laid down there. For one, the decision was rendered in the context that the petitioner was transferred under some policy decision of the Police Headquarters, whereas Urdu Translators-cum-Junior Clerks appointed by the Superintendent of

Police, after selection by the District Magistrate in the Police Establishment, are not members of the U.P. Police Force. They are not governed by the Police Act, 1861 or the rules and regulations applicable to enrolled policemen. They are simply civilian, non-police personnel in the Police Department. It was opined that they would be governed by the rules framed under the proviso to Article 309 of the Constitution or an executive order issued by the State Government in the exercise of powers under Articles 162 and 166 of the Constitution. There is a further remark in Trabuddin's case (supra) to the effect that the Rules of 1994 do not contemplate any transfer. It is also observed that the State Government have clarified vide order dated August 25, 2006 that neither the post nor the personnel working as Urdu Translators-cum-Junior Clerks are transferable or should be transferred. It is in view of the aforesaid Government Order dated August 25, 2006 that the Court ultimately concluded that the Police Headquarters could not assume the authority to lay down conditions of service or do policy making. It was remarked that a transfer policy with respect to Urdu Translators-cum-Junior Clerks is within the domain of the State Government and if it had decided that these posts are non-transferable, the U.P. Police Headquarters had no power to take a contrary policy decision.

47. In the aforesaid judgment, the learned Single Judge has not noticed the various provisions of the Rules of 1994, which make it abundantly clear that service conditions, including the appointing authority, the strength of service in each Government Department or office relating to Urdu Translators-cum-Junior Clerks would depend on the Government Department or office, to which an Urdu Translator is appointed, by the relevant service rules, that is to say, the service rules applicable to the Government Department or office, wherever an Urdu Translator-cum-Junior Clerk is appointed. The Rules of 1994 would not govern it as the learned Single Judge has opined. Nor is it within the domain of the Government to issue a Government Order forbidding transfer of all Urdu Translators-cum-Junior Clerks, when according to the relevant service rules applicable to the Government Department or office, where an Urdu Translator-cum-Junior Clerk has been appointed, he holds a transferable post.

48. There are rules framed under the proviso to Article 309 of the Constitution governing the service conditions of Junior Clerks, that would be applicable to Urdu Translators-cum-Junior Clerks by virtue of the Rules of 1994. We are, therefore, not in agreement with the learned Single Judge in **Trabuddin** that the Rules of 1994 do not contemplate a transfer, and further, that once the Government had forbidden the transfer of Urdu Translators-cum-Junior Clerks by a Government Order, such Urdu Translators-cum-Junior Clerks cannot be transferred, unless the State Government takes a policy decision.

49. To our understanding, the subject is much governed by the Statutory Service Rules in different Departments of the Government and offices, where of course, some executive instructions to supplement the Statutory Rules can be issued, if the relevant rules permit.

Answer to the question referred

50. Our answer to the question referred by the learned Single Judge would, therefore, be that the post of an Urdu

Translator-cum-Assistant Clerk (sic Junior Clerk) may be a District Level Cadre Post or a State Level Cadre Post, depending on the Government Department or office, wherein the Urdu Translator-cum-Junior Clerk is appointed and the service rules applicable to that Department or office.

Disposition of the Writ Petitions and Special Appeals

51. We now proceed to take up the Writ Petitions and Special Appeals as indicated in the opening part of this judgment for final determination, bearing in mind our answer to the question.

Writ-A Nos. 10004, 10365 and 11430 of 2021

52. The petitioner in the leading case was undisputedly appointed to a service, which is not a District Level Cadre Post. It is a post, whose appointing authority is the Director (Administration), Medical Health and Family Welfare, U.P., part of the office of the Director General, Medical Health and Family Welfare, Government of U.P. The Director (Administration), Medical Health and Family Welfare, U.P., or for that matter the Director General, Medical Health and Family Welfare, Government of U.P., functions under the control of the Department of Medical Health and Family Welfare of the State Government. The office of the Director General, Medical Health and Family Welfare, Government of U.P. has Establishments and offices throughout the State and the office of the Chief Medical Officer in any district is one such subordinate Establishment. The Medical Service Rules, 1994, which govern the service of the petitioner by virtue of the Rules of 1994, as these are the relevant rules, provide that service under the Medical Service Rules, 1994 means the Uttar Pradesh Medical Health and Family Welfare Department (Subordinate Office) Clerical Cadre Service. The Rules clearly make the petitioner part of a State Level Service and not a District Cadre Service. The same holds true of the petitioners in **Writ-A No. 10365 of 2021 and Writ-A No. 11430 of 2021.** Thus, there appears to be no impediment in transferring the petitioners in terms of the orders impugned dated July 15, 2021 under challenge in each of the three writ petitions under reference.

Writ-A No. 11378 of 2022

53. So far as this writ petition is concerned, the petitioner here was selected under the Rules of 1994 by a Selection Committee headed by the District Magistrate, Basti and appointed to the post of an Urdu Translator-cum-Junior Clerk in the office of the District Basic Education Officer, Basti. By the impugned order dated June 28, 2022, he has been transferred from the office of the District Education Officer, Basti to the office of the District Basic Education Officer, Siddharth Nagar.

54. In case of an Urdu Translator-cum-Junior Clerk appointed to the office of the District Basic Education Officer, the relevant service rules within the meaning of the Rules of 1994 would be the Rules of 1985. The service there is defined as Uttar Pradesh Adhinasth Shiksha Lipik Varg Sewa, under Rule 3(*Chha)* of the Rules of 1985. A "subordinate office' has been defined under Rule 3(*Ja*) as the office of the Regional Deputy Director/ Regional Inspectress of Girls Schools/ District Inspector of Schools/ District Basic Education Officer/ Rashtrakrit Vibhagiya Pariksha, Allahabad. Likewise, under Rule 3(*Ka*) of the Rules of 1985, the appointing

authority for a post shown in Schedule (*Ka*) is the authority shown, as such, against the relative post. A perusal of Schedule (*Ka*) shows that for a post of Junior Clerk the appointing authority is Regional Deputy Director of Education, which the Court was informed during the hearing is now the Director of Education (Basic), Uttar Pradesh.

55. The fact that the appointing authority of a Junior Clerk in the office of the District Education Officer is either the Regional Deputy Director of Education or the Regional Joint Director of Education or the Director of Education (Basic), U.P. would show that the post of Urdu Translator-cum-Junior Clerk in the office of the District Basic Education Officer is not a District Level Cadre post. It is either a Regional Cadre within the region of a Deputy or Joint Director of Education or a State Level Cadre post, if the appointing authority indeed has been upgraded and is the Director of Education (Basic), U.P. The petitioner here has not annexed his letter of appointment, except the recommendation dated February 28, 1995 issued in response to a requisition for appointment of an Urdu Translator under the Government Order. The District Basic Education Officer cannot be the appointing authority of a Junior Clerk in his office under the Rules of 1985 and a fortiori cannot be the appointing authority of an Urdu Translator-cum-Junior Clerk. The transfer order impugned in this petition, transferring the petitioner from Basti to Siddharth Nagar on the ground that it is a District Basic Level Cadre post, cannot be questioned.

Special Appeal (D) No. 97 of 2022

56. Now, taking up this special appeal, we find that the learned Single Judge has declined to interfere with the transfer order dated July 15, 2021 passed by the Director (Administration), Medical Health and Family Welfare, U.P., transferring the writ petitioner from the office of the Chief Medical Officer, Firozabad to the office of the Chief Medical Officer, Etawah. In doing so, the learned Single Judge has followed the decision of the learned Single Judge in **Jahid Mohammad**, which we have already approved in the earlier part of this judgment, on principle, while answering the question referred. Even otherwise, in view of the answer that we have given to the question and the remarks in relation to an Urdu Translator-cum-Junior Clerk governed by the Medical Service Rules, 1994, which are applicable in this case, we find no infirmity in the order impugned passed by the learned Single Judge.

Special Appeal No. 52 of 2022

57. In this appeal, the judgment of the learned Single Judge in **Jahid Mohammad** is under challenge. We have already expressed our agreement with the learned Judge's opinion on principle while answering the question referred to us, dealt with in the earlier part of this judgment. On facts, we find that the writ petitioner here was transferred from the office of the Chief Medical Officer, Meerut to the office of the Chief Medical Officer, Agra in the same capacity, that is to say, as an Urdu Translator-cum-Junior Clerk. His conditions of service are governed by the Medical Service Rules, 1994, where there is no lack of jurisdiction in the appointing authority, that is to say, the Director (Administration), Medical & Health Services, U.P., Lucknow in transferring an Urdu Translator-cum-Junior Clerk from one subordinate office to another, located in

different districts. We do not find any good ground to interfere with the order impugned.

Special Appeal No. 522 of 2022

58. So far as this appeal is concerned, it has been filed against the direction carried in the order dated July 20, 2022 passed by the learned Single Judge in Contempt Application (Civil) No. 1452 of 2022. The direction has been issued on the foot of the interim order dated September 7, 2021 and confirmed on September 14, 2021, passed by the learned Single Judge in Writ-A No. 10004 of 2021, Mohd. Mustaqueem v. State of U.P. and others. The contempt proceedings were initiated with a case that notwithstanding the order of the learned Single Judge in **Mohd. Mustaqueem's case** *(supra)* to the effect that till the next date fixed in the case, the petitioner shall not be relieved, unless he has already been relieved, the petitioner has been relieved in willful violation. A clarification of the order was made on September 14, 2021 and despite the further order dated October 8, 2021, the petitioner was relieved from his earlier posting pursuant to the impugned transfer order. The learned Single Judge by the order impugned dated July 20, 2022 has issued directions to the effect that if the order passed on the writ side is complied with by the next date fixed before the learned Single Judge in the contempt proceedings, an affidavit of the contemnor would suffice; else the officer in contempt shall remain present in Court and charge shall be framed.

59. The entire edifice of the proceedings in Contempt Application (Civil) No. 1452 of 2022 are the interim orders of the learned Single Judge passed in Mohd. Mustaqueem's case (supra), which by the present common judgment and order, insofar as it relates to the said writ petition, we have found no merit in and propose to dismiss it, which would bring to an end all interim orders passed therein. No useful purpose would, therefore, be served in proceeding with the contempt in terms of the order dated July 20, 2022, which, therefore, ought to be set aside.

Special Appeal No. 523 of 2022

60. In this appeal, the order impugned is the order dated July 20, 2022 passed by the learned Single Judge in Contempt Application (Civil) No. 1453 of 2022. By that order, the learned Single Judge has issued certain directions ordering the contemnor-opposite party to comply with the orders dated August 18, 2021 and September 14, 2021 passed in Writ-A No. 10365 of 2021, or else appear before the Court by the date fixed for framing of charges. Since by this common judgment and order, we propose to dismiss the aforesaid writ petition, which would bring an end all interim orders passed therein, no useful purpose would be served by permitting the directions made by the learned Single Judge in the contempt proceedings to survive.

Orders

61. In the result, Writ-A Nos. 10004 of 2021, 10365 of 2021, 11430 of 2021, 11378 of 2022, Special Appeal Defective No. 97 of 2022 and Special Appeal No. 52 of 2022 fail and are dismissed. All interim orders passed in the writ petitions, wherever operating, are hereby vacated. Special Appeal Nos. 522 of 2022 and 523 of 2022 are hereby allowed. The order of the learned Single Judge, impugned in each

of the two appeals, are set aside. The Contempt Applications pending before the learned Single Judge are consigned to records.

(2023) 4 ILRA 619
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 10405 of 2022

Jai Prakash Retired (Kar Samaharta) ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Pradip Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Jai Prakash Gupta

A. Service Law – Pension – Retirement Benefits - U.P. Nagarpalika Non-Centralized Services Retirement Benefits Regulation, 1984 (Rules of 1984) - U.P. Qualifying Service for Pension and Validation Act, 2021 - **It is settled since long that daily wager employees are entitled to pensionary benefits counting their services from the date of their initial appointment and not from the date of their regularization.** (Para 7)

The facts of the case are that the petitioner was appointed as daily wage employee on 01.01.1989. He continued to serve on Class IV Post as Clerk. He was treated as regular employee and was regularized on 03.05.2011 and thereafter, he retired on 31.01.2020. (Para 2)

B. Words and Phrases – '*post*' - Section 2 of the Act of 2021 is read down and it is held that the word 'post' used in Section 2 of the Act of 2021, be it temporary or permanent, has to be read down as **'services rendered by a government employee, be it of temporary or permanent nature**'. (Para 7)

The present Rules of 1984 are parallel to the Rules of St. Government which have been read down by the Supreme Court, being held in violation of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. In the present case also an artificial classification is created as admittedly, as the daily wage employees perform the same duties as the regular employees and are throughout treated as the regular employee. They were also regularized in continuation of their services. Thus, the matter is squarely covered by the law settled in case of *Prem Singh* (*Infra*). (Para 8)

Respondent no.3-Commissioner, Gorakhpur Mandal, Gorakhpur is directed to ensure regular payment of pensionary and other benefits to the petitioner under/Rules of 1984 by counting past services rendered by petitioner before his regularization for the purpose of calculating post retiral benefits within a period of three months. (Para 10)

Writ petition allowed and impugned order dated 09.07.2020 is set aside. (E-4)

Precedent followed:

Dr. Shyam Kumar Vs St. of U.P. & ors., Writ-A No. 8968 of 2022 (Para 7)

Present petition challenges the order dated 09.07.2020, whereby the respondent authority has refused to grant him pension and other benefits on retirement which he claims to be entitled of.

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard counsel for the parties.

2. Petitioner has approached this Court challenging the order dated 09.07.2020 whereby the respondent authority has refused to grant him pension

and other benefits on retirement which he claim to be entitled. The facts of the case are that the petitioner was appointed as daily wage employee on 01.01.1989. He continued to serve on Class IV Post as Clerk. He was treated as regular employee and was regularized on 03.05.2011 and thereafter, he retired on 31.01.2020.

3. Learned counsel for petitioner submits that he is entitled for pension under U.P. Nagarpalika Non-Centralized Services Retirement Benefits Regulation, 1984 (Rules of 1984). Reference is made to Rule 2(m), which reads as follows:

"(m)"Qualifying service" means the service which qualified for pension in accordance with the provisions of Article 368 of the Civil Service Regulations, as amended from time to time, excepting the following:

(i) periods of temporary or officiating service in a non-pensionable establishment under the Municipal Board concerned;

(ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contigencies.

Provided that period of continued, temporary or officiating service under the Municipal Board concerned shall count as qualifying service if it is followed by confirmation on the same post or any other post without any interruption of service.

Note:- If service rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment it will not constitute an interruption of service."

4. Further submission is that similar rules prevailed with regard to employees of the State Government which also provide non-counting of services performed on work charge basis. A three Judge's Bench of Supreme Court on reference in case of Prem Singh vs. State of U.P. and others, (2019) 10 SCC 516 considered their entitlement for pension. The relevant paragraphs of the said judgment reads:

"8. We first consider the provisions contained in the Uttar Pradesh Retirement Benefits Rules, 1961 (for short "the 1961 Rules"). Rule 3(8) of the 1961 Rules which contains the provisions in respect of qualifying service is extracted hereunder:
3. In these rules, unless is anything repugnant in the subject or context-

*(1)-(7) * * **

(8) "Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-
(i) periods of temporary or officiating service in a non-pensionable establishment;

(ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contingencies shall also count as qualifying service.

Note. If service rendered in a non-pensionable establishment work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service

in a pensionable establishment, it will not constitute an interruption of service.

9. Regulations 361, 368 and 370 of the Uttar Pradesh Civil Services Regulations are also relevant. They are extracted hereunder:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:

First - The service must be under Government.

Second - The employment must be substantive and permanent."

These three conditions are fully explained in the following Regulations.

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post shall qualify, except-

(i) periods of temporary or officiating service in non-pensionable establishment;

(ii) periods of service in work-charged establishment; and

(iii) periods of service in a post paid from contingencies."

10. The qualifying service is the one which is in accordance with the provisions of Regulation 368 i.e. holding a substantive post on a permanent establishment. The proviso to Rule 3(8) clarify that continuous, temporary or officiating service followed without interruption by confirmation in the same or any other post is also included in the qualifying service except in the case of periods of temporary and officiating service in a non-pensionable establishment. The service in work-charged establishment and period of service in a post paid from contingencies shall also not count as qualifying service.

11. The Note appended to Rule 3(8) contains a provision that if the service is rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies, falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service. Thus, the Note contains a clear provision to count the qualifying service rendered in work-charged, contingency paid and non-pensionable establishment to be counted towards pensionable service, in the exigencies provided therein.

12. The provisions contained in Regulation 370 of the Civil Services Regulations excludes service in a non-pensionable establishment, work-charged establishment and in a post paid from contingencies from the purview of qualifying service. Under Regulation 361 of the Civil Services Regulations, the services must be under the Government and the employment must be substantive and permanent basis.

.....

30. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in

nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In Narain Dutt Sharma v. State of U.P. [CA No. _____2019 arising out of SLP (C) No. 5775 of 2018] the appellants were allowed to cross efficiency bar, after "8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak with effect from 15-9-1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs 200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs 205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularised time to time by different orders. However, the services of some of the appellants in few petitions/appeals have not been regularised even though they had served for several decades and ultimately reached the age of superannuation.

31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularised. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

32. In view of the Note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work-charged, contingencies or non-pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularisation had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in the Note to Rule 3(8) of the 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible

classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make Rule 3(8) valid and non-discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

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

36. There are some of the employees who have not been regularised in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularised under the Government instructions and even as per the decision of this Court in State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one-time measure, the services be regularised of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularised. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

37. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

5. He further submits that since similar rules for pensionary benefits exist

in the respondent Nagarpalika, therefore, the matter is squarely covered by the said judgment and petitioners herein should also be extended the benefit of the law settled in the case of **Prem Singh (Supra).**

6. Learned counsel for the respondent Nagarpalika submits that in light of U.P. Qualifying Service for Pension and Validation Act, 2021 (for short 'the Act of 2021') the effect of Prem Singh (supra) judgment has been nullified and, therefore, petitioner cannot claim benefits of the law settled in the case of Prem Singh (supra).

7. So far as Act of 2021 is concerned, the same is applicable only upon the employees of State Government. There is no similar Act which is applicable with regard to employees of the Non-Centralized Services of the Nagarpalika. Even otherwise Act of 2021 is already read down by this Court by judgment dated 17.02.2023 passed in **Writ-A No.8968 of 2022** ***(Dr. Shyam Kumar Vs. State of U.P. and others)*****.** Relevant paragraphs of the same reads as:

"....14. It is settled since long that daily wager employees are entitled to pensionary benefits counting their services from the date of their initial appointment and not from the date of their regularization. Suffice would be to refer to the judgment in cases of Hari Shankar Asopa vs. State of U.P. and another, 1989(1) UPLBEC 501; Yashwant Hari Katakkar vs. Union of India and others, 1996 (7) SCC 113; and Prem Singh (supra). In fact earlier they were covered by Rule 2 of U.P. Retirement Benefit Rules, 1961 and other Civil Services Regulations.

15. Now learned Standing Counsel submits that in view of Section 2 of the Act of 2021, since petitioners were not appointed on a temporary or permanent post initially, therefore, benefit of said services cannot be granted to them.

16. The said aspect of the matter is already discussed above at length. Section 2 of the Act of 2021 is already read down and it is held that the word 'post' used in Section 2 of the Act of 2021, be it temporary or permanent, has to be read down as 'services rendered by a government employee, be it of temporary or permanent nature'.

17. In view thereof, the petitioners are also covered by the aforesaid interpretation of Section 2 of the Act of 2021 as given in the present judgment. Orders impugned in different writ petitions on the grounds stated above are covered by the earlier judgments as well as by findings given above in this judgment and, hence, petitioners are held to be entitled for counting of their services rendered as daily wagers for pensionary benefits. All impugned orders are set aside.

.....

22. In the aforesaid facts and circumstances of the case, all the orders impugned in the writ petitions are passed either on the ground that they are covered by the Ordinance/Act of 2021 or they were not party in case of Prem Singh (supra) or without considering the judgment of Prem Singh (supra) and hence, the same are squarely covered by the finding given above. Therefore, the impugned orders cannot stand and are set aside. However, petitioners shall be entitled to past pensionary benefits for last three years only.

23. All the writ petitions are allowed."

8. The present Rules of 1984 are parallel to the Rules of State Government which have been read down by the Supreme Court, being held in violation of

Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. In the present case also an artificial classification is created as admittedly, as the daily wage employees perform the same duties as the regular employees and are throughout treated as the regular employee. They were also regularized in continuation of their services. Thus, the matter is squarely covered by the law settled in case of Prem Singh (Supra).

9. Thus, the writ petition is allowed and impugned order dated 09.07.2020 is set aside.

10. Respondent no.3-Commissioner, Gorakhpur Mandal, Gorakhpur is directed to ensure regular payment of pensionary and other benefits to the petitioner under the Rules of 1984 by counting past services rendered by petitioner before his regularization for the purpose of calculating post retiral benefits within a period of three months.

(2023) 4 ILRA 625
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 20960 of 2022
alongwith
Writ A No. 635 of 2023

Kapil Kumar Dixit & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri PrabhakarAwasthi, Sri Durvesh Kumar, Sri Shikher Trivedi, Sri Vijai Shanker Tripathi, Sri Vinod Shankar Tripathi

Counsel for the Respondents:
C.S.C.

Service Law- Constitution of India, 1950 - Article 14, 16 & 226 - U.P. Police Sub-Inspector and Inspector (Civil Police), Rules, 2015-Rule 15(f)) -Writ Petition seek to declare Rule 15(f) *ultra vires* of Articles 14 and 16 of the Constitution of India further direction has been sought to the St.-respondents to invite the petitioners for medical test against the vacancy which could not be filled up as some of the candidates were declared medically unfit, and/ or, were absent-The employer is at liberty to legislate and provide the conditions of recruitment and selection-Court would not substitute the discretion of the employer until it is shown that the Rule itself is inherently arbitrary to be violative of Article 14-Mere absence of a provision providing for waiting list would not render the rule manifestly arbitrary to make it contrary to the Constitution-Held-Rule 15(f) of Rules, 2015 constitutionally valid. (Para 2, 3, 37, 38, 44)

Petition dismissed. (E-15)

List of Cases cited:

1. Ajay Prakash Mishra & ors. Vs St. of U.P. & ors. Special Appeal Defective No. 416 of 2021, decided on 10.08.2021

2. St. of T.N. Vs P. Krishnamurthy (2006) 4 SCC 517

3. Cellular Operators Association of India & ors. Vs Telecom Regulatory Authority Of India & ors. (2016) 7 SCC 703

4. Indian Express Newspapers (Bombay) (P) Ltd. Vs U.O.I. (1985) 1 SCC 641

5. Khoday Distilleries Ltd. & ors. Vs St. of Karnataka & ors. (1996) 10 SCC 304

6. Sharma Transport Vs Government of A.P. & ors. (2002) 2 SCC 188

7. Reeta Singh & ors. Vs St. of U.P. & ors. Writ-C No. - 1715 of 2017, dated 02 February, 2018.

8. Ranvijay Singh & ors. Vs St. of U.P. & ors. Writ-C No. 3336 of 2016, decided on 29.03.2018

9. U.O.I. Vs Pushpa Rani & ors. 9 SCC 242

10. Chandigarh Administration Vs Usha Kheterpal Waie & ors. (2011) 9 SCC 645

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

1. Heard Shri Prabhakar Awasthi, learned counsel assisted by Shri Durvesh Kumar, Shri Vinod Shanker Tripathi, Shri Vijai Shanker Tripathi and Shri Shikher Trivedi, learned counsels for the petitioners and Shri Manish Goyal, learned Additional Advocate General assisted by Shri Vikram Bahadur Singh, learned counsels for the State-respondents.

2. Petitioners (33 in number) seek to declare Rule 15(f) of U.P. Police Sub-Inspector and Inspector (Civil Police), Rules, 2015 (for short "Rules, 2015'), as amended in the year 2020, ultra vires, of Articles 14 and 16 of the Constitution of India.

3. A further direction has been sought to the State-respondents to invite the petitioners for medical test against the vacancy which could not be filled up as some of the candidates were declared medically unfit, and/or, were absent.

4. The facts, inter se, parties are not in dispute.

5. The second respondent-Uttar Pradesh (Police Recruitment and Promotion Board) U.P., Lucknow, (for short "Board'), issued an advertisement dated 24 February 2021, inviting online applications for recruitment of 9,027 posts of Sub-Inspector (Police), 484 posts of Platoon Commander and 23 post of P.A.C. and Fire Station Second Officer, i.e., total 9,534 posts were advertised.

6. The rules governing recruitment/selection is provided under Rules, 2015.

7. The candidates as per the scheme of selection were required to clear: (i) Written Examination, (ii) Scrutiny of documents and physical standard test, (iii) Physical efficiency test.

8. The petitioners herein being eligible, applied for the post and successfully cleared the written examination. Thereafter, their documents were scrutinized and petitioners, thereafter, appeared for the physical standard test. It is claimed that all the petitioners cleared the physical standard test and their documents were also found to be valid and genuine. Thereafter, petitioners appeared for the physical efficiency test.

9. The petitioners claim that they qualified the physical efficiency test. In the result published by the Board on 12 June 2022, the name of the petitioners did not find place in the select list. The Board forwarded the final merit list with its recommendation to the Head of Department, in terms of Rule 15(e) of Rules, 2015. The final select list was subject to the candidates clearing medical test and character verification. There is no provision for preparation of waiting list under the Rules, 2015. The Head of Department after according his approval shall forward the list sent by the Board to the Appointing Authority for further action.

10. Rule 15(e) is extracted:

"***15(e) Selection and Final Merit List-*** *From amongst the candidates found*

successful in Physical Efficiency Test under clause (d), on the basis of marks obtained by the each candidate in written examination under clause (b), Board shall prepare, as per the vacancies, a select list of each category of candidates, as per the order of merit keeping in view the reservation policy and send it with recommendation to the Head of Department subject to Medical test and character verification. No waiting list shall be prepared by the Board. List of all candidates with marks obtained by the each candidate shall be uploaded on its website by the Board. The Head of the Department shall after his approval forward the list sent by the Board to the Appointing Authority for further action."

11. On plain reading of Rule 15(e), it mandates that there would be no waiting list, i.e., the Board is required to recommend that many number of candidates against the vacancies notified. Further, the list so forwarded is subject to the candidates clearing medical test and character verification to be undertaken by the Appointing Authority before issuing appointment letter to the recommended candidates.

12. The impugned Rule 15(f) provides for medical test. The Rule is extracted:

15(f) Medical Test- *The candidates, whose names are in as per 15(e), will be required to appear for Medical Examination by the Appointing Authority. For conducting the medical examination, the Chief Medical Officer of the concerned district shall constitute a Medical Board, which will have three doctors, who will conduct medical examination as per "Police Recruitment Medical Examination Form' as prescribed and codified by the Head of Department in consultation with the Director General of Medical Health. Any candidate not satisfied by the Medical Examination, may file an appeal on the day of examination itself. Any appeal with regard to Medical Examination will not be considered if the candidates fails to file the appeal on the date of medical examination and declaration of its result itself. The Medical Board constituted for appeal shall have expert regarding Medical deficiency of the applicant. The detailed instructions for conducting medical examination will be issued Director General of Police.* ***The candidates found unsuccessful in Medical Examination shall be declared unfit by the Appointing Authority and such vacancies shall be carried forward for next selection."***

13. The Rule mandates that the Appointing Authority would request the Chief Medical Officer of the concerned district to constitute the Medical Board which will conduct medical examination of the selected candidates as per Police Recruitment Medical Examination Form in consultation with Director General of Health. The aggrieved candidate has remedy of appeal.

14. The Rule further mandates that candidates found unsuccessful in the medical examination, i.e., declared unfit by the Appointing Authority, all such vacancy shall be carried forward for the next selection.

15. Rule 16 of Rules, 2015 provides for character verification of the candidates recommended by the Board. The Rule mandates that character verification shall be completed under the supervision of the

Appointing Authority before issuing appointment letter and before sending the candidate for training. The Rule reads thus:

"The candidates found unsuccessful in the Medical Examination shall be declared unfit by the appointing authority and such vacancies shall be carried forward for the next selection"

16. In this backdrop, the learned counsel for the petitioner submits that the Rule 15(f) is inherently arbitrary as it does not provide for the waiting list.

17. Accordingly, it is submitted that all those candidates who were not found fit in the medical examination, and/or, character verification, such vacancies would remain unfilled and is required to be carried forward for next selection. It is submitted that petitioners who had successfully qualified the written and other examinations/tests may be treated as candidates in the waiting list and their names be sent for medical examination/character verification.

18. According to the petitioners, seven lakh candidates appeared for the recruitment process, and finally result of 9,534 candidates was declared by the Board. It is further submitted that 763 candidates were found medically unfit and 101 candidates were absent.

19. In this backdrop, it is submitted that the vacancies that remained unfilled, accordingly, petitioners should be given an opportunity to appear for medical examination/character verification and if found fit, they be considered for appointment. In the event, the vacancies are carried forward, as per Rule 15(f), according to the petitioners, it is inherently arbitrary and violative of Article 14 and 16 of the Constitution of India.

20. Per contra, learned counsel appearing for the State-respondent has placed reliance on the decision of the Division Bench rendered in Ajay Prakash Mishra and Others vs. State of U.P. and others1, decided along with companion writ petitions. It is urged that the vires of a similar rule has been upheld. The writ petition lacks merit and is liable to be dismissed.

21. Rival submissions fall for consideration.

22. The question that arises is as to whether the impugned Rule is manifestly arbitrary/unreasonable to render it violative of Article 14 of the Constitution of India.

23. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who challenges it to show that it is ultra vires/invalid. It is also well recognized that subordinate legislation can be challenged under any of the following grounds:

"(a) Lack of legislative competence to make the sub-ordinate legislation.

(b) Violation of Fundamental Rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the

Court might well say that the legislature never intended to give authority to make such rules)."

(Refer: State of T.N. vs. P. Krishnamurthy2 & Cellular Operators Association of India and others vs Telecom Regulatory Authority Of India and others3)

24. One of the tests for challenging the constitutionality of subordinate legislation is that the subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation.

(Refer: Indian Express Newspapers (Bombay) (P) Ltd. vs. Union of India4)

25. That takes us to consider the test of 'manifest arbitrariness'. It is well explained in **Khoday Distilleries Ltd. and others vs. State of Karnataka and others**5, which reads thus:

"13. . . . The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In the case of Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [(1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. ***A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary" . . . In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."***

(emphasis supplied)

26. Also in **Sharma Transport vs. Government of A.P. and others**6, the Supreme Court held as follows:

"25. . . . The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. ***In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in*** *the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone. . . ."*

(emphasis supplied)

27. The Division Bench of this Court in **Reeta Singh and others vs. State of U.P. and others**7, declared Rule 5 of U.P. Medical Health and Family Welfare Department Health Workers and Health Supervisors (Male & Female) Service Rules, 1997, insofar as it relates to Health Worker (Female) ultra vires of India Nursing Council Act, 1947, and violative of petitioners' fundamental right under Articles 14 and 16 of the Constitution. The

rule was held to be manifestly arbitrary as it permitted only those female candidates who had successfully completed training course conducted by U.P. Nurses and Midwives Council, excluding other such female candidates for the post who had obtained recognized qualifications prescribed under the Act from other institutions.

28. Learned counsel for the petitioner is unable to show as to how the Rule 15(f) of Rules, 2015, is invalid being manifestly arbitrary.

29. One of the questions before the Court in **Prakash Mishra (supra)** was with regard to the validity of the Rule 15(e) of the Uttar Pradesh Constable and Head Constable Services Rules, 2015.

30. In Paragraph 10 of the report, it is noted that "The challenge to constitutional validity of Rule 15(e) has also been made which denies preparation of wait list. It is also Rule 15(g) which provides carry forward of the vacancies if one is declared medically unfit.'

31. Rule 15(e) is pari materia with the Rule impugned 15(f) of the Rules, 2015, under challenge in the present writ petition.

32. The Division Bench rejected the argument with regard to the validity of the Rule. Paragraph 26 and 27 is extracted:

"26. The argument aforesaid cannot be accepted only for the reason that after publication of the select list on the website when the candidates were called for medical examination, many of them were declared unfit and as a consequence of which, the posts remained vacant and were carried forward....The elimination of candidates was even in absence of character verification as per Rule 16 to the Rules 2015 and thereby all those eliminated after preparation of the select list under clause (e) to Rule 15, equivalent posts were carried forward. It is for the reason that no provision for wait list exist rather it is barred by Rule 15(e) to the Rules of 2015.

27. The alleged procedural lapse in carrying out the recruitment is not made out. ***The direction to fill up the vacant posts cannot be given only for the reason that in the medical examination or character verification, certain candidates were eliminated. It is more so when the Rule provides for carry forward of the vacancy as a consequence thereof.*** *It is also settled law that mere participation in the selection or even placement in the select list does not give indeficiable right of appointment. The aforesaid issue has been touched in detailed by the learned Single Judge. It may be true that number of posts remained vacant but that is due to declaration of certain candidates to be medically unfit or in absence of character verification* ***but merely for the reason that certain posts remained unfilled would not invite an interpretation of the Rule different than what was intended by the legislatures. When Rule 15(e) is specific and directs preparation of the select list equivalent to the number of vacancies with restrain on wait list, then consequence was to follow.*** *Accordingly, we are unable to accept any of the arguments raised by the appellants. It is also that unfilled posts in the recruitment of 2015 were carried forward and taken in account for recruitment in the year 2018. With the next selection, the issue pertaining to recruitment of year 2015 would not have survived."*

33. The Court relying on an earlier Division Bench decision rendered in

Ranvijay Singh and others vs. State of U.P. and others8, did not find Rules 15(b), 15(c) and 15(e) of the Rules, to be ultra vires to the Constitution or statutory provisions. The challenge to Rule 15(e) was made mainly in reference to bar on preparation of wait list. The Division Bench in **Ranvijay Singh (supra)** held Rule 15(e) to be constitutionally valid. The relevant paragraphs of the judgment is extracted hereunder:

"10. It is not in dispute that Rules, 2015 supersede all existing rules, i.e. the Rules, 2008 and orders issued in that behalf. In other words, the moment Rules, 2015 were introduced and were brought into force, Rules, 2008 ceased to operate. The writ petitions before us do not challenge Rules, 2015 as a whole and seek declaration that Rules 15(b), (c) and (e) of the Rules, 2015, as ultra vires the provisions of the Constitution of India. In the absence of challenge to Rules, 2015, as a whole, a very strange situation would arise if the challenge to Rules 15(b), (c) and (e) only is upheld. If these clauses are declared ultra vires the Constitution, the remaining rules will make the entire Rules, 2015 otiose/unworkable, which is impermissible and cannot be conceived. It is settled position of law that Courts cannot legislate or enter into the realm of executive field by substituting or altering the subordinate legislation. Despite such declaration and so also legal hurdle in the way, we have examined the challenge raised to clauses (b), (c) and (e) of Rule 15 of Rules, 2015 independently to find out whether the procedure prescribed for recruitment or the mode of selection to the post of constable vide Rules, 2015 is irrational and arbitrary, as contended by Mr. Khare, learned Senior Counsel for the petitioners. The question, therefore, arise whether the criteria of selection and evaluation is manifestly arbitrary.

13. In this backdrop, when we look at the procedure for recruitment laid down under Rules, 2015, we find that these Rules provide a mechanism for selection of the most suitable person for the job of constable on merits, impartially and objectively. The procedure would definitely avoid patronage and favoritism and also would do away with unfairness. We would also like to examine the case from another angle and to record further reason to say so. ***It is well settled that the power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any Constitution or statutory provision or is patently arbitrary or is vitiated due to mala fides. It is settled legal position that matters relating to creation and abolition of posts formation or structuring and restructuring of cadres, prescribing mode of recruitment and qualifications, criteria of selection, evaluation of candidates/employees falls within the exclusive domain of the employer."***

34. Reliance was placed on the decision rendered by the Supreme Court in **Union of India vs. Pushpa Rani and others**9, wherein, it was held that the Court and tribunals can neither prescribe the qualifications nor sit in appeal over the judgment of the employer laying down the criteria and methodology of recruitment and selection. Paragraph 37 reads thus:

"37. Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment

and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. ***The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The Court has no role in determining the methodology of recruitment or laying down the criteria of selection.*** *It is also not open to the Court to make comparative evaluation of the merit of the candidates.* ***The Court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration."***

(emphasis supplied)

35. Similarly, in **Chandigarh Administration vs. Usha Kheterpal Waie and others**10, Supreme Court, in paragraph 22, observed thus:

"22. It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. The courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the authority concerned so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of the Constitution, statute and rules. [See J. Rangaswamy vs. Govt. of A.P. (1990) 1 SCC 288 and P.U. Joshi vs. Accountant General (2003) 2 SCC 632]. In the absence of any rules, under Article 309 or statute, the appellant had the power to appoint under its general power of administration and prescribe such eligibility criteria as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of Ph.D. is unreasonable." (emphasis supplied)

36. Having regard to the decision rendered in **Ajay Prakash Mishra (supra)** and Ranvijay Singh (supra), Court was of the view that the issue of constitutional validity of Rule 15(e) of the Rules, cannot be held to be manifestly arbitrary, merely for the reason that wait list has not been provided by the Rule making authority. Further, mandating that the unfilled vacancies shall be carried forward, would not make the Rule ultra vires of the provisions of the Constitution of India or the statutory statute. It is the sole prerogative of the Rule making authority to spell out the modalities of selection and recruitment. The Court has no role in the matter.

37. It is settled principle of law that the employer is at liberty to legislate and provide the conditions of recruitment and selection. The Court would not substitute the discretion of the employer until it is shown that the Rule itself is inherently arbitrary to be violative of Article 14. No such ground has been raised while challenging the constitutional validity of Rule 15(f). In any case, Division Bench has upheld a similar *pari materia* rule in **Ajay Prakash Mishra (supra).**

38. Accordingly, the employer has the sole discretion to prescribe qualification

and decide the mode of recruitment. The Court under the garb of judicial review would not substitute the Rule making authority to decide what is best suited for the employer in the recruitment process. Having regard to the nature of duty, the selected candidates have to perform, it is always open to the employer to provide or not provide for waiting list. Mere absence of a provision providing for waiting list would not render the rule manifestly arbitrary to make it contrary to the Constitution.

39. In **Maharashtra Public Service Commission vs. Sandeep Shriram Warade**11, the Court observed as under:

9. The essential qualifications for appointment to a post are for the employer to decide. ***The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work.*** *In no case can the Court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same.*

40. In **Punjab National Bank vs. Anit Kumar Das**12, the Court observed as under:

21. "it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the Courts to consider and assess. A greater latitude is permitted by the Courts for the employer to prescribe qualifications for any post. There is a rationale behind it. Qualifications are prescribed keeping in view the need and interest of an Institution or an Industry or an establishment as the case may be. ***The Courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications....."***

41. Similarly, in **Zahoor Ahmad Rather vs. Seikh Imtiyaz Ahmad**13, the Supreme Court made the following observation:

27. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision making. The state as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily"

42. Supreme Court similarly in **Sanjay Kumar Manjul vs. Chairman, UPSC**14, observed as under:

25. The statutory authority is entitled to frame statutory rules laying down terms and conditions of service as also the qualifications essential for holding a particular post. It is only the authority concerned who can take ultimate decision therefore.

27. It is well settled that the superior courts while exercising their jurisdiction under articles 226 or 32 of the Constitution of India ordinarily do not direct an employer to prescribe a qualification for holding a particular post.

43. As per Rule 15(e) of Rules, 2015, the Board is called upon to prepare the

select list of candidates of that many vacancies notified to the Board. The Board in that event cannot recommend candidates over and above the vacancies notified. It follows that the State cannot make more appointments than the posts notified in the advertisement. In **Prem Singh vs. Haryana State Electricity Board**15, the Supreme Court observed as under-

"The selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. ***If the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts advertised****...State can deviate from the advertisement and make appointments on the posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf."*

(Refer: Ashok Kumar vs. Chairman, Banking Service Recruitment Board16)

44. The learned counsel for the petitioner failed to show as to how the impugned Rule 15(f) is unreasonable in the sense that it is manifestly arbitrary so as to offend Article 14 of the Constitution.

45. Accordingly, we hold Rule 15(f) of Rules, 2015, to be constitutionally valid.

46. Having regard to the discussions hereinabove, the writ petition being devoid of merit is, accordingly, **dismissed.**

(2023) 4 ILRA 634
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 63364 of 2009

Zuhair Alam ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajeev Misra, Sri Hritudhwaj Pratap Sahi, Sri P.K. Chaurasia, Sri Prashant Kumar Tripathi, Sri Samarath Singh, Sri Sankalp Narain

Counsel for the Respondents:
C.S.C., Sri O.P. Singh Sikarwar, Sri Purushottam Mani Tripathi, Sri Vashistha Tiwari

A. Service Law – Disciplinary Proceedings – Suspension/Termination – Maintainability of this petition - The grievance arising out of service matters connecting to Madrasa is maintainable u/Article 226 of the Constitution of India by way of filing writ petition before the Hon'ble Court. (Para 13)

B. For imposing the major penalty, it was mandatory on the part of the respondents to conduct proper disciplinary proceedings as mentioned in the Uttar Pradesh Government Servant (Discipline and Appeal) Rule, 1999. (Para 14)

On the precise query as made before the learned counsel for the respondents that on which dates the matter has been posted which was initiated for conduction of the disciplinary proceedings against the petitioner, the same could not be apprised and even there is no description while framing the counter affidavit against the grounds of the petition, there is no description and mention of any dates which took place during the course of disciplinary proceedings wherein the petitioner was warranted to appear but he failed to do so. Moreover, it has been argued by learned counsel for the petitioner that only on the basis of inquiry report which has never been supplied to the petitioner is brazen in law and the same

is contrary to the procedure as settled by catena of judgments by the Apex Court. (Para 11)

The entire matter against the petitioner has been initiated while constituting the three Members Committee and no evidence or records have ever been called from the petitioner while conducting the inquiry. The inquiry report was never ever served upon the petitioner and he has never been given any opportunity for explaining his defense in respect of the findings arrived at by the Inquiry Committee. The Disciplinary Authority without following the proper procedure for conduction of the disciplinary proceedings directly arrived over the conclusion only after giving credence to the report submitted by the Inquiry Committee. (Para 14)

Writ petition allowed. Directed reinstatement along with back wages. (E-4)

Precedent followed:

1. Union of India Vs Mohd. Ramzam Khan, 1990 0 Supreme (SC) 606 (Para 12)

2. St. of U.P. & ors. Vs Mam Chand Tyagi & anr., 2017 (6) ALJ 460 (Para 12)

3. Mohammad Shoeb Vs St. of U.P. & ors., Special Appeal No. 447 OF 2016, decided on 30.08.2017 (Para 12)

4. Alauddin Vs St. of U.P. & ors., 2013 ILR 2 All 851 (Para 13)

Present petition challenges the termination order dated 25.10.2009, passed by the Manager of the committee of Management of the institution.

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

1. Heard Sri Samarath Singh, learned counsel for the petitioner, Sri Purushottam Mani Tripathi, learned counsel for the respondent nos.4 and 5 and learned Standing Counsel for the State-respondent nos.1 to 3.

2. The present petition has been filed seeking the following relief:-

"1. Issue a writ order or direction in the nature of certiorari quashing the impugned order 25.10.2009 passed by the Manager of the committee of Management of the institution (annexure 29 to the writ petition).

2. Issue a writ order or direction in the nature of certiorari calling for the records of the case and quash the resolution dated 25.10.09 passed by the respondent no.4 the committee of Management of the institution.

3. Issue a writ order or direction in the nature of certiorari calling for the records of the case and quash the enquiry report submitted by the respondent no.6 the Enquiry Committee.

4. Issue a writ order or direction in the nature of mandamus commanding the respondents to reinstate the petitioner in service not to interfere in the peaceful working of the petitioner as an Assistant Teacher "Tahtaniya" in Madarsa Darul Uloom Faize Mohammadi, Hathiagarh, District Maharajganj and further pay the salary of the petitioner regularly and continuously on due dates."

3. It is the case of the petitioner that he was appointed as an Assistant Teacher (Tahtaniya) in the institution named as Darul Uloom Faiz-E Mohammadi, Hathiagarh Laxmipur, District Maharajganj vide appointment letter dated 28.03.2004 issued by the Committee of Management of the Institution, the appointment of the petitioner was duly approved over the intimation by the competent authority. The petitioner sought leave at the behest of some family function which was going to be held in respect of marriage of his sister's daughter but the same has been denied by

the then Principal which culminated into a dispute between the petitioner and the Principal of the Institution, thereafter from 12.11.2008, the petitioner has been mentioned in the attendance register as absent.

4. At the time of formalities which have been conducted by the respondent no.3 with regard to release of salary in respect of each and every employees of the Institution, the same has been inquired with regard to the long absence of the petitioner and only thereafter the Manager of the Committee of Management of the Institution passed a resolution dated 25.01.2009 proposing the suspension of the petitioner in contemplation of the inquiry and the order of suspension was passed vide order dated 04.02.2009.

5. Having been aggrieved by the order of suspension dated 04.02.2009, the petitioner preferred a representation on 07.02.2009 before the respondent no.4 for revocation of his suspension. Considering the claim in shape of representation, the respondent no.4 considered the period as casual leave, the petitioner again preferred an application dated 24.02.2009 before the respondent no.2 for taking suitable action and requested to transfer the petitioner to some other institution.

6. On dated 26.02.2009, an Inquiry Committee comprising of three Members issued a chargesheet, whereupon the petitioner submitted his reply on dated 02.03.2009, while filing the reply, certain charges have been levelled against the Principal of the Institution by the petitioner and the same has been addressed to the respondent no.2 which was taken up for consideration and the Principal alongwith the petitioner has been given opportunity to appear before the respondent no.2 on dated 17.03.2009 for their contentions and allegations put forward by both of them against each other, meanwhile certain more information in shape of documentary evidences have been put forward by the petitioner for substantiating the allegations as levelled upon the Principal of the Institution, due to failure of attendance, the next date was fixed by the respondent no.2 i.e. 24.03.2009 for appearance of both the parties.

7. Being also aggrieved by the order of suspension dated 04.02.2009, the petitioner challenged the same by filing Writ Petition No.15950 of 2009 (Zuhair Alam Vs. State of U.P. and others) and the same was dismissed as withdrawn vide order order dated 27.03.2009 and thereafter, the petitioner also filed Writ Petition No.24791 of 2009 (Zuhair Alam Vs. State of U.P. and others) and the same was finally disposed of vide order dated 14.05.2009 with a specific direction for the Committee of Management to conclude the inquiry and bring it to its logical end within three months from the date of receipt of a certified copy of the order, subject to full cooperation being extended by the petitioner. For seeking full cooperation of the petitioner, the Committee of Management of the Institution sent letters dated 04.08.2009 and 08.08.2009 and the same have been replied by the petitioner vide letter dated 17.08.2009 through registered post to the Manager of Committee of Management of the institution. Meanwhile, District Minority Welfare Officer, Maharajganj sent a compliance report dated 26.08.2009 in compliance of the order of this Court dated 14.05.2009 wherein, it was directed that in case it is found that the terms and conditions of the suspension order have

been complied by the petitioner then he shall be ensured subsistence allowance. Vide report dated 26.08.2009 submitted by the District Minority Welfare Officer, Maharajganj, it is clarified that the petitioner is entitled for the payment of subsistence allowance during the period of suspension. The petitioner made repeated representations which were appended to the petition as representations dated 24.09.2009 and 17.10.2009 for seeking redressal of his grievance.

8. Upon receipt of the report of the Inquiry Committee pertaining to the matter of the petitioner, the Committee of Management of the Institution in its meeting dated 25.10.2009 proposed to terminate the services of the petitioner and in pursuance of the same, the Manger of the Committee of the Management of the Institution passed an order dated 25.10.2009 by which the services of the petitioner were terminated.

9. After receiving the order of termination, the petitioner immediately preferred an application before the District Minority Welfare Officer, Maharajganj with a specific stand that he has never been called for appearing before the three Members Committee as constituted only for the purposes of conducting disciplinary proceedings against the petitioner and as such, there was hardly any opportunity afforded to the petitioner for creating any defense against the charges as levelled against him. As per the arguments raised by learned counsel for the petitioner, the penalty imposed upon the petitioner which is major in nature, cannot be directly determined only by way of constituting a Committee and receiving a report of the same, moreover it is specific case of the petitioner that during the course of inquiry, no evidence has been received or even called for from the petitioner neither after finalizing the inquiry, the report of the inquiry has ever been supplied or served upon the petition and as such, the determination and arrival over the decision in shape of termination, is not maintainable in the eye of law.

10. Per contra, learned counsel appearing on behalf of the respondent nos.4 to 6 submitted that the averments made in the order which impugned the present petition by way of taking reliance that full opportunity of hearing has already been afforded in favour of the petitioner but in response, he never intended to participate or cooperate with the disciplinary proceedings whatsoever has been initiated by the three Members Committee constituted by the Committee of Management. While supporting the order which impugned the petitioner, learned counsel for the respondent nos.4 to 6 depends on the narrations as advanced in shape of counter affidavit as well as supplementary affidavit wherein the contents of the petition have been vehemently denied and rebutted on several grounds and the burden and onus casted upon the petitioner which culminated into the termination order due to non-cooperation and altogether absent from the disciplinary proceedings.

11. On the precise query as made before the learned counsel for the respondents that on which dates the matter has been posted which was initiated for conduction of the disciplinary proceedings against the petitioner, the same could not be apprised and even there is no description while framing the counter affidavit against the grounds of the petition, there is no description and mention of any dates which

took place during the course of disciplinary proceedings wherein the petitioner was warranted to appear but he failed to do so. Moreover, it has been argued by learned counsel for the petitioner that only on the basis of inquiry report which has never been supplied to the petitioner is brazen in law and the same is contrary to the procedure as settled by catena of judgments by the Apex Court wherein few of the leading cases have been referred and taken shelter of the same.

12. The judgment in the case of **Union of India Vs. Mohd Ramzam Khan [1990 0 Supreme (SC) 606]** is one of them. The same has been followed by a Division Bench of this Court in the case of **State of U.P. and others Vs. Mam Chand Tyagi and another [2017 (6) ALJ 460]** and **Mohammad Shoeb Vs. State of U.P. and 6 others** (Special Appeal No.447 of 2016, decided on 30.08.2017).

13. Sofar as the ground of maintainability of this petition as raised by learned counsel for the respondents, it has been held by a coordinate Bench of this Court in **Alauddin Vs. State of U.P. and 3 others (2013 ILR 2 All 851)** that the grievance arising out of service matters connecting to Madrasa is maintainable under Article 226 of the Constitution of India by way of filing writ petition before the Hon'ble Court.

14. After considering the rival contentions as raised by learned counsel for both the parties as well as after going through the different judgments as supplied by learned counsel for the petitioner along with the proceedings initiated by the respondents while conducting the inquiry and the disciplinary proceedings, the writ petition is hereby **allowed**. The impugned order dated 25.10.2009 is hereby set aside on the following grounds:-

I. The entire matter against the petitioner has been initiated while constituting the three Members Committee and no evidence or records have ever been called from the petitioner while conducting the inquiry.

II. The inquiry report was never ever served upon the petitioner and he has never been given any opportunity for explaining his defense in respect of the findings arrived at by the Inquiry Committee.

III. The Disciplinary Authority without following the proper procedure for conduction of the disciplinary proceedings directly arrived over the conclusion only after giving credence to the report submitted by the Inquiry Committee.

IV. For imposing the major penalty, it was mandatory on the part of the respondents to conduct proper disciplinary proceedings as mentioned in the Uttar Pradesh Government Servant (Discipline and Appeal) Rule, 1999.

15. The respondent no. 4 is directed to reinstate the petitioner and extend the benefit of backwages as admissible to him immediately after receiving a certified copy of this order.

(2023) 4 ILRA 638
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 8262 of 2023

Smt. Jyoti & Anr. ...Petitioners
Versus
M.A.C.T. Fatehpur & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ram Singh, Sri Amit Kumar Singh

Counsel for the Respondents:

Civil Law- The Motor Vehicles Act, 1988- Sections 159, 166(3) & 166(4)- (Rule 150 of Central Motor Vehicles Rules, 1989- Rule 204 A of Uttar Pradesh Motor Vehicle Rules 1998- Claim petition filed by the petitioner u/s 166 of the M.V Act dismissed being beyond the limitation prescribed u/s 166 (3)- Two modes of claiming compensation are prescribed, one under sub section 3 of Section 166 and other under sub-section 4 of section 166-The duty to file the claim is cast upon the Police Authorities under Section 166(4) read with Rule 150 of Central M.V Rules coupled with an obligation cast upon the tribunal to treat the same as claim application under Section 166(4) read with Rule 204A of the UP M.V Rules-Mandate of Section 159 & Section 166(4) of the Act has to be considered before rejecting any claim application under section 166 (3) of the Motor Vehicles Act on grounds of limitation. (Para 9-15, 20-24)

Writ petition allowed. (E-15)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Swaran Singh; (2004) 3 SCC 297

2. CIT Vs Hindustan Bulk Carriers (2003)3 SCC 57

3. P. Raghava Kurup & anr. Vs V. Ananthakumari & ors. (2007) 9 SCC 179

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Ram Singh the counsel for the petitioner.

2. The present petition has been filed by the petitioner challenging the order dated 27.01.2023 whereby the claim petition filed by the petitioner under section 166 of the Motor Vehicles Act, 1988 has been dismissed as being beyond the limitation prescribed under section 166 (3) of the Motor Vehicles Act, 1988 as amended with effect from 01.04.2022.

3. The facts, in brief, are that the legal heirs of Late Chetan Kumar filed a petition under section 166 of the Motor Vehicles Act claiming compensation on account of the death of Late Chetan Kumar in a motor accident on 01.05.2022. The said claim petition was filed on 27.01.2023. As the same was beyond the limitation of six months prescribed under section 166 (3) of the Act, the same was dismissed by means of the impugned order.

4. The submission of the counsel for the petitioner is that there was a delay of about fifty seven days' and the Act being a beneficial piece of legislation should be interpreted liberally and the delay should be condoned. He relies upon a judgment of the Hon'ble Supreme Court in the case of ***National Insurance Co. Ltd. vs. Swaran Singh; (2004) 3 SCC 297.***

5. To analyze the submission made at the bar, the scheme of claiming compensation as prescribed under the Motor Vehicles Act (herein after referred to as MV Act) is to be read as a whole. The relevant chapters for the case in hand are chapter XI and Chapter XII of the Act and Sections 159 and Section 166 and the Rules framed by the Central Government and the State Government.

6. It is relevant to note the provisions as contained in Section 166 of the Act, which is as under :

"166. Application for compensation. *(1) An application for compensation*

arising out of an accident of the nature specified in sub-section (1) of section 165 may be made

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be :

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

[Provided further that where a person accepts compensation under section 164 in accordance with the procedure provided under section 149, his claims petition before the Claims Tribunal shall lapse.]

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:)

(3) No application for compensation shall be entertained unless it is made within six months of the occurrence of the accident.

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under section 159 as an application for compensation under this Act.

(5) Notwithstanding anything in this Act or any other law for the time being in force, the right of a person to claim compensation for injury in an accident shall, upon the death of the person injured, survive to his legal representatives, irrespective of whether the cause of death is relatable to or had any nexus with the injury or not."

7. In terms of the provision of Section 166 (3) of the Act, it is clear that the legislature in its wisdom prescribed that the Motor Accidents Claims Tribunal shall not entertain any application for grant of compensation, if the same is not filed within six months of the occurrence of the incident, thus, starting point of limitation is the date of occurrence of the incident. Relying upon the said provision, the order impugned has been passed by the Tribunal rejecting the claim petition.

8. The said view of the Tribunal, in the opinion of this court, is not justified as the court has interpreted the provisions of section 166 in a narrow and pedantic manner, whereas, the Act being a socio beneficial piece of legislation, needs to be interpreted purposively and the various sections have to be interpreted harmoniously.

9. Section 166(3) of the Act cannot be read in isolation disjunct with Section 166 (4) which makes it mandatory for the Claims Tribunal to treat any report of the accident forwarded to it under section 159 as an application for compensation.

10. Section 159 of the Act which is quoted herein below, mandates the Police Officer, investigating the accident to necessarily prepare an accidental information report to facilitate the settlement of claim within a period of three months and containing such particulars to the Claims Tribunal or any other agency that may be prescribed. Section 159 of the Act is quoted as under:

*"**159. Information to be given regarding accident -** The police officer shall, during the investigation, prepare an accident information report to facilitate the settlement of claim in such form and manner, within three months and containing such particulars and submit the same to the Claims Tribunal and such other agency as may be prescribed."*

11. Section 164C of the Motor Vehicle Act confers power on the Central Government to frame rules for the purpose of carrying into effect the provision of Chapter XI of Motor Vehicle Act which includes Section 159.

12. In terms of the powers under Section 164C, the Central Government has framed rules known as Central Motor Vehicles Rules, 1989. Rule 150 of the said rules provides as under:

*"**150. Furnishing of copies of reports to Claims Tribunal.--(**1) The police report referred to in section 159 shall be in Form 54 and the accident information report shall be submitted to the Claims Tribunal, insurer and such other agency as may be notified by the Central Government.*

(2) A registering authority or a police officer who is required to furnish the required information to the person eligible to claim compensation under section 160 or insurer against whom a claim has been made and such other person as may be notified by the Central Government, shall furnish the information in Form 54, within seven days from the date of receipt of the request and on payment of a fee of rupees ten."

13. On a conjoint reading of section 166 (4) read with section 159 of the Act read with Rule 150 of Central Motor Vehicle Rules, it is clear that on the occurrence of any accident, a duty has been cast upon the Police Officer, investigating the accident, to send an information containing the particulars to the Claims Tribunal in Form No.54 and the Claims Tribunal is bound to accept the said report as an application for settlement of the Claim.

14. Section 176 of Motor Vehicle Act empowers State Government to frame rules for the Tribunals and in excrecise of the said powers State Government has framed rules Uttar Pradesh Motor Vehicle Rules 1998. Rules 204 A of the said rules is quoted as under :

***204-A. Police report submitted under Section 158(6)-(1)** On receipt of report of Investigating Police Officer submitted under sub- rule (4) of Rule 202- A, the Claims Tribunal shall go through the same and may call for such further information or material as considered necessary for proper and effective action in accordance with sub-section (4) of Section 166.*

*(2) The Claims Tribunal after examining the report **and further information material,** if called for, **shall register the claim case thereon** and, then, issue notice for appearance to all the parties concerned which would include the victims the accident, of the legal*

representatives of persons deceased, as the case may be driver, owner and insurer of the Vehicle involved in the accident.

(3) On receipt of notice, the parties mentioned in sub-rule (2) ***would be required to appear and declare through affidavit, if any claim case had been preferred, or was being preferred in respect of the same cause of action, and if so, the report of Investigating Police Officer, treated as Claim case, would be tagged to such claim case preferred independently by the parties.***

(4) If the persons injured, or legal representative of the persons deceased do not appear in response to the notice issued under sub-rule (2) in the manner indicated in sub-rule (3) the Claims Tribunal may presume that the said parties were not interested in pursuing the same for, any compensation in such proceedings, and on such presumption the case shall be closed.

(5) Unless the Police report treated as claim case stands tagged to independent claim case preferred by the parties themselves, the Claims Tribunal shall call upon the person, injured or legal representatives of the person deceased as the case, may be, and the persons who have appeared in response to the notice, to submit statements of facts regarding compensation, if claimed by them.

(6) If statements of facts about compensation claimed and basis thereof are furnished by the parties. The case shall be further proceeded in the same manner as required to deal with applications moved by the parties for compensation directly before the Claims Tribunal.

(7) If statements of facts about the compensation claimed, has been furnished by the parties and subsequently commits default in appearance, the provisions of Order-IX of the Code of Civil Procedure, 1908 would apply"

15. On a conjoint reading of Section 166(3) read with Section 166(4) read with the rules as referred to above ,the inescapable conclusion is that two modes of claiming compensation are prescribed, one under sub section 3 of Section 166 and other under sub-section 4 of section 166.The duty to file the claim is cast upon the Police Authorities under Section 166(4) read with Rule 150 of Central M.V Rules coupled with an obligation cast upon the tribunal to treat the same as claim application under Section 166(4) read with Rule 204A of the UP M.V Rules.

16. In fact, in terms of the Rule 204A(3) any claim filed by the claimant in addition to the report of Police Authorities is to be tagged with the first report and is to be heard and decided simultaneously.

17. In view of there being two modes prescribed for making claim under sub-sections 3 and 4 of section 166 and both have a same purpose and both are aimed at the same objective i.e. to expeditiously register a claim for damages sustained in the accident, both have to be harmoniously reconciled so as to promote the object of the Statute and not to frustrate it.

18. The Supreme Court has laid down principles that govern the doctrine of harmonious constructions in ***(2003)3 SCC 57; CIT vs. Hindustan Bulk Carriers*** wherein it was observed and laid down in paras 14 to 21 as under:

"14. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim ut res magis valeat quam pereat i.e. a liberal construction should be put

upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. [See Broom's Legal Maxims (10th Edn.), p. 361, Craies on Statutes (7th Edn.), p. 95 and Maxwell on Statutes (11th Edn.), p. 221.]

15. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable. (See Whitney v. IRC [1926 AC 37 : 10 Tax Cas 88 : 95 LJKB 165 : 134 LT 98 (HL)] , AC at p. 52 referred to in CIT v. S. Teja Singh [AIR 1959 SC 352 : (1959) 35 ITR 408] and Gursahai Saigal v. CIT [AIR 1963 SC 1062 : (1963) 48 ITR 1] .)

16. The courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used. (See Salmon v. Duncombe [(1886) 11 AC 627 : 55 LJPC 69 : 55 LT 446 (PC)] AC at p. 634, Curtis v. Stovin [(1889) 22 QBD 513 : 58 LJQB 174 : 60 LT 772 (CA)] referred to in S. Teja Singh case [AIR 1959 SC 352 : (1959) 35 ITR 408] .)

17. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result. (See Nokes v. Doncaster Amalgamated Collieries [(1940) 3 All ER 549 : 1940 AC 1014 : 109 LJKB 865 : 163 LT 343 (HL)] referred to in Pye v. Minister for Lands for NSW [(1954) 3 All ER 514 : (1954) 1 WLR 1410 (PC)] .) The principles indicated in the said cases were reiterated by this Court in Mohan Kumar Singhania v. Union of India [1992 Supp (1) SCC 594 : 1992 SCC (L&S) 455 : (1992) 19 ATC 881 : AIR 1992 SC 1] .

18. The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.

19. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with other parts of the law and the setting in which the clause to be interpreted occurs. (See R.S. Raghunath v. State of Karnataka [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81] .) Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty of the court to avoid a head-on clash between two sections of the same Act. (See Sultana Begum v. Prem Chand Jain [(1997) 1 SCC 373 : AIR 1997 SC 1006] .)

20. Whenever it is possible to do so, it must be done to construe the provisions which appear to conflict so that they harmonise. It should not be lightly assumed that Parliament had given with one hand what it took away with the other.

21.The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus a construction that reduces one of the provisions to a "useless lumber" or "dead letter" is not a harmonised construction. To harmonise is not to destroy."

19. The rule of interpreting two provisions of a statute was considered by the Supreme Court in ***(2007) 9 SCC 179; P. Raghava Kurup and another vs. V. Ananthakumari***

and others and the Supreme Court in paras 7, 9 and 10 has recorded as under :

7. Therefore, the intention of the rule-framing authority can be brought forth by reading these two provisions harmoniously. The settled principle of interpretation of statute is that if two rules can be read harmoniously and the object sought to be achieved can be achieved without violation of any rule then it should be so read. Secondly, it may also be relevant to mention that Note (1) to Rule 1 was inserted in 1982 subsequently knowing fully well that Rule 43-B starts with non obstante clause. Therefore, the note which is subsequent to the Rules of 1959 can be read harmoniously without doing any violence to Rule 43-B.

9. Mr Rao placed reliance on a decision of this Court in Nalinakhya Bysack v. Shyam Sunder Haldar [AIR 1953 SC 148 : 1953 SCR 533] their Lordships observed as follows: (SCR p. 534)

"In construing a statute it is not competent to any court to proceed upon the assumption that the legislature has made a mistake and even if there is some defect in the phraseology used by the legislature, the court cannot aid the defective phrasing of an Act or add and amend, or by construction, make up deficiencies which are left in the Act."

10. No attempt is made in this case to add or subtract any word. It is only after reading the two provisions of the Rules harmoniously the result can be achieved without any violence to any of the provisions of the Act or the Rules. The object as already indicated above, was to provide promotional avenues to the non-teaching staff for the post of teacher provided they fulfil requisite qualifications. Therefore, this case is of no help to the appellants."

20. Scope of Section 166(3) which empowers the claimant to apply under Section 166(3) within 6 months on conjoint reading with Section 166(4) of the Act and on the basis of analysis referred above, has to be referable to cases of motor accidents in which no FIR could be registered for any reason or where he chooses to file a claim before the Police Authorities send the report to the Claims Tribunal.

21. In the present case, the Tribunal has not considered this aspect and has failed to record any material fact in respect of the accident report being on record and/or steps taken thereon by the Tribunal in terms of Rule 204 A and has proceeded to reject the claim petition ignoring the said aspect, as such, the impugned order dated 27.01.2023 is not sustainable and is liable to be set aside.

22. The Claims Tribunal is directed to process and decide the claim in accordance with law as it was the duty of the Police Officer investigating the accident to sent the information and it was also mandatory on the Claims Tribunal to accept the said report as a claim application which appears to have not been done, for no fault of the petitioner.

23. In case the police officer has failed to fill/send his report, the Tribunal will be well within its powers to call for the same and register it as a Claim Petition and then take steps as prescribed under Rule 204A of the Rules.

24. Thus, the order dated 27.01.2023 is set aside. It is further directed for guidance of Tribunals functioning under the Act, that the mandate of Section 159 and Section 166(4) of the Act has to be considered before rejecting any claim

application under section 166 (3) of the Motor Vehicles Act on grounds of limitation.

25. The writ petition stands ***allowed.***

26. The Registrar General is directed to forward a copy of this judgment to all the Claims Tribunal functioning in the State of U.P.

(2023) 4 ILRA 645
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 18684 of 2010

Laxman Singh Bhadauriya ...Petitioner
Versus
Controlling Auth. Under the payment of Gratuity Act & Anr. ...Respondents

Counsel for the Petitioner:
Sri S.N. Dubey, Sri Amit Kumar Srivastava, Sri S.K. Singh Yadav

Counsel for the Respondents:
C.S.C.

A. Payment of Gratuity Act, 1972 – Section 7(3-A) – Notification dated 01.10.1987 – Gratuity – Delayed payment – 10% interest rate is provided – However, award of 4% interest was passed – Legality challenged – Held, the respondent no. 1 has not given any basis or source for payment of only 4% annual interest instead of 10% annual interest as per existing notification dated 01.10.1987 issued by the Central Government in respect of Sec 7 (3-A) of the Payment of Gratuity Act, 1972 – Payment of 4 % interest is contrary and against the law. (Para 8)

Writ petition allowed. (E-1)

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

1. Heard Sri S.N.Dubey, learned counsel for the petitioner and Sri Jitendra Narain Rai, learned Additional Chief Standing Counsel.

2. This writ petition has been filed for the issuance of writ, order or direction in the nature of Certiorari for quashing the Award dated 18.12.2009 passed by Respondent no. 1 so far it relates to 4% interest and also for issuance of mandamus directing the Respondent no. 2 to pay 10% interest on the delayed payment of gratuity.

3. In brief, facts of the case are that the petitioner was clerk in District Cooperative Bank, Ltd. Fatehpur, and retired from the service on 31.01.2000. He completed 29 years service but the respondent no. 2 paid him less gratuity of 4 years and 10 months. He moved an application on 16.08.2007 before the Respondent no. 01 with the prayer that the respondent no. 2 has paid less gratuity therefore, he may be directed to pay Rs. 85,983/-. The case was registered as case no. P.G. 13/2007 marked as annexure - 1 to the petition. Respondent no. 2 filed written statement and its photocopy is annexure - 2 to this petition. The petitioner filed the rejoinder annexure - 3 to the petition.

4. The petitioner filed documentary evidence and adduced oral evidence before respondent no.1. The respondent no. 1 by the judgment and order dated 18.12.2009 allowed the petition directing the respondent no. 2 to pay Rs 34,632/-which is annexure - 4 to the petition. The respondent no. 1 while allowing the claim

of the petitioner awarded 4% interest which is against the law. The petitioner had prayed for and was entitled for 10% interest on delayed payment.

5. Section 7 (3-A) of Payment of Gratuity Act, 1972 provides that the employer shall be liable to pay interest not exceeding the rate notified by the Central Government. The central Government by notification dated 01.10.1987 has notified that on delayed payment the rate of interest would be 10% which is as under :

"NOTIFICATION NO. S.O 874 (E), dated 1st October, 1987

Gazette of India, Extraordinary, dated 1.10.1987, Part II,

Section 3 (ii), P - 2

In exercise of the power conferred by sub - section (3-A) of Section 7 of the Payment of Gratuity Act, 1972, the Central Government hereby specifies ten per cent annum at the rate of simple interest payment for the time being by the employer to his employee in cases where the gratuity is not paid within the specified period.

(2) This notification shall come into force on the date of its publication in the official gazette."

6. Thus the petitioner was entitled for 10% interest on the delayed payment as per Section 7 (3-A) of Payment of Gratuity Act, 1972 but respondent no. 1 has awarded only 4% interest which is illegal. The respondent no. 1 has not recorded any findings as to why 10% interest has not been awarded. The order passed by respondent no. 1 is illegal and unjust. The petitioner has got no equally efficacious and alternatively remedy except to invoke the extraordinary writ jurisdiction of this Hon'ble court under Article 226 of the Constitution of India hence, this petition has been instituted.

7. As per office report no undelivered registered notice and acknowledgment have been received back hence opposite party no. 2 is presumed to be sufficiently served through notice. No counter affidavit and vakalatnama has been filed. Hence heard learned counsel for the applicant S.N Dubey , Amit Kumar Srivastava, Shri S.K Dubey for petitioner and learned standing counsel for the respondent and perused the record.

8. The petitioner has annexed all the relevant papers along with the notification of the Central Government which are referred in the petition. There is no evidence that respondents have challenged the order dated 18.12.2009 before the competent authority or the court. Hence, the finding in favor of the petitioner in respect of the claim has become absolute. It is the petitioner who has grievance regarding payment of less percentage of interest on the ground that in case of delayed payment of gratuity there is provision of Central Government to pay 10% simple interest for the period of delay. The petitioner has challenged the order of respondent no. 1 in respect of direction of payment of only 4% interest in place of 10% for the period of delay in payment of gratuity. When notice was properly sent to the respondent no. 2, it was its duty to appear and file counter affidavit against the petition, but it refrained from its duty. Such act of respondent no. 2 shows that respondent no. 2 has no objection with regard to the case/objection raised by the petitioner. The claim of the petitioner finds support form the aforesaid notification of Central Government according to which in case the gratuity is not paid within the specified period, employer would pay 10% per annum simple interest. The respondent no. 1 has not given any basis or source for

payment of only 4% annual interest instead of 10% annual interest as per existing notification dated 01.10.1987 issued by the Central Government in respect of Sec 7 (3-A) of the Payment of Gratuity Act,1972. Thus, this court comes to the conclusion that the order and judgment passed by the respondent no. 1 in respect of payment of 4 % interest is contrary and against the law. Hence, this writ petition is liable to be allowed.

ORDER

This writ petition is **allowed** and the award dated 18.12.2009 passed by respondent no. 1 so far as it relates to payment of 4% interest is hereby quashed and is modified to the extent that respondent no. 2 shall pay 10% interest on the delayed payment of gratuity for a period of 4 years and 10 months. It is directed that respondent no. 2 shall pay the interest amount as ordered above within a period of 1 month from the date of production of a certified copy of this judgment.

(2023) 4 ILRA 647
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No. 48699 of 1999

B.N.S.D. Shiksha Niketan Uchchatar Madhyamik Vidyalaya ...Petitioner
Versus
The Regional Provident Fund Commiss. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Tewari

Counsel for the Respondents:
S.C., Sri Nishant Mehrotra, Sri Vijay Kumar Singh

Civil Law-Employees Provident Fund & Miscellaneous Provisions Act, 1952-Section 14-B-Writ petition filed seeking quashing of the order passed by whereby damages u/s 14-B levied on the belated payment in depositing the PF contribution-Damages u/s 14-B of EPF Act are penal in nature-Once the petitioner admitted the applicability of the Act from the date of coverage then he is liable to pay penal damages for the delayed compliance-Object of imposition of penalty u/s 14-B is not merely "to provide compensation for the employees"- It is meant to penalise defaulting employer as also to provide reparation for the amount of loss suffered by the employees. (Para 9-20)

Writ petition dismissed. (E-15)

List of Cases cited:

1. Organo Chemical Industries & anr. Vs UOI & ors., (1979) 4 SCC 573

2. Hindustan Times Ltd. Vs U.O.I & ors. , (1998) 2 SCC 242

3. M/s D.A.V. College & ors. Vs Regional Provident Fund Commissioner & ors., [1988 (Suppl) SCC 518]

4. Horticulture Experiment Station Gonikoppal, Coorg Vs Regional Provident Fund Organization, (2022) 4 SCC 516

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

1. Heard Shri Rajesh Tewari, learned counsel for the petitioner and Shri Nishant Mehrotra learned counsel for the respondents.

2. The present writ petition has been filed seeking quashing of the order dated

22.01.1999 passed by the respondent no.1. The petitioner has also sought direction in the nature of mandamus commanding the respondents not to impose the damages upon the petitioner.

3. The learned counsel for the petitioner submitted that the petitioner is an educational institution and is registered under the Society Registration Act and had introduced the Provident Fund Scheme for its employees privately and number of employees working in the institution were less than 10 but for the first time on 04.06.1991 the respondent's authority informed that the petitioner's institution was covered under the Employees Provident Fund & Miscellaneous Provisions Act, 1952 with effect from 01.07.1990. Thereafter the respondents initiated the proceedings under section 7A of EPF & MP Act 1952 for realization of the Provident Fund dues since the date of enforcement of the Act i.e 01.07.1990 then the petitioner deposited the entire amount of the contribution of the period from 1990 to 1995 on 13.10.1995.

4. The counsel for the petitioner further submitted that when the amount of contribution was deposited by the petitioner establishment thereafter it received notice under section 14-B of the Act for levy of damages imposed by the respondent authority as the petitioner has made the delayed payment and defaulted to pay the Employees Provident Fund Contribution on the due date for the period 08/1990 to 06/1996. The submission of the petitioner is that since the petitioner had already deposited entire amount of contribution in 1995 and delay in the depositing the contribution was due to the pendency of the proceedings under 7A of the Act and also the petitioner educational institution is willing to comply the provisions of Provident Fund Scheme in his School, however, the respondent authority while passing the impugned order dated 22.01.1999 had not consider all the aforesaid facts.

5. Per Contra, the learned counsel appeared for the respondents has supported the order passed under section 14-B of the Act and submitted that the petitioner establishment was employing more than 20 employees as on 01.07.1990 and was covered under the EPF & MP Act 1952 with effect from 01.07.1990 vide letter dated 27.03.1991 on the basis of enquiry report dated 24.08.1990 submitted by the Enforcement Officers and therefore the petitioner establishment was directed to comply with provisions of the EPF & MP Act 1952 and scheme frame there under vide letter dt. 04.06.1991. A notice dated 07.02.1992 was issued under section 7A of the Act for determination of the dues. The establishment disputed the applicability of the Act on the ground that they were never employing 20 or more persons. However the establishment started compliance of the provisions of the Act and submitted photocopies of the challans in support of the demand of the dues deposited for the period 08/90 to 01/96 i.e since coverage.

6. The learned counsel for the respondents further submits that petitioner had been covered under the EPF & MP Act 1952 with effect from 01.07.1990 by coverage letter dated 27.03.1991 and at the later stage has accepted the liability and started the compliance of the provisions of the Act and in such circumstances the employer establishment had defaulted for the payment of Provident Fund dues for a long time and for the said reason the establishment is liable to pay the damages

levied on the belated payment under the provisions of Section 14B of the EPF & MP Act 1952 because the delay was on the part of the petitioner in depositing the PF contribution, hence the petitioner is liable to pay damages as per Section 14-B of the EPF Act. The EPF Act is social security legislation and is meant for the benefits of the employees. The provisions of Section 14-B and Section 7-Q of the EPF Act have to be strictly construed.

7. I have given my thoughtful consideration to the submissions made by learned counsel for both the parties and have also perused the material on record.

8. Undisputedly, EPF Act is a beneficial piece of legislation. It was passed with an object of making some provisions for the future of the industrial worker after his retirement or for his dependents in the case of his early death. The parliamentarian, after considering various financial and administrative difficulties in old and survival pension"s schemes and gratuity schemes, agreed to introduce the institution of contributory provident fund schemes in which, both the worker and the employer would contribute. Provident fund scheme was considered as a means to encourage the stabilization of a steady labour force in industrial centre. The Parliamentarians were well aware of the fact that with industrial growth, although, the big employers had introduced the scheme of provident fund for the welfare of their workers, but all these schemes until then were private and voluntary and the workers of the small employers remain deprived of the benefits which were provided by big employers. Thus, with an object to provide for compulsoryestablishment of provident fund by every employer in the industrial concerns for the betterment of his employee, the EPF Act was enacted.

9. The EPF Act under its various sections, encompasses the provisions for establishment of Employees" Provident Fund Schemes, contribution and matters which may be provided for in scheme, determination of money due from the employer, deposit of amount due, mode of penalties, recovery, etc. Section 14-B of the EPF Act provides for the power to recover damages which is material in the present case. Section 14-B of the EPF Act reads as under: -

"14B. Power to recover damages - Where an employer makes default in the payment of any contribution to the Fund, the Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:

Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:

Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by

the Board for Industrial and Financial Reconstruction established under section 4 of the SickIndustrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme."

10. Section 14-B of the EPF Act was inserted with an object to act as a deterrent measure on the employer to prevent them from not carrying out their statutory obligations to make payments to the provident fund. The damages under Section 14-B EPF Act are penal in nature. This section authorizes the Central Provident Fund Commissioner or such other officer as may be authorized to impose exemplary or punitive damages and thereby prevent the employer from making defaults. In the absence of such a provision, the employer could deliberately default in the payment of their provident fund contributions and in the meanwhile utilize both their contributions as well as that of employees" in their business. In such a case, an employer could delay the payment of provident fund dues without any genuine reasons on his part for doing so and may escape from his liability to make payment without undergoing any additional financial liabilities. To prevent this, the said section was made a part of the EPF Act and also the words "damages not exceeding 25% of amount of arrears" were amended to "not exceeding the amount of arrears" under the said section.

11. The Hon'ble Supreme Court in ***Organo Chemical Industries and Anr. vs. UOI & Ors., (1979) 4 SCC 573***, referred to the reasons which made the Parliamentarian to insert Section 14-B on the statute book and observed: -

"10. In its working, the authorities were faced with certain administrative difficulties. An employer coulddelay payment of Provident Fund dues without any additional financial liability. Parliament, accordingly, inserted Section 14-B for recovery of damages on the amount of arrears. The reason for enacting Section 14-B is that employers may be deterred and thwarted from making defaults in carrying out statutory obligations to make payments to the Provident Fund. The object and purpose of the section is to authorise the Regional Provident Fund Commissioner to impose exemplary or punitive damages and thereby to prevent employers from making defaults. Section 14-B as originally enacted, provided for imposition of such damages, not exceeding 25% of the amount of arrears. This, however, did not prove to be sufficiently deterrent. The employers were still making defaults in making contributions to the Provident Fund, and in the meanwhile utilizing both their own contribution as well as the employees' contribution, in their business. The provision contained in Section 14-B for recovery of damages, therefore, proved to be illusory. Accordingly, by Act 40 of 1973, the words "twenty-five per cent of" were omitted from Section 14-B and the words "not exceeding the amount of arrear" were substituted. The intention is to invest the Regional Provident Fund Commissioner with power to impose such damages that the employer would not find it profitable to make defaults in making payments."

The Hon'ble Supreme Court speaking through Sen, J. in Organo Chemical's case (supra) discussed the scope of "damages" under Section 14-B of the EPF Act and observed as under: -

"22. The expression "damages" occurring in Section 14-B is, in substance,

a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty under Section 14-B is not merely "to provide compensation for the employees". We are clearly of the opinion that the imposition of damages under Section 14-B serves both the purposes. It is meantto penalise defaulting employer as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements of Section 6, but at the same time it is meant to provide compensation or redress to the beneficiaries i.e. to recompense the employees for the loss sustained by them. There is nothing in the section to show that the damages must bear relationship to the loss which is caused to the beneficiaries under the Scheme. The word "damages" in Section 14-B is related to the word "default". The words used in Section 14-B are "default in the payment of contribution" and, therefore, the word "default" must be construed in the light of Para 38 of the Scheme which provides that the payment of contribution has got to be made by the 15th of the following month and, therefore, the word "default" in Section 14-B must mean "failure in performance" or "failure to act". At the same time, the imposition of damages under Section 14-B is to provide reparation for the amount of loss suffered by the employees."

In the same judgment, concurring with Sen J., Krishna Iyer J., with regard to damages observed as under: -

"38. What do we mean by "damages"? The expression "damages" is neither vague nor over-wide. It has more than one signification but the precise import in a given context is not difficult to discern. A plurality of variants stemming out of a core concept is seen in such words as actual damages, civil damages, compensatory damages, consequential damages, contingent damages, continuing damages, double damages, excessive damages, exemplary damages, general damages, irreparable damages, pecuniary damages, prospective damages, special damages, speculative damages, substantial damages, unliquidated damages. But the essentials are (a) detriment to one by the wrongdoing of another, (b) reparation awarded to the injured through legal remedies,and (c) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often, not always, a punitive addition as a deterrent-cum-denunciation by the law. For instance, "exemplary damages" are damages on an increased scale, awarded to the plaintiff ever and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages, and (vulgarly) "smart-money". [See Black's Law Dictionary, 4th Edn., pp. 467-648] It is sufficient for our present purpose to state that the power conferred to award damages is delimited by the content and contour of the concept itself and if the Court finds the Commissioner travelling beyond, the blow will fall. Section 14-B is good for these reasons."

In the same context the Apex Court in ***Hindustan Times Ltd. Vs U.O.I and Others , (1998) 2 SCC 242,*** held: -

"29. From the aforesaid decisions, the following principles can be summarised:

The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show- cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under Section 14-B. The fact that proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under Section 14-B would be taken; mere delay in initiating action under Section 14-B cannot amount to prejudice inasmuch as the delay on the part of the Department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additionalprovision for charging interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under Section 14-B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an "irretrievable" nature; he might also claim prejudice upon proof of loss of all the relevant records and/or non- availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the show-cause notice and must satisfy the authority concerned with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect."

12 Further, under Section 14-B of EPF Act the authority concerned is empowered to impose a penalty up to a maximum limit, i.e., "such damages, not exceeding the amount of arrears, as may be specified in the Scheme" however, it is not mandatory that the competent authority must always impose the maximum cap of damages provided under the said section as a matter of routine or as a mechanical exercise. Rather, the authority concerned is expected to pass an order that would sub-serve the purpose of introduction of Section 14-B in the scheme of the EPF Act.

13. Therefore, it becomes obligatory on the concerned authority that once it makes up its mind to impose penalty it should also decide the quantum of damages which it seeks to impose on the erring party. Here too the competent authority is under an obligation to decide the quantum of damages only after consideration of proper facts and circumstances of the case.

14. Also, the provisions of the E.P.F. and M.P. Act is applicable to the educational institutions in India as provided in Para 1 (3) (b) (xcvi) of The Employee's Provident Fund Scheme, 1952 ("...as respects the educational, scientific, research and training institutions specified in the notification of the Government of India in the Ministry of Labour No. S.O. 986, dated the 19th February 1981, published in Part II, Section 3, sub-section (ii) of the Gazette of India, dated the 6th March 1982").

15. The Hon'ble Apex Court in the matter of ***M/s D.A.V. College and Others Vs. Regional Provident Fund Commissioner and others, [1988 (Suppl) SCC 518]*** held as under :-

" Shri S.K. Bagga, learned Counsel appears for the petitioners. We do not find any substance in the contention of the petitioners in these cases that the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'the Act') has no application to the educational institutions who are petitioners in these cases. We, therefore, dismiss all these cases."

16. In the present case, initially the establishment disputed the applicability of the Act on the ground that they were never employing 20 or more persons and the delay had caused due to pendency of 7-A proceeding under the Act however the establishment started compliance of the provisions of the Act subsequently and deposited the dues amount in compliance of the demand notice for the period 08/90 to 01/96 i.e since coverage.

17. The learned counsel for the petitioner also did not dispute the contention of the respondent Counsel that the petitioner had been covered under the EPF & MP Act, 1952 with effect from 01.07.1990 by coverage letter dated 27.03.1991 and at the later stage has accepted the liability and started the compliance of the provisions of the Act. Once the petitioner had admitted the applicability of the Act from the date of coverage then the institution is liable to pay penal damages for the delayed compliance.

18. Learned counsel for the respondent nos. 1 & 2 has placed reliance on the judgment passed in ***Horticulture Experiment Station Gonikoppal, Coorg Vs. Regional Provident Fund Organization, (2022) 4 SCC 516***, wherein following observation has been made;

"Taking note of three-Judge Bench judgment of this Court in Union of India and Others v. Dharmendra Textile Processors and others (supra), which is indeed binding on us, we are of the considered view that any default or delay in the payment of EPF contribution by the employer under the Act is a sine qua non for imposition of levy of damages under Section 14B of the Act 1952 and mens rea or actus reus is not an essential element for imposing penalty/damages for breach of civil obligations/liabilities."

19. In such circumstances of the case it transpires that the Petitioner establishment had defaulted for the payment of Provident Fund dues for a long time and for the said reason it is liable to pay the damages levy on the belated payment under the provisions of Section 14B of the EPF & MP Act 1952 because the delay was on the part of the petitioner in depositing the Provident Fund contribution and hence the petitioner is liable to pay damages as per Section 14-B of the EPF Act. The damages

occurring in Section 14-B is, in substance, a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty under Section 14-B is not merely "to provide compensation for the employees". The imposition of damages under Section 14-B serves both the purposes. It is meant to penalise defaulting employer as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements of Section 6, but at the same time it is meant to provide compensation or redress to the beneficiaries i.e. to recompense the employees for the loss sustained by them.

20. In the light of aforesaid discussion, this Court is of the opinion that the respondent no.1 has rightly passed the impugned order dated 22.01.1999 under section 14-B of the EPF & MP Act, 1952. Therefore, the writ petition lacks merit and is liable to be dismissed.

21. Accordingly, the writ petition is **dismissed.** Stay order, if any, shall stand vacated.

(2023) 4 ILRA 654
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.03.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ-C No. 1007386 of 2009

Raj Kishore Dhaon ...Petitioner
Versus
Registrar Co-Operative Societies U.P. Lko. & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Kumar Singh

Counsel for the Respondents:
C.S.C.

A. UP Cooperative Societies Act, 1965 – Section 68 – Surcharge –Payment of ex-gratia – Loss to the Bank occurred – Surcharge imposed – Legality challenged – No notice was given – Effect – The petitioner admittedly has not been held responsible in the enquiry report. Only order for recovery has been passed. In the enquiry report the name of the petitioner has been inserted by interpolation/overwriting – Effect – Held, there is also no finding in the enquiry report or in the show cause notice that the petitioner is liable for causing the payment of ex-gratia of 1995-96, hence, for this reason surcharge cannot be imposed. (Para 15 and 16)

Writ petition allowed. (E-1)

List of Cases cited:

Raghunandan Prasad Pandey & ors. Vs The Co-Operative Tribunal Lucknow & ors.; 1982 SCC OnLine All 913

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

1. Heard Shri Anurag Kumar Singh, learned Counsel for the petitioner and Shri P.C.Rai, learned Counsel for the State/respondent as well as perused the record.

2. The petitioner has assailed the impugned order dated 14.10.2009 passed by U.P. Cooperative Tribunal, Lucknow by which surcharge, in exercise of power under Section 68(2) of the U.P. Cooperative Societies Act, 1965 (in short hereinafter referred to as 'Act') has been imposed upon the petitioner and he has been directed to

pay a sum of Rs.33,56,479/- along with interest. The appeal filed by the petitioner has also been dismissed vide order dated 17.4.2022 which is also impugned in this petition.

3. Learned counsel for the petitioner submits that vide order dated 19.6.1986 the Registrar, Cooperative Societies U.P. directed for payment of ex-gratia to employees of Cooperative Societies. This direction of the Registrar was only for Financial year 1984-85 however the same continued to be paid to the employees thereafter. On 27.4.1995 while the petitioner was posted as Secretary/General Manager, District Cooperative Bank Limited, Lakhimpur Kheri when Committee of Management of the Bank passed a resolution for payment of ex-gratia for financial year 1994-95 to its employees. Thereafter it appears that on 10.05.1995 Registrar, Cooperative Societies U.P. issued an order directing to Secretary General Manager, U.P. Cooperative Bank not to provide facility of bonus or ex-gratia to the employees. This order dated 10.5.1995 was received in the office of District Cooperative Bank Limited. Lakhimpur Kheri on 02.06.1995. The petitioner has not taken any action for implementation of resolution dated 27.04.1995 and no payment of ex-gratia was made to the employees for financial year 1994-95 or till the time the petitioner was posted at the Society concerned. In the meantime on 04.08.1995 the petitioner was transferred to Moradabad. The petitioner proceeded on leave on 09.08.1995. Thereafter vide order dated 19.8.1995, order dated 04.08.1995 was amended and the petitioner stood transferred to Hardoi as Secretary/ General Manager, District Cooperative Bank Limited, Hardoi. On 24.08.1995 the petitioner was relieved from District Cooperative Bank Limited, Lakhimpur Kheri and one Surendra Singh Sengar took charge ofSecretary/General Manager on 14.10.1995. The Committee of Management of the Bank, while Surendra Singh Sengar, Secretary/General Manager was posted as Secretary of the Society, passed a resolution while considering the circular of the Registrar dated 10.05.1995 and proceeded to pay ex-gratia to the employees citing the reason that it was being paid in previous years and the Bank was in profit ignoring the fact that there is clear prohibition in the resolution of the Registrar dated 10.5.1995. The audit objection was raised in the special audit of the Bank pertaining to financial year 1995-96 and 1996-97 and Surendra Singh Sengar was held responsible for the payment of ex-gratia in 1995-96 and 1996-97 pertaining to the corresponding two previous years (Annexure- 10). Thereafter an enquiry under Section under Section 68(1) of the Act was conducted and the report submitted by the Enquiry Officer which holds Surendra Singh Sengar responsible for making payment of ex-gratia and causing the entire loss to the Bank of an amount of Rs. 78,42,167/-. Although the petitioner was not held responsible for causing loss to the Bank in the body of the enquiry report. However the name has been inserted by making overwriting/interpolation by hand in the typed enquiry report (Annexure 11). It is worthwhile to mention that the then Committee of Management of the Bank was also held responsible in the enquiry under Section 68(1) of the Act. On 23.01.2006 a show cause notice was issued to the petitioner however, incorrect figures were mentioned against the name of the petitioner and the petitioner was given show cause notice for payment of bonus in 1996-97 and payment of ex-gratia in 1996-

97 when he was not even posted in the Bank. A reply was submitted by the petitioner on 07.11.2006 (Annexure SCA-1 to the Supp. Counter Affidiavt) to the show cause notice wherein he has asserted that he has not made any payment after the order dated 10.05.1995 and has followed the order passed by the Registrar. Admittedly there is no direction of the Registrar for annulment of any resolution of Committee of Management during the tenure of the petitioner, direction is only not to make payment (Annexure 12).

4. Learned counsel for the petitioner further submits that order under Section 68 (2) of the U.P. Cooperative Societies Act, 1965 has been passed imposing surcharge and directing the petitioner to make payment of Rs. 35,56,479/- along with interest.

5. He submits that although in the inquiry report Committee of Management, which had passed the resolution dated 27.04.1995, has been held responsible, however, while passing order under Section 68 (2) of the U.P. Cooperative Societies Act, 1965 it has been exonerated without recording any finding for this.

6. It has also been submitted by learned counsel for the petitioner that no show cause notice for making payment of Rs. 35,56,479/- has been given to the petitioner rather a show cause notice given to the petitioner is for different figure. Thus, show cause notice also has been issued without application of mind. The appeal filed by the petitioner i.e. Appeal No. 81/2007 before the U.P. Cooperative Tribunal has been dismissed without considering the relevant facts and merely on the fact that the appeal filed by Surendra Singh Sengar was dismissed.

7. Per contra, learned Standing Counsel has opposed the petition and submitted that the petitioner was under obligation to annul the resolution dated 27.4.1995 and by passing the resolution and being part of the resolution dated 27.4.1995 he has caused loss to the society.

8. I have considered the submissions of learned counsel for the parties.

9. The provision of Surcharge defined under Section 68 of the U.P. Cooperative Societies Act, 1965 is extracted below:-

"68. Surcharge. - (1) If in the course of an audit inspection or the winding up a co-operative society it is found that any person, who is or was entrusted with the organisation or management of such society or who is or has at any time been an officer or an employee of the society, has made or caused to be made any payment contrary to this Act, the rules or the bye-laws or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has misappropriated or fraudulently retained any money or other property belonging to such Society, the Registrar may of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorised by him by an order in writing in this behalf to inquire into the conduct of such person:

Provided that no such inquiry shall be commenced after the expiry of twelve years from the date of any act or omission referred to in this sub-section.

(2) Where an inquiry is made under sub-section (1) the Registrar may after affording the person concerned a reasonable opportunity of being heard, made an order of surcharge requiring him

to restore the property or repay the money or any part thereof, with interest at such rate, or to pay contribution and costs or compensation to such an extent, as the Registrar may consider just and equitable.
(3) Where an order of surcharge has been passed against a person under sub-section (2) for having caused any deficiency in the assets of the society by breach of trust or willful negligence, or for having misappropriated or fraudulently retained any money or other property belonging to such society, such person shall, subject to the result of appeal, if any field against such order, be disqualified from continuing in or being elected or appointed to an office in any co-operative society for a period of five years from the date of the order of surcharge."

10. A perusal of sub-section 1 of Section 68 of the Act shows that in the course of audit inspection or the winding up a co-operative society it is found that any person, who is or was entrusted with the organization or management of such society or who is or has at any time been an officer or an employee of the society, has made or caused to be made any payment contrary to this Act, the rules or the bye-laws of the society or caused any deficiency in the assets of the society the Registrar may of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorized by him by an order in writing in this behalf to inquire into the conduct of such person.

11. It is lastly submitted by learned counsel for the petitioner that mere existence of willful negligence cannot be inferred on the mere footing that the society suffered loss. There has to be some basis for the authority or the tribunal to arrive at the finding that the petitioner had either caused or caused to be made financial loss to the society. In support of his submission he has relied on the judgement of this Court in the case of ***Raghunandan Prasad Pandey and Others Vs. The Co-Operative Tribunal Lucknow and Others*** reported in 1982 SCC OnLine All 913. Emphasis is on paragraphs 8 and 9 of the judgement.

12. Relevant paragraphs 8 and 9 of the Raghunandan Prasad Pandey (supra) are extracted below:-

8. In the instant case there is no averment by the respondents to the effect that the petitioners made or caused to be made any payment contrary to the Act, Rules or Bye-laws. It is also not alleged that the petitioners or any of them misappropriated or fraudulently retained any money or other property belonging to the society. Reliance placed by the learned Standing counsel would seem to be exclusively on the provision relating to the person concerned having caused deficiency in the assets of the society by wilful negligence. There is no element of breach of trust attributed to any of the petitioners. In relation to wilful negligence, the words ?Wilful? and ?Wilfully? have been frequently used in many statutes and have come up for judicial consideration in the courts time and again. In Ramchandra v. State of Mysore (AIR 1964 SC 1701) : (1964 All LJ 822), in the context of S. 53 of the Indian Post Office Act, 1898, after a review, of the authorities the Supreme Court observed that not infrequently the word ?wilful? or ?wilfully? has been used to mean that the act had been done with a bad purpose or without justifiable excuse or stubbornly, obstinately or perversely.
9. In the show cause notice issued on Sept. 25, 1974 in the instant case, there appears

no charge made to wilful negligence against the petitioners. The order made by the District Assistant Registrar, Co-operative Societies, Banda, dated Dec. 30, 1974 is also silent in relation to any act of the wilful negligence. The District Assistant Registrar seems indeed to have had in view R. 115 of the U.P. Co-operative Societies Rules, 1965, according to which in the conduct of the affairs of the Co-operative Society, every member of the committee of management shall exercise prudence and diligence of an ordinary man of business, shall not perform any act contrary to the provisions of the Act, Rules and Bye-laws of the Society and shall not default in the performance of the duties entrusted under the Act, Rules or Bye-laws of the society. Assuming that there was lack of exercise of due prudence and diligence on the part of the petitioners in this case, there is no liability for surcharge imposed under S. 68 merely on that account. The existence on wilful negligence may not be inferred on the mere footing that the Society suffered loss to the tune of Rs. 5166.52 as the Tribunal seems to have thought in this case. The order made by the Tribunal does not indicate the basis for arriving at this finding except that there is a reference made to the balance sheet of the Society of the relevant year. The relevant content of the balance sheet are explained in the affidavit accompanying the petition which are not countered specifically on the other side. The decision taken to enter into an agreement for proceeding with Lakhan Singh Narbada Prasad was under a resolution passed by the Committee of Management and there is no finding recorded to the effect that the petitioners individually or collectively were guilty of wilful negligence in the matter of this agreement being entered into or the same being operated upon. It was also submitted for the petitioners that there is no case of any deficiency caused in the assets of the society. The question is whether the order of surcharge could be passed under S. 68 against the members of the Committee of Management for the loss suffered by the society in carrying out the trade or business concerned. Assuming that upon the facts and circumstances of a case, it is possible to do so, for which we need express no opinion herein, the existence of wilful negligence or breach of trust or misappropriation etc., as the case may be, in accordance with sub-s. (1) of S. 68 remains indispensable.

13. In the case in hand, the petitioner was posted as Secretary/General Manager of the Society on 27.4.1995 wherein the resolution for payment of ex-gratia for financial year 1994-95 to its employee was passed. The restraining order by the Registrar dated 10.5.1995 was passed wherein all the District Cooperative banks of the State were directed not to provide facility of bonus or ex-gratia to the employees. The petitioner was admittedly transferred and relieved from the District Cooperative Bank Lakhimpur Kheri on 24.8.1995. After the transfer of the petitioner taking note of the order of the Registrar the resolution dated 14.10.1995 appears to have been passed by which decision was taken to pay ex-gratia to the employees of the society/bank on the ground that it was being paid in the previous years and the bank was in profit.

14. The submission of learned Standing Counsel that by the resolution dated 27.4.1995 the petitioner has made or caused to be made any payment contrary to the Act appears to be incorrect as after the resolution dated 27.4.1995 the petitioner was transferred from the society and was

relieved on 24.8.1995. Thereafter on 14.10.1995 the resolution was passed, when Surendra Singh Sengar was the Secretary/General Manager taking note of the restraining order of the Registrar dated 10.5.1995, had decided to pay ex-gratia to the employees stating the reason that it was being paid in previous years and the bank was in profit. Thus, ex-facie it is clear from the resolution dated 14.10.1995 that the payment of ex-gratia was made to the employees as a consequence to the resolution dated 14.10.1995 which while passing said resolution has taken note of the order of the Registrar dated 10.5.1995, therefore, submission to the extent that the petitioner has caused to be made any payment contrary to the Act is not correct. It appears from the show cause notice that show cause notice was given to the petitioner for causing loss to the tune of Rs.42,85,608/-, however, as per the admitted case no show cause notice for the penalty imposed to the petitioner i.e. Rs.35,56,479/- has been given.

15. So far as second submission of learned Standing counsel that the petitioner, while posted as Secretary of the Society, has failed to get the resolution dated 27.4.1995 annulled also appears to be incorrect as Section 128 of the U.P. Cooperative Societies Act does not impose any obligation on the secretary of the Society. Only the Registrar can exercise power under Section 128 of the U.P. Cooperative Societies Act for annulling the resolution passed by the society. It is thus clear that payment has not been made pursuant to the resolution dated 27.10.1995. The payment has also not been made during the tenure of the petitioner in the district Lakhimpur Kheri. On the contrary the payment has been made in pursuance to the resolution dated 14.10.1995 even the circular letter dated 10.5.1995 does not direct any Secretary/General Manager to refer the resolutions passed by the Board of the Bank for payment of ex-gratia to the Registrar under Section 128 of the Act for annulment. The Board in its resolution has considered the order of the Registrar dated 10.5.1995 and despite the bar has decided to pay the ex-gratia to the employees. It is also evident that payment of ex-gratia for the financial year 1995-96 and 1996-97 has been made during the tenure of Surendra Singh Sengar thus from the discussion made hereinabove it is clear that non-referral of the resolution of the committee of management dated 27.4.1995 to the Registrar under Section 128 of the Act cannot be construed that the petitioner has caused financial loss or caused to be made the financial loss to the society. Further, no surcharge has been imposed on the committee of management or its members. The petitioner admittedly has not been held responsible in the enquiry report. Only order for recovery has been passed. In the enquiry report the name of the petitioner has been inserted by interpolation/overwriting. The committee of management has been exonerated in the final order dated 17.4.2007 without recording any finding. The surcharge has been imposed for payment of Rs.35,56,479/- for which no show-cause notice, admittedly, have been given to the petitioner.

16. There is also no finding in the enquiry report or in the show cause notice dated 23.1.2006 that the petitioner is liable for causing the payment of ex-gratia of 1995-96, hence, for this reason surcharge cannot be imposed.

17. Considering the above, the petition is allowed. The impugned orders

dated 14.10.2009 passed by respondent no.3 and 17.4.2007 passed by the respondent no.2 are hereby quashed.

(2023) 4 ILRA 660
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.04.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ-C No. 3001168 of 1980

State of U.P. ...Petitioner
Versus
Kailash Nath & Ors. ...Respondents

Counsel for the Petitioner:
C.S.C.

Counsel for the Respondents:
B.R. Tripathi, Rajeiu Kumar Tripathi

Civil Law-U.P. Imposition of Ceiling on Land Holdings Act, 1960-Sections 37, 38 - Code of Civil Procedure, 1908-Section 96, Order-41 Rule 31-Writ petition challenging the order passed in Ceiling Appeal whereby the order declaring surplus land of tenure holder was set aside -Appellate Authority to considered the appeal in the manner as provided under Order 41 Rule 31 of the CPC-Findings recorded by the first Appellate authority in respect of Will, sale deed and adoption deed not supported by clear and cogent evidence-Findings recorded by the Prescribed Authority not considered by the Appellate Court in its correct perspective nor any reason has been incorporated why the conclusion of the Prescribed Authority were erroneous nor the findings of the Prescribed Authority have been reversed. Result-Matter remitted to Appellate Authority.

Writ Petition allowed. (E-15)

List of Cases cited:

1. Sudarsan Puhan Vs Jayanta Ku. Mohanty & ors. reported in (2018) 10 SCC page 552

2. St. of U.P. Vs Bankey Singh & ors. 1996 (27) ALR page 445

3. St. of U.P. Vs Amar Singh & ors. (1997) 1 SCC page 734

4. Nawal Singh Vs St. of U.P. & ors. (1995) supplement I SCC page 204

5. Brijendra Singh Vs St. of U.P. & others 1981 (1) SCC page 597

6. Mulk Nath Singh Vs St. of U.P. & ors. passed in Writ-C No.3000002 of 1996 decided on 13.10.2022

7. Rathinam @ Kuppamuthu & ors. Vs L. S. Mariappan & ors. [(2007) 6 SCC 724]

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

C. M. Applications No.5 and 6 of 2022

1. The instant two applications have been moved by the petitioner to bring on record the heirs of deceased respondent no.2 Dinanath who is reported to have died on 20.10.2017. The record indicates that the notices were issued to the proposed legal heirs of the deceased. In furtherance whereof Shri Rajeiur Kumar Tripathi, learned counsel has filed his Vakalatnama.

2. Considering the aforesaid facts and the ground shown in the application which is found sufficient, accordingly, the applications are allowed. Learned Additional Chief Standing Counsel shall carry out the necessary amendment during the course of the day.

3. Heard Shri G. K. Pathak, learned Additional Chief Standing Counsel for the State-petitioner and Shri Rejeiu Kumar

Tripathi, learned counsel appearing for private respondents on merits.

4. By means of the instant petition preferred under Article 226 of the Constitution of India, the State challenges the judgment and order dated 27.11.1979 passed by the District Judge in Ceiling Appeal No.148 of 1979 whereby the appeal of the private respondents was allowed and the order dated 26.03.1979 passed by the Prescribed Authority Qaisarganj District Bahraich declaring 71.373 acres of land belonging to the tenure holder Dinanath as surplus was set aside.

5. It will be relevant to mention that the appeal before the Appellate Court was filed by Kailashnath and Moolchand who are the sons of Dinanath and have been impleaded as private respondents no.1 and 2. During pendency of the proceedings, Kailashnath and Moolchand both have died and their legal heirs are on record represented by Shri Rajeiu Kumar Tripathi.

6. Briefly the facts giving rise to the instant petition are that upon the commencement of U.P. Imposition of Ceiling on Land Holdings Act, 1960 initial notice under Section 10(2) of the said Act was issued to Dinanath son of Ram Bihari. The Prescribed Authority under the Ceiling Act by means of an ex parte order dated 20.06.1974 confirmed the ceiling notice issued to Dinanath. An application was moved by Dinanath for recall of the ex parte order. During aforesaid pendency, it was also noticed that another tenure holder namely Yashodra had expired on 24.06.1973 and her land also was clubbed with that of Dinanath. Accordingly, revised notice was sent to Dinanath indicating that the land of Yashodra was also be clubbed with that of Dinanath.

7. Dinanath filed his objection wherein he challenged that the land belonging to Yashodra had been incorrectly clubbed with his holding on the ground that Yashodra had already an adopted son Ramji alias Lallu and he being her legal heir would inherit the share of Yashodra and the same could not be clubbed in the hands of Dinanath.

8. The objections were filed by Ramji alias Lallu through his natural father claiming rights over the land and also to the effect that the holding ought not to be included with that of Dinanath.

9. Before the said proceedings could be finalized, another tenure holder namely Smt. Kunta wife of Pratap Narain died. Another notice was issued to Dinanath for including her land of 15.279 acres with the holding of Dinanath. Separate objections were filed by Kailashnath son of Dinanath claiming that Smt. Kunta had executed her Will in favour of Kailashnath and Moolchand and as such they are in cultivatory possession, hence the said land could not be included or clubbed with that of Dinanath.

10. Another issue that cropped up was that some land was sold by Dinanath to one Sundar Lal and this land was also included in the holdings of Dinanath.

11. The Prescribed Authority, considering the objections and after permitting the parties to lead evidence, by means of order dated 26.03.1979 negatived the contentions of the tenure holder and confirmed the notice under Section 10(2) of the Ceiling Act and declared 71.373 acres of irrigated land as surplus.

12. An appeal came to be filed by Kailashnath and Moolchand and the said

appeal has been allowed by means of judgment dated 27.11.1979 by the District Judge Bahraich in Ceiling Appeal No.148 of 1979 and the notice under Section 10(2) of the Ceiling Act was cancelled and this judgment dated 27.11.1979 is under challenge in this petition.

13 The Additional Chief Standing Counsel while assailing the impugned appellate order has raised the following contentions:-

(I) It is urged that once the Prescribed Authority after considering the relevant and detailed evidence recorded findings to the effect that the alleged Will by which the land of Kunta was included in the hands of Dinanath being a transaction hit by Section 5(6) of the Ceiling Act it has been reversed on an incorrect notion of law and moreover without even considering any evidence in respect thereto and in a cursory manner.

(II) It is also urged that the findings returned by the Prescribed Authority which categorically held that the alleged adoption said to have been made by Yashodra of Ramji alias Lallu was also not a bonafide transaction and by taking notice of the evidence including that of the witnesses, it was held that the said adoption deed was not for a bonafide reason and even evidence on this issue has not been discussed but ignored by the Appellate Court and the findings have been reversed on mere surmises and conjunctures.

(III) It is also urged that the transaction regarding the sale deed said to have been executed by Dinanath in favour of Sundar Lal was also held to be not bonafide for the reason that the said tenure holder in whose favour the said sale deed was executed did no come forward to raise any objection. The proceedings went on for the number of years but even till date, Sunder Lal or his successor have not come forward which all clearly indicates that the said sale transaction was bad in the eyes of law nor there was any material to substantiate the same and in absence of any cogent material and evidence led by the tenure holder to indicate that the aforesaid three transactions were bonafide. The findings of the Prescribed Authority could not have been reversed and that too in a cursory manner without considering the evidence led before the Prescribed Authority nor any reason have been given why the findings of the Prescribed Authority were bad.

(IV) The next submission of the learned Additional Standing Counsel for the State is that Section 5 of Ceiling Act clearly lays down the manner in which the authorities have to consider how the land is to be declared as surplus. What transactions have to be excluded and the procedural aspect is contained in Sections 37 and 38 which confers power on the Prescribed Authority to take evidence and the Appellate Authority is also to decide the appeal in accordance with the provisions contained in the Code of Civil Procedure. This necessarily implied that the evidence which was valid and admissible in law is to be considered and the Appellate Authority while dealing with an appeal is required to adhere to the broad mandate of Order 41 Rule 31 CPC that is to say that the reasons must be given and while reversing the findings recorded by the Prescribed Authority, it was incumbent upon the Appellate Court to have met with the reasons recorded by the Prescribed Authority and only after noticing the error could it record its own findings based on admissible and cogent evidence with reasons.

14. It is urged that from the perusal of the impugned judgment, it would indicate

that the Appellate Court has merely recorded its conclusion but it is absolutely silent on the evidence available before the Prescribed Authority and how the conclusion of the Prescribed Authority based on such evidence was erroneous. The Appellate Court did not deal with the evidence or reason given by the Prescribed Authority in appeal and the Appellate Court has merely recorded its own finding conclusions without reversing the findings of the Prescribed Authority which has rendered the judgment passed by the Appellate Court bad in the eyes of law and deserves to be set aside.

15. Shri Rajeiu Kumar Tripathi, learned counsel for the private respondent submits that in so far as the land of Yashodra which has been included with the holding of Dinanath is concerned, the same was erroneous for the reason that Yashodra had adopted Ramji alias Lallu and the adoption deed was placed on record. In light of the adoption deed, the land would vest with her son and could not be clubbed in the hands of Dinanath and therefore the findings recorded by the Appellate Authority to the aforesaid extent, cannot be doubted or be termed to be erroneous.

16. It is also urged that as far as the Will of Smt. Kunta in favour of Kailashnath and Moolchand is concerned, the same is not hit by the transaction as mentioned in Section 5(6) of the Ceiling Act which has been recorded by the Appellate Court, hence the said finding also does not suffer from any error.

17. It is urged that it is only a transfer which is susceptible to be seen in terms of Section 5(6) of the Ceiling Act but as the Will is a testamentary document which disposes the property in accordance with the wish of the testator, it is not included in the said section, hence the findings of the Appellate Authority cannot be faulted on that count. In support of his contention on this point he relies upon a discussion of this Court in Mulk Nath Singh Vs. State of U.P. and others passed in ***Writ-C No.3000002 of 1996 decided on 13.10.2022.***

18. It is further urged that in so far as the issue regarding sale deed executed by Dinanath in favour of Sundar Lal is concerned, the same was prior to 24.01.1971 i.e. the cut off date hence the same was protected and the said land could not be clubbed in the hands of Dinanath even though the tenure holder namely Sundar Lal did not appear before the Prescribed Authority to file any objections nor he preferred an appeal. For the aforesaid reasons, it is urged that the impugned order passed by the Appellate Authority is based on the sound reasoning and is not liable to be interfered with, consequently the writ petition be dismissed.

19. The Court has considered the rival submissions and also perused the material on record.

20. At the outset, it may be noticed that Sections 37 and 38 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 clearly makes provisions of the CPC applicable by reference. The aforesaid sections read as under:-

"37. Powers of officers and authorities in hearing and disposal of objections and procedure to be followed- *Any officer or authority holding an enquiry or hearing an objection under this Act, shall, insofar as it may be applicable, have all the powers and privileges of a Civil Court, and follow the procedure laid down*

in the Code of Civil Procedure, 1908, for the trial and disposal of suits relating to immovable property.

38. Powers of the appellate Court and the procedure to be followed by it- *(1) In hearing and deciding an appeal under this Act, the appellate Court shall have all the powers and the privileges of a Civil Court and follow the procedure for the hearing and disposal of appeals laid down in the Code of Civil Procedure, 1908.*

(2) Where, under the provisions of this Act, an appeal has to be heard by the [Commissioner], he may either hear the appeal himself or transfer it for hearing to any[Additional Commissioner] subordinate to him.

21. In view of the aforesaid, it will be relevant to notice that the Appellate Authority was obliged to have considered the appeal in the manner as provided under the Code of Civil Procedure. It will be appropriate to notice Order 41 Rule 31 CPC which reads as under:-

"**31. Contents, date and signature of judgment**- The judgment of the Appellate Court shall be in writing and shall state-

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

22. In this context, since the Appellate Authority is exercising powers of the First Appellate Court it was incumbent upon the said court to have considered the various contentions, the evidence on record and then gone on to record its conclusion. In this regard the decision of the Apex Court in the case of **Sudarsan Puhan Vs. Jayanta Ku. Mohanty and others reported in (2018) 10 SCC page 552** will be gainful to notice and the relevant portion reads as under:-

"23. This Court also in various cases reiterated the aforesaid principle and laid down the powers of the Appellate Court under Section 96 of the Code while deciding the first appeal.

24. We consider it apposite to refer to some of the decisions.

*25. In **Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179**, this Court held (at pages 188189) as under:*

"15...The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it"

*26. The above view was followed by a three Judge Bench decision of this Court in **Madhukar & Ors. v. Sangram & Ors.,(2001) 4 SCC 756**, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to*

deal with all the issues and the evidence led by the parties before recording its findings.

27. In ***H.K.N. Swami v. Irshad Basith,(2005) 10 SCC 243****, this Court (at p. 244) stated as under: (SCC para 3)*

"3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

28. Again in ***Jagannath v. Arulappa & Anr., (2005) 12 SCC 303****, while considering the scope of Section 96 of the Code, this Court (at pp. 30304) observed as follows: (SCC para 2)*

"2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion."

29. Again in ***B.V Nagesh & Anr. vs. H.V. Sreenivasa Murthy, (2010) 13 SCC 530,*** *this Court taking note of all the earlier judgments of this court reiterated the aforementioned principle with these words:*

"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide ***Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p. 758, para 5.)***

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

30. The aforementioned cases were relied upon by this Court while reiterating the same principle in ***State Bank of India & Anr. vs. Emmsons International Ltd. & Anr., (2011) 12 SCC 174 and Uttar Pradesh State Road Transport Corporation vs. Mamta & Ors. (2016) 4 SCC 172.***"

23. From the above, it would be clear, as to how the First Appellate Court must exercise its jurisdiction. However, unfortunately from the perusal of the impugned judgment passed by the Appellate Court dated 27.11.1979 this Court finds that the same is wanting in many material aspects of meeting with the reasons of the trial court, assigning its own reasons and reversing the findings.

24. Even the counsel for the private respondent could not dispute the fact that neither the evidence led before the Prescribed Authority was noticed nor the findings recorded by the Prescribed Authority have been touched or noticed and reversed. Thus to the aforesaid extent, the submission of the counsel for the petitioner has force and this Court finds itself in agreement with it.

25. Now considering the submissions raised by the respective parties on merits of the controversy, this Court finds that the findings recorded by the First Appellate Court that a Will of Smt. Kunta not being a transfer is not covered under Section 5(6) of the Ceiling Act and the said view is defended by the counsel for the respondent by relying upon a decision of a Co-ordinate Bench of this Court in ***Mulk Nath Singh (supra)*** wherein the Co-ordinate Bench has relied upon the decision of the Apex Court in the case of Rathinam @ Kuppamuthu and others Vs. L. S. Mariappan and others [(2007) 6 SCC 724], while coming to its conclusion holding that a Will is not a transfer.

26. In this regard, Section 5(6) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 and the explanation appended thereto will be relevant to be noticed and which reads as under:-

"[5. Imposition of Ceiling.-(1) [On and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972], no tenure-holder shall be entitled to hold in the aggregate through-out Uttar Pradesh, any land in excess of the ceiling area applicable to him.

[Explanation I.-In determining the ceiling area applicable to a tenure-holder, all land held by him in his own right, whether in his own name, or ostensibly in the name of any other person, shall be taken into account.]

Explanation II.-[If on or before January 24,1971, any land was held by a person who continues to be in its actual cultivatory possession and the name of any other person is entered in the annual register after the said date] either in addition to or to the exclusion of the former and whether on the basis of a deed of transfer or licence or on the basis of a decree, it shall be presumed, unless the contrary is proved to the satisfaction of the prescribed authority, that the first mentioned person continues to hold the land and that it is so held by him ostensibly in the name of the second mentioned person.]

(2) Nothing in sub-section (1), shall apply to land held by the following classes of persons namely-

(a) the Central Government, the State Government or any Local Authority or a Government Company or a Corporation;

(b) a University;

(c) [an intermediate or degree college imparting education in agriculture or a post-graduate college;];

(d) a banking company or a co-operative bank or a co-operative land development bank;

(e) the Bhoodan Yagna Committee constituted under the U.P. Bhoodan Yagna Act, 1952.

(3) [Subject to the provisions of sub-sections (4), (5), (6) and (7)] the ceiling area for purposes of sub-section (1) shall be-

(a) in the case of a tenure-holder having a family of not more than five members, 7.30 hectares of irrigated land (including land held by other members of his family) plus two additional hectares of irrigated land or such additional land which together with the land held by him aggregates to two hectares, for each of his adult sons, who are either not themselves tenure-holders or who hold less than two hectares of irrigated land, subject to a maximum of six hectares of such additional land;

(b) in the case of a tenure-holder having family of more than five members, 7.30 hectares of irrigated land (including land held by other members of his family), besides, each of the members exceeding five and for each of his adult sons who are not themselves tenure-holders or who hold less than two hectares of irrigated land, two additional hectares of irrigated land or such additional land which together with the land held by such adult son aggregates to two hectares, subject to a maximum of six hectares of such additional land;

Explanation.-The expression 'adult son' in clauses (a) and (b) includes an adult son who is dead and has left surviving behind him minor sons or minor daughters (other than married daughters) who are not themselves tenure-holders or who hold land less than two hectares of irrigated land;

(c) [x x x]

(d) [x x x]

(e) in the case of any other tenure-holder, 7.30 hectares of irrigated land;

Explanation.-Any transfer or partition of land which is liable to be ignored under sub-sections (6) and (7) shall be ignored also-

(f) for purposes of determining whether an adult son of a tenure-holder is himself a tenure-holder within the meaning of [clause (a) or clause (b)];

(g) for purposes of service of notice under Section 9.

(4) Where any holding is held by a firm or co-operative society or association of persons (whether incorporated or not, but not including a public company), its members (whether called partners, share-holders or by any other name) shall, for purposes of this Act, be deemed to hold that holding in proportion to their respective shares in that firm, co-operative society or other society or association of persons:

[Provided that where a person immediately before his admission to the firm, co-operative society, or other society or association of persons, held no land or an area of land less than the area proportionate to his aforesaid share then he shall be deemed to hold no share, or as the case may be, only the lesser area in that holding, and the entire or the remaining area of the holding, as the case may be, shall be deemed to be held by the remaining members in proportion to their respective shares in the firm, co-operative society or other society or association of persons.]

(5) In respect of any holding held by any private trust,-

(a) where the shares of its beneficiaries in the income from such trust

are known or determinable, the beneficiaries shall, for purposes of this Act, be deemed to have the shares in that holding in the same proportions as their respective shares in the income from such trust,

(b) in any other case, it shall be governed by [clause (e)] of subsection (3).

(6) In determining the ceiling area applicable to a tenure-holder, any transfer of land made after the twenty-fourth day of January, 1971, which but for the transfer would have been declared surplus land under this Act, shall be ignored and not taken into account;

Provided that nothing in this sub-section shall apply to-

(a) a transfer in favour of any person (including Government) referred to in sub-section (2);

(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a benami transaction or for immediate or deferred benefit of the tenure-holder or other members of his family.

[Explanation I.-For the purposes of this sub-section, the expression transfer of land made after the twenty-fourth day of January, 1971, includes-

[(a) a declaration of a person as a co-tenure-holder made after the twenty-fourth day of January, 1971 in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-fourth day of January, 1971];

(b) any admission, acknowledgment, relinquishment or declaration in favour of a person to the like effect, made in any other deed or instrument or in any other manner.

Explanation II.-The burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefit."

27. From the above, it would indicate that it uses the terminology to include not mere simplicitor transfer but other deed or instrument or in any other manner. Considering this aspect the Apex Court in ***1996 (27) ALR page 445 State of U.P. Vs. Bankey Singh and others*** has held as under:-

".....The only question in this case is : whether the respondents would get benefit of 1/4th share in the surplus land declared by the competent authority? On September 8, 1982, Krishan Pal Singh filed objection, who claimed land of Khat Nos.340, 341 and Khata No.33 of village Nawada and Khata No.77 of Village Jamla Jot on the basis of a Will executed by Smt. Gajraji. On that basis, the said land is required to be excluded from the surplus land. The primary authority had rejected the claim by proceedings dated July 30, 1983 and on appeal the District Judge allowed the appeal by order dated November 9, 1983 and excluded 1/4th of the land held by Gajraji on the basis of the Will dated September 2, 1978. When it was questioned, the High Court dismissed Writ Petition No.1731/84. Hence, this appeal by special leave.

Section 5 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (U.P. Act No.1 of 1961) (for short, 'the Act') in Chapter II imposes ceiling on land holdings. Certain exemption mentioned in the Article gets excluded from surplus land. Section 5 postulates that on and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, no tenure-holder

shall be entitled to hold in the aggregate throughout Uttar Pradesh, any land in excess of ceiling area applicable to him.

Sub-section (6) postulates determination of the ceiling area applicable to a tenure-holder. It provides that any transfer of land made after the 24th day of January, 1971, which but for the transfer, would have been declared surplus land under this Act, shall be ignored and not taken into account. Explanation-1 provides that for the purpose of this sub-section the expression transfer of land made after the twenty-fourth day of January, 1971 includes, among other things, an admission, acknowledgment, relinquishment or declaration in favour of a person to the like effect, made in any other deed or instrument or in any other manner, shall be construed to be a transfer for the purpose of sub-section (6).

Admittedly, the Will was executed on February 10, 1978 long after the specified date. By the Will a devise was made by Gajraji, owner of the land bequeathing her 1/4th share in favour of her brother's grand-son, Krishan Pratap Singh. Therefore, it must be construed to be a devise "in any other manner" within the meaning of Explanation 1(b) of sub-section (6) of the Act. It shall be ignored for the purpose of determination of the surplus land. The High Court and the appellate authority, therefore, were not right in directing to exclude the said land.

The appeal is accordingly allowed. No costs."

28. In light of the aforesaid clear authority of the Apex Court which is in context with the provisions of the Ceiling Act, this Court finds that the decision cited by the counsel for the respondent and placing reliance on the Co-ordinate Bench decision of ***Mulk Nath Singh (supra)*** would be per incuriam for the reason it does not take note of the decision of the Apex Court in ***Bankey Singh (supra)***. Moreover, the decision of the Apex Court which has been relied upon in the case of ***Mulk Nath Singh (supra)*** namely that of ***S. Rathinam @ Kuppamuthu (supra)*** is not in context with the ceiling proceedings rather the said decision was in context with the general law where Will was held to be not a case of transfer. However, in the instant case since the proceedings arise out of a Special Act where special provisions have been incorporated and the same has been interpreted by the Apex Court in the case of ***Bankey Singh (supra)***, accordingly in the humble opinion of this court, the decision of ***Bankey Singh (supra)*** would be a binding authority and for the aforesaid reason, the Court is not inclined to accept the contention of the counsel for the respondent and follow the decision of ***Mulk Nath Singh (supra)***.

29. It will also be relevant to notice that the finding which has been reversed by the Appellate Court in respect of the sale deed said to have been executed by Dinanath in favour of Sundar Lal, the same is not adequately considered nor supported with reasons. Whether the said sale deed was executed prior to 24.01.1971 or thereafter could only be proved once the said sale deed was on record. In absence of the said sale deed merely relying upon certain entries in the revenue records which do not establish title and are only for fiscal purposes could not give rise to a categorical finding and conclusion that since the name of Sundar Lal was recorded in the revenue records prior to the said date of 24.01.1971 without clear dates being available as to when it was entered in the revenue records and what was the basis and the reason for incorporating such entries. The findings of

the Appellate Court on the aforesaid point are not supported by any clear and cogent evidence, hence are unsustainable.

30. Now coming to the third issue regarding clubbing the land of Yashodra in the hands of Dinanath, ignoring the adoption deed, even the said findings recorded by the Appellate Court do not inspire confidence as the Prescribed Authority while holding the adoption to be not proved had painstakingly considered the evidence of the witnesses as well as noticed the fact that Ramji alias Lallu was the son of Kailashnath who just few month prior to the death of Yashodra had been given in adoption to her. Dinanath otherwise, being the natural grand father of Ramji, the said adoption was created only to divert the property so that it may escape the clutches of the Ceiling Act.

31. The Prescribed Authority also noticed that the husband of Yashodra has expired long ago and in case if he had expressed his desire to adopt the son, then Yashodra ought to have adopted the child much before and not at the late stage when the Ceiling Act had already come into the picture and therefore the transaction was not valid.

32. How a ceiling area is to be considered while adjudging a transaction and whether it would be hit by Section 5 (6) of the Ceiling Act and the manner in which the Prescribed Authority is to hold an inquiry in this regard has been considered by the Apex Court in ***(1997) 1 SCC page 734 State of U.P. Vs. Amar Singh and others***, the relevant portion thereof reads as under:-

"5. Thus, on and from the date the Amendment Act came into force, namely, 21-1-1971, the tenure-holder shall not hold, throughout the State of Uttar Pradesh, any land in the aggregate in excess of ceiling area applicable to him. Explanation I adumbrates that in determining ceiling area applicable to a tenure-holder, all lands held by him in his own right, whether in his own name or ostensibly in the name of any other person, shall be taken into account. In other words, as on the date the Amendment Act came into force, the land must be held by the tenure-holder in his own right and the lands ostensibly in the name of any other person shall be taken into account. In this case, admittedly, the alienations came to be made by Kishun Singh in favour of his sons and daughters-in-law. Normally, one would expect that if there is any compelling legal necessity to alienate the land, one would sell the land to third parties and that too, as prudent vendor for valuable consideration not to the sons and daughters-in-law. The object appears to be, as rightly pointed out by the District Judge, that the alienations were made by registered instruments in favour of his sons and daughters-in-law only to see that the provisions of the Act are defeated and the lands do not pass into the hands of strangers. It is true that the evidence was adduced by the respondents as regards proof of mutation. Mutation was effected on the basis that sale deeds came to be executed in favour of sons and daughters-in-law. Therefore, the mutation officer was not concerned at that stage to find out whether the sales were benami or ostensibly intended to defeat the provisions of the Act. It is settled law that mutation entries are only for the purpose of enabling the State to collect the land revenue from the person in possession but it does not confer any title to the land. The title would be derived from an instrument executed by the owner in favour of an alienee as per the

Stamp Act and registered under the Registration Act. The alienees being sons and daughters-in-law, the tenure-holder remained to be the owner and holder of the land. The sons and daughters-in-law are only ostensible owners under Explanation I to Section 5(1) of the Act. It is true that Lekh Pal has not categorically stated whether the respondents remained in possession in their own right after the alienation. It is not in dispute that the father and sons remained to be members of the joint family and were cultivating the land. Under these circumstances, one would normally expect that Lekh Pal may not be in a position to categorically assert whether respondents remained in possession in their own right as owners or were cultivating land on their own or on behalf of the coparceners. Under these circumstances, the findings of the High Court are illegal. The case falls under Explanation I of Section 5(1) and the burden is always only on the respondents to establish that they were not ostensibly owning the land but remained in their own right as owners. Accordingly, we hold that Kishun Singh was the holder of the land. He was a tenure-holder as on the date and, therefore, ceiling area has to be computed treating him to be the owner of the land; besides himself, he had eight sons who are entitled to the respective additional ceiling area given to them under the Act. The authorities are, therefore, directed to compute the ceiling area accordingly and take possession of the surplus land.

33. The Apex Court has also considered the aforesaid aspect in ***(1995) supplement I SCC page 204 Nawal Singh Vs. State of U.P. and others*** and the relevant portion reads as under:-

2. For a transfer effected after 24-1-1971 to be valid it must be proved to have been made in good faith, for adequate consideration, under an irrevocable instrument, not being a benami transaction, or for immediate or deferred benefit of the tenureholder or other members of his family. Findings have been recorded at one stage or the other that the sale effected by the appellant was for adequate consideration and under an irrevocable instrument, not being a benami transaction or for immediate or deferred benefit of the tenureholder or other members of his family. These findings have been recorded in the backdrop that the appellant had his holdings in two villages i.e. Sihi and Asawar and that he was residing in Sihi, and had to manage his land at Asawar at a distance of about two and a half miles. Additionally he was an old man of about 65 years of age at the relevant time, had no son to look after him and his only daughter who was married was living elsewhere. In this situation, the appellant thought proper, as is his case, to sell the land at village Asawar for a sum of Rs 60,000 and he asserts that out of it he transferred a sum of Rs 35,000 to his daughter by way of gift and paid gift tax thereon. These assertions of the appellant have not been countered at any stage. His complete version has been doubted only on the premise that the sale was effected after the crucial date i.e. 24-1-1971 which was reflective of absence of good faith.

3. We do not at all appreciate the approach of the courts below. If this approach is accepted that no transfer effected after 24-1-1971 can escape, sub-section (6) of Section 5 would be rendered meaningless and a dead letter in the statute. The facts as stated above have been asserted by the appellant clearly and openly. There is nothing on these facts to attract a finding

that all what he did was in bad faith. We are satisfied that he has more than ordinarily proved that the transaction of sale was effected in good faith and the approach of the courts below was not in accordance with the spirit of the statute. We thus set aside the impugned orders of the High Court as also that of the courts below and hold that the transaction in question was entered in good faith and the land covered by it is not to be reckoned towards computing his holding for ceiling purposes. The appeal is accordingly allowed. No costs.

34. The Apex Court again in the case of ***Brijendra Singh Vs. State of U.P. & others 1981 (1) SCC page 597*** has considered the issue and the relevant portion reads as under:-

14..... It will be seen that when sub-section (6) of Section 5 provides that in determining the ceiling area and surplus area, any transfer of land which but for the transfer would have been declared surplus land under the Act, shall be ignored, it proceeds on the presumption that the tenure holders being aware of the resolution or manifesto adopted by the ruling All India Congress Party on January 24, 1971, and of the consensus at the Chief Ministers Conference held in July 1972, to take measures to lower the ceiling on agricultural holdings, might make attempts to defraud, defeat and evade the ceiling law, then in offing, by making fictitious transfers of land in favour of other persons. The presumption which underlies the main provision in Section 5(6) can be displaced, as the legislature has itself indicated, on proof of the conditions set out in proviso (b). Although the strength of the aforesaid presumption and the nature and quantum required to satisfy the conditions of proviso (b) may vary according to the circumstances of the particular case, yet it can be said as a general proposition that in the case of transfers made prior to the decision of the Chief Ministers Conference in July 1972 to lower the ceiling, the burden under Explanation II on the tenure holder to establish the facts bringing his case within clause (b) of the proviso, would be lighter than the one in the case of a transfer made after the aforesaid decision in July 1972.

15. In order to bring his case within the purview of proviso (b), the tenure holder has to show--

(i) that the transfer has been made in "good faith';

(ii) that it is a transfer for adequate consideration;

(iii) that it has been made under an irrevocable instrument; and

(iv) that it is not a benami transaction or for immediate or deferred benefit of the tenure holder or other members of his family.

16. There is no dispute in regard to the connotation, construction and existence of ingredients (ii), (iii) and (iv) in the instant case. Controversy, however centres round the true meaning and scope of the expression "good faith" within the contemplation of clause (b) of the proviso. In the instant case, the Appellate Authority appears to have taken the view -- a view which has been upheld by the High Court -- that a transfer cannot be said to have been made in "good faith" merely because it has been honestly or genuinely made and satisfies the aforesaid Conditions (ii), (iii) and (iv), unless it is proved further that it was made for a valid pressing necessity.

.....

18. The expression "good faith" has not been defined in the Ceiling Act. The expression has several shades of meaning.

In the popular sense, the phrase "in good faith" simply means "honestly, without fraud, collusion, or deceit; really, actually, without pretence and without intent to assist or act in furtherance of a fraudulent or otherwise unlawful scheme", (see Words and Phrases, Permanent Edn., Vol. 18-A, p. 91). Although the meaning of "good faith" may vary in the context of different statutes, subjects and situations, honest intent free from taint of fraud or fraudulent design, is a constant element of its connotation. Even so, the quality and quantity of the honesty requisite for constituting "good faith" is conditioned by the context and object of the statute in which this term is employed. It is a cardinal canon of construction that an expression which has no uniform, precisely fixed meaning, takes its colour, light and content from the context.

19. The meaning and scope of the expression "good faith" is therefore, to be considered in the light of the scheme and purpose of Section 5, in general, and the context of proviso (b) to sub-section (6), in particular. We have already noticed that the primary object of the Ceiling Act, as adumbrated in the pivotal provision in Section 5(1) is to prohibit and disentitle a tenure holder from holding land in the aggregate in the State of Uttar Pradesh, in excess of the ceiling area, in his own right, whether in his own name, or ostensibly in the name of any other person. The ceiling area and surplus land of a tenure holder under the Ceiling Act, as already mentioned, are to be determined as on June 8, 1973 when the U.P. (Amendment) Act 18 of 1973 came into force. A transfer, therefore, made after January 24, 1971 which is designed to serve as a cloak for retention of a right or interest of the transferor in the ostensibly transferred land in excess of the ceiling area, even on or after June 8, 1973, will be patently not "in good faith". But the proviso (b) to sub-section (6) of Section 5 extends the negative aspect of the concept "good faith" a little further by indicating, that even if the transfer is not an ostensible transfer and the transferor divests himself of all interest and rights in present in the transferred land, but reserves some benefit in futuro for himself or other members of his family, then also, the transfer will be not in "good faith". A transfer solely for the purpose of converting surplus land into cash without any kind of need (not to be confused with legal necessity) may also lack good faith.

20. Broadly speaking, the benefit of clause (b) of the proviso to sub-section (b) is available to a transfer made in good faith, that is, to a bona fide transfer whereby the tenure holder genuinely and irrevocably transfers all right, title and interest in the land in favour of the transferee, in the ordinary course of management of his affairs and which is not a collusive arrangement, or device or subterfuge to enable the tenure holder to continue to hold the surplus land or any reserved interest in presenti or in future, therein, (or merely to convert it into cash), and thus circumvent the ban under Section 5(1) of the Ceiling Act. In order to be entitled to the benefit of proviso (a), a transfer made in good faith, must satisfy the further conditions, (ii) to (iv), enumerated in the proviso (b). The positive conditions laid down in proviso (b) are: that the transfer should be for adequate consideration; that it should have been made under an irrevocable instrument. The negative conditions set out in clause (b) of the proviso are: that it must not be a benami transaction; that it must not be for immediate or deferred benefit of the transferring tenure holder or other members of his family. These tests or Conditions (ii),(iii) and (iv) provided in

proviso (b) may not by themselves be conclusive to hold that the transfer was in "good faith". For instance, another important test for judging the genuineness or otherwise of a sale would be whether or not cultivatory possession and enjoyment of the land has passed under the sale to the vendee. Even so, once it is established by the transferring tenure holder that the transfer in question effected in the course of ordinary management of his affairs, was made for adequate consideration and he has genuinely, absolutely and irrevocably divested himself of all right, title and interest (including cultivatory possession) in the land in favour of the transferee, the onus under Explanation II, in the absence of any circumstances suggestive of collusion, or an intention or design to defraud or circumvent the Ceiling Act, on the tenure holder to show that the transfer was effected in "good faith", will stand discharged, and it will not be necessary for the tenure holder to prove further that the transfer was made for an impelling need or to raise money for meeting a pressing legal necessity. Although proof of the fact that a transfer was made for a valid pressing necessity may highlight or strengthen the inference in favour of the genuineness of the transfer, it is not an indispensable constituent of "good faith"; nor is the proof of legal necessity requisite, as a matter of law, to enable a tenure holder to avail of the benefit of clause (b) of the proviso. It may be remembered that at the time when such a transfer was made, there was no legal restriction on his power to alienate the whole or any part of his holding. In other words, at the time when such a transfer was made it was not unlawful, even if it were made without any pressing necessity. It became unlawful by the subsequent enactment of a legal fiction introduced in Section 5(6) of the Ceiling Act (U.P. Act 18 of 1973) with retrospective effect from January 24, 1971. Even so, under this statutory fiction, a transfer of land made after January 24, 1971 does not become wholly void for all purposes; it can be ignored and would not be taken into account in determining the ceiling area of the transferring tenure holder for purposes of the Ceiling Act, and that too, if the following two conditions are satisfied--

(a) that the land but for the transfer would have been declared surplus land under the U.P. Act 18 of 1973; and

(b) that the transfer is not of a kind covered by proviso (6) to Section 5(6) of the Act.

This being the position, once a transfer is shown to be bona fide and further satisfies all the other positive and negative conditions laid down in the proviso (b) to Section 5(6), there is no justification in law to stretch the legal fiction further and to spell out from the expression "good faith" an additional requirement of proving pressing necessity for the transfer before the tenure holder is entitled to the benefit of the aforesaid proviso (b).

35. In light of what is culled out from the decisions of the Apex Court noticed above, this Court observes that the Appellate Authority must consider the evidence in a manner aforesaid to find out whether the transactions are bonafide.

36. Now noticing the aforesaid dictum in ***Amar Singh (supra), Nawal Singh (supra) and Brijendra Singh (supra)*** and applying the said principles to the instant case, this Court finds that the Appellate Court has not adhered to the principles of law settled and also the manner in which the objections of the tenure holder and the evidence thereon is to be considered. Moreover, categorical

findings which have been recorded by the Prescribed Authority have not been considered by the Appellate Court in its correct prespective nor any reason has been incorporated why the conclusion of the Prescribed Authority were erroneous nor the findings of the Prescribed Authority have been reversed.

37. In view of the aforesaid discussions, this Court has no hesitation to hold that the impugned judgment passed by the Appellate Court dated 27.11.1979 cannot sustain judicial scrutiny and is liable to be set aside.

38. For the reasons aforesaid, the writ petition is ***allowed***. A writ of certiorari is issued and the impugned judgment dated 27.11.1979 passed in Ceiling Appeal No.148 of 1979 shall stand quashed. The matter shall stand remitted to the Appellate Authority who shall after affording full opportunity of hearing to the parties shall pass a fresh order in appeal noticing the observations made in the judgment preferably within a period of six months, from the date a copy of this order is placed before the Appellate Court. In the facts and circumstances, there shall be no order as to costs.

(2023) 4 ILRA 675
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.04.2023

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Matters Under Article 227 No. 220 of 2016

Smt. Neeta Agarwal ...Petitioner
Versus
Smt. Shanti Rani Agarwal & Ors.
...Respondents

Counsel for the Petitioner:
Sri Sheo Ram Singh, Ms. Priya Dimri, Sri Nitin Agarwal

Counsel for the Respondents:
Sri Ashish Kumae Singh

A. Civil Law – Amendment of pleadings - Code of Civil Procedure, 1908 - Order XV Rule 5 - Order 6 Rule 17 of the C.P.C. - Amendment of pleadings cannot be allowed so as to alter materially or substitute the cause of action or the nature of claim applies to amendments to the plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable. (Para 57)

B. No relief could be granted as claim for under the petition in case the same does not flow from the facts as contained in the petition. No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. (Para 58)

The present petition is liable to be dismissed on both the grounds namely the amendment filed by the petitioner will change the nature of the case and secondly there is no pleadings whatsoever made by the petitioner in the entire petition while challenging the aforesaid orders. Further nothing has been stated in the amendment application nor in the present petition regarding the latches in filing the amendment application since the suit was filed in this case in the year, 2000 and amendment was sought by him in the year 2009. (Para 62)

The Civil Suit which was filed by the plaintiff-petitioner is pending consideration before the Trial Court since last 23 years. Written statements have already been filed by the parties. In this view of the matter, Court is of the opinion that the Trial Court be directed to decide the aforesaid suit most expeditiously and positively within a period of six months …strictly

in accordance with law and without bring influenced with any observations made by this Court in this judgement. (Para 64, 65)

Writ petition disposed of. (E-4)

Precedent followed:

1. Tildesley Vs Harper, (1878) 10 Ch D 393 (Para 33)

2. Cropper Vs Smith, (1884) 26 Ch D 700 (CA) (Para 34)

3. Steward Vs North Metropolitan Tramways Co., (1886) 16 QBD 556 (Para 35)

4. Arundhati Mishra Vs Ram Chandra Pandey, (1994) 2 SCC 29) (Para 36)

5. Weldon Vs Neal, (1887) 19 QBD 394 (Para 37)

6. Kisandas Rupchand Vs Rachappa Vithoba Shilwant, ILR (1909) 33 Bom 644 (Para 39)

7. Ma Shwe Mya Vs Maung Mo Hnaung, AIR 1922 PC 249 (Para 43)

8. Amulakchand Mewaram Vs. Babulal Kanalal Taliwala, (1933) 35 Bom LR 569 (Para 44)

9. L.J. Leach & Co. Ltd. Jardine Skinner & Co., AIR 1957 SC 357 (Para 45)

10. Pirgonda Hongonda Patil Vs Kalgonda Shidgonda Patel, AIR 1957 SC 363 (Para 46)

11. Purushottam Umedbhaiu & Co. Vs Manilal & Sons, AIR 1961 SC 325 (Para 47)

12. Ganesh Trading Co. Vs Moji Ram, (1978) 2 SCC 91 (Para 47)

13. Laxmidas Dayabhai Kabrawala Vs Nanabhai Chunilal Kabrawala, AIR 1964 SC 11 (Para 48)

14. Jai Jai Ram Manohar Lal Vs National Building Material Supply, (1969) 1 SCC 869 (Para 50)

15. Ganga Bai Vs Vijay Kumar, (1974) 2 SCC 393 (Para 51)

16. Modi Spg. & Wvg. Mills Co. Ltd. Vs Ladha Ram & Co., (1976) 4 SCC 320 (Para 52)

17. Haridas Aildas Thadani Vs Godrej Rustom Kermani, (1984) 1 SCC 668 (Para 53)

18. Suraj Prakash Bhasin Vs Raj Rani Bhas, (1981) 3 SCC 652 (Para 54)

19. B.K. Narayana Pillai Vs Parmeswaran Pillai, (2000) 1 SCC 712 (Para 55)

20. Usha Balashaheb Swami Vs Kiran Appaso Swami, (2007) 5 SCC 602 (Para 56)

21. Bachhaj Nahar Vs Nilima Mandal, (2008) 17 SCC 49 (Para 58)

22. V. Prabhakara Vs Basavaraj K. (Dead) By Legal Representatives and Another, 2022 (1) SCC Page 115 (Para 59)

Present petition challenges judgments and orders dated 06.03.2010, passed by Additional Civil Judge (Senior Division), Allahabad as well as the order dated 30.11.2015, passed by Additional District Judge, Allahabad.

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Nitin Agrawal along with Ms. Priya Dimri, learned counsel for the plaintiff-petitioner and Sri Ashish Kumar Singh, learned counsel for the contesting respondent Nos.1 & 2.

2. The petitioner has preferred the present petition under Article 227 of the Constitution of India with the prayer to annul Judgments and orders dated 06.03.2010 passed by Additional Civil Judge (Senior Division) Court No. 6 Allahabad as well as the order dated 30.11.2015 passed by Additional District Judge, Court No. 10 Allahabad insofar as it relates with the prayer no. (a) of the proposed amendment sought which has been rejected by the trial court and affirmed

by the revisional court by means of the impugned orders and substitute the same by its own judgment allowing the amendment application in toto or direct the trial court to decide the amendment application afresh in the light of observation/ direction of this Court.

3. Facts in brief as contained in the petition are that the property bearing house no. 129/Al situated at Darbhanga Colony, District - Allahabad of which the petitioner is sole owner and is in possession. The house no. 129 had been constructed over plot no. 33 Darbhanga Castle compound District Allahabad of which one Chowdhary Labh Singh was the recorded owner. Labh Singh through his will deed dated 29.02.1966 divided the said house in two equal portions bequeathing the same in favour of his two sons through will deed. Northern 1/2 portion of said house was allocated in favour of Shri Surendra Jeet Singh Rekhi/ defendant respondent no. 3 and the southern 1/2 portion was allocated to Shri Nirmal Jeet Singh his other son.

4. After the death of Chowdhary Labh Singh the defendant/respondent No.3 became the sole and absolute owner in possession over the northern half portion of House No.129 Darbhanga Castle Colony Allahabad total area 600 Sq. Yards (501.60 Square meters) out of which covered area was 302 Square Yards (252.47 Square Meters) and rest of area 298 Square Yards (249.13 Square Meter) was an open area. The Nagar Nigam allotted House No. 129/1A to the said house in the name of respondent no. 3. The respondent no.3 became absolute recorded owner of the house in question. The respondent no. 3 executed sale deed of the house in question in respect of the area 430 Square Meters (514.39 Sq.) through registered sale deed dated 19.02.1994 in favour of the Plaintiff/petitioner.

5. After execution of sale deed the respondent No.3 remained owner of remaining area 85.61 Sq. Yards (600 - 514.39)=85.61. Thereafter the respondent No.3 executed a sale deed dated 26.10.1994 in favour of Smt. Indira Mishra for area 85.16 Sq. Yards = 72 Sq. Yards of the Darbhanga Colony in respect of House No.129/1. Thus, the respondent no.3 sold the entire area of house no. 129/1 Darbhanga Colony Allahabad by means of two sale deeds. Therefore, after execution of the aforesaid two sale deeds, though no area remained with the respondent No.3 even then he executed another sale deed of excess area 80 Sq. Yards of House No. 129/1 Darbhanga Colony Allahabad in favour of defendant/respondent no. 1 through sale deed dated 19.07.1997.

6. It is argued that the aforesaid sale deed could not be executed by the respondent No.3 in favour of the respondent No.1 as the respondent No.1 was never in physical possession over any part of the house in question. It is argued that due to mistake in the sale deed dated 19.02.1994 executed in favour of petitioner, the eastern boundary was wrongly shown to be part of house no. 129/1 Darbhanga Colony Allahabad after the execution of second sale deed dated 26.10.1994 and no area of house in question remained balance. It is argued that on 26.08.2000 and the defendants/respondent no. 1 and 2 tried to interfere in peaceful possession of the Plaintiff/ petitioner and Plaintiff/ petitioner filed Civil Suit being Original.Suit. No. 432 of 2000 (Smt. Neeta Agrawal Vs. Smt. Shanti Rani Agrwal and two others).

7. In the aforesaid suit, the defendants/respondent no. 1 and 2 filed their joint written statement along with counter claim on 22.11.2000. The respondent no. 3 also filed his separate written statement taking different stand but failed to justify the area alleged to be sold in favour of respondent no. 1. It is argued that the petitioner filed replication to the aforesaid written statements filed by the respondents denying the contents of the aforesaid written statement.

8. In the meanwhile, an amendment application was filed by the Plaintiff/ petitioner on 01.10.2009 which was marked as Paper no. 103-A seeking certain amendments in the plaint as per provisions contained under Order 6 Rule 17 of the C.P.C The aforesaid amendment was opposed by the respondent nos. 1 and 2 only and they filed their objection on 05.10.2009. The trial court vide its order dated 06.03.2010 partly allowed the amendment application and rejected the prayer seeking amendment in Eastern boundary of the disputed house.

9. Aggrieved by the aforesaid order, the petitioner preferred Civil Revision No. 91 of 2010 in the Court of District Judge under section 115 C.P.C. on 26.03.2010. The Revisional Court rejected the same vide its order dated 30.11.2015. Hence the present petition.

10. A counter affidavit has been filed by Sri Ashish Kumar Singh, learned counsel for respondent Nos.1 & 2. It is argued that the total area of house was 600 sq. yards mentioned in the sale deed map and eastern open area was not mentioned in the sale deed map and in the sale deed map, it is specifically stated that open area of which respondent No.3 was owner is in the eastern side. It is further stated in the counter affidavit that the respondent No.3 having more area in the eastern side and the same was sold by him to the respondent No.1. It is further argued that the land in dispute was purchased by the respondent No.1 and the amendment application was illegally filed by the petitioner after the expiry of nine years of the filing of the suit. By moving the aforesaid amendment application, the petitioner is trying to linger on the proceedings. It is further argued that absolutely a frivolous case has been carved out by the plaintiff-petitioner by moving amendment application. Hence, the amendment application by which an amendment is sought in the prayer of the suit was rightly rejected by the Courts below.

11. A rejoinder affidavit has also been filed by counsel for the petitioner reiterated the same facts as narrated in the petition.

12. Heard learned counsel for the parties and with the consent of learned counsel for the parties, the present petition is finally decided.

13. From perusal of the facts narrated in the petition, it is clear that Original Suit No.432 of 2000 was filed by the plaintiff-petitioner in the Civil Court of Allahabad with the following reliefs:-

"(a) That the defendants, their agents, servants, representatives and all persons claiming through them be restrained by means of permanent injunction from disturbing the possession of the plaintiff in Premises No. 129/1 A, Darbhanga Castle, Allahabad or to demolish any portion of the boundary walls or the gate fixed therein or raise any

constructions on the East of the plaintiff's house.

(b) That, if defendant no. 1 and 2 produce and rely upon any sale deed executed by defendant no. 3 in respect of any portion of premises No. 129/1 A, Darbhanga Castle, Allahabad city, the same may be declared null and void and non est. against the interest of the plaintiff.

(c) That the cost of the suit be awarded in favour of the plaintiff and against the defendants.

(d) That any other and further relief be granted in favour of the plaintiff and against the defendants which the court may deems fit in the interest of justice.

Description of the Premises in Suit.

514.39 sq yards (equal to 430.03 sq. mts.) of the construction area and the land appurtenant thereto shown bounded by Red Lines in the plan appended to the sale deed of the house no. 129/1 A, Darbhanga Colony, Allahabad city, boundaries whereof are as follows : -

North -- Sarak

South -- House of Sri Sanjay Agrawal with common boundry wall.

East - Open Land of defendant no. 3

West - Open Land."

14. Paragraph 7 of the plaint reads as follows:-

"7. That, the area sold, as stated above, is 430.03 sq mts.(equal to 514.39 sq yards) shown bounded by RED LINES In the site plan appended to the sale deed with the following boundries:

North -- Sarak

South -- house of Sri Sanjay Agrawal with common boundry wall.

East - open Land of defendant no. 3

West - open Land."

15. Now by way of amendment, the petitioner wanted that in place of the words "open land of defendant no.3 described against east side of the boundaries, as contained in paragraph-7 of the plaint, the word corner of the house should be inserted.

16. From perusal of the description of the premises in suit, it is clear that in the sale deed which according to the petitioner was executed in his favour, under the heading description of the premises in suit against the word East it is mentioned as "open land of defendant no.3". The same description has been given by the petitioner in paragraph-7 of the plaint as quoted above. Now the petitioner wants by way of amendment application that against the boundaries of the property as mentioned against the word East "in place of open land of defendant no.3" it should be mentioned as corner of the house.

17. While rejecting the amendment application, it was recorded that since no application was filed at any point of time by plaintiff-petitioner to make correction in the sale deed, the permission to amend the plaint cannot be granted. Findings were also recorded that in case the amendment is

allowed, it will change the nature of the plaint. The operative portion of the order passed by the Trial Court is reproduced below:-

परन्तु प्रार्थना-पत्र 103 ए का पैरा ए जिसके जरिये वादी वाद-पत्र में यह अंकित कराना चाहता है कि पूर्व साइड में बाउण्ड्री विकय-पत्र व वाद-पत्र में गलत अंकित हो गये है इस जगह मकान का कोना है लिखने की अनुमति दी जाय सही प्रतीत नहीं होता है क्योकि यह तथ्य पूर्व से ही वादी के संज्ञान में है तथा वादी द्वारा विकय-पत्र में भी कोई दुरूस्तीकरण नहीं कराया गया है तथा यदि वादी को वाद-पत्र में अंकित तथ्यों को लिखने की अनुमति प्रदान की जाती है तो विवादित सम्पत्ति को प्रकृति बदल जायेगी ।

18. Similar findings were also recorded by the Revisional Court while rejecting the Revision. The relevant portion of the order reads as follows:-

अतः स्पष्ट है कि संशोधन प्रार्थनापत्र 103ए के पैरा–''ए" में वर्णित तथ्य " ओपेन लैण्ड आफ डिफेण्डेण्ट नं03'' के स्थान पर "कार्नर आफ हाउस" लिखे जाने की स्थिति में वाद की प्र..ति में परिवर्तन होता है। यह स्पष्ट है कि अधीनस्थ न्यायालय द्वारा अपने आदेश में भी इस तथ्य को स्पष्टरूप से अंकित किया है कि "संशोधन केवल पूरब साइड को बदलने के लिये प्रार्थनापत्र खारिज किये जाने योग्य है क्योंकि यह तथ्य विकय विलेख में ही खुला स्थान प्रतिवादी सं०3 लिखा हुआ है। यह संशोधन केवल देरी की वजह से स्वीकार नहीं किया जा रहा है बल्कि विकय पत्र भी यह बाउण्ड्री पूरब साइड में खुला स्थान प्रतिवादी स0 3 अंकित है जो वादपत्र में भी अंकित है। इसलिये वादपत्र मे संशोधन की अनुमति नहीं दिया जाता है क्योकि उक्त संशोधन से वादग्रस्त सम्पत्ति की प्र..ति बदल जायेगी।" अवर न्यायालय द्वारा प्रार्थना पत्र 103ए के प्रस्तावित प्रस्तर बी व सी में प्रस्तावित संशोधन को स्वीकार कर लिया गया था। स्पष्टतः: प्रार्थनापत्र 103ए के पैरा ए को स्वीकार किये जाने की स्थिति में वाद की प्र..ति में परिवर्तन होता है क्योंकि वादी ओपेन लैण्ड आफ प्रतिवादी स0 3 के स्थान पर कार्नर आफर हाउस लिखना चाहता है जो कि विकय विलेख में वाद नहीं है वादी को वादग्रस्त सम्पत्ति के सम्बन्ध में जो अधिकार उद्भूत है, वह विकय विलेख के पश्चात ही है और उसे सभी तथ्य पूर्व से ही मालूम थे उसे इस चौहददी का भी सम्यक ज्ञान रहा है अतः प्रस्तावित संशोधन जो वादग्रस्त सम्पत्ति के पूरब अंकित किये जाने को लेकर है, उसे वादपत्र में अंकित किये जाने की अनुमति नहीं दी जा सकती। अतः अवर न्यायात्रय द्वारा पारित आदेश दिनांकित 06.03.10 में कोई अवैधानिकता अथवा तात्विक अनियमितता नहीं की गयी है।

19. In the present petition the orders passed by both the courts below rejecting the amendment applications are under challenge. Only ground taken in the present petition to challenge the aforesaid order contained in paragraph-23 & 24 of the petition reads as follows:-

"23. That in case during the pendency of the present writ petition this Hon'ble Court is not graciously be pleased to stay the further proceedings of the O.S. No. 432 of 2000 Smt. Neeta Agrawal Vs. Smt. Shanti Rani Agrawal pending before the respondent no. 5, then the petitioner shall sufer irreparable loss and the suit may be defeated.

24. That the balance of convenience lies in suitable interim order being passed to protect the interest of the petitioner during pendency of the writ petition before this Hon'ble Court."

20. From perusal of the aforesaid, the Court is of the opinion that no proper pleadings whatsoever has been taken by the petitioner while challenging the aforesaid order.

21. In order to consider whether the plaintiff-petitioner has made out a case for amendment of his plaint, it is useful to refer Order VI Rule 17 CPC which reads as under:

17. Amendment of pleadings.- *The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

22. The first part of the rule makes it abundantly clear that at any stage of the proceedings, parties are free to alter or amend their pleadings as may be necessary for the purpose of determining the real questions in controversy. However, this rule is subject to proviso appended therein. The said rule with proviso again substituted by Act 22 of 2002 with effect from 01.07.2002 makes it clear that after the commencement of the trial, no application for amendment shall be allowed. However, if the parties to the proceedings are able to satisfy the court that in spite of due diligence they could not have raise the issue before the commencement of trial and the court is satisfied with their explanation, amendment can be allowed even after commencement of the trial.

23. To make it clear, Order VI Rule 17 C.P.C. confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just.

24. The courts have very wide discretion in the matter of amendment of pleadings but court's powers must be exercised judiciously and with great care. While deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.

The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

The other important condition which should govern the discretion of the court is the potentiality of prejudice or injustice which is likely to be caused to the other side. Ordinarily, if the other side is compensated by costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side.

25. Some basic principles which ought to be taken into consideration while allowing or rejecting the application for amendment are: (i) whether the amendment sought is imperative for proper and effective adjudication of the case; (ii) whether the application for amendment is bona fide or mala fide, (iii) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money; (iv) refusing amendment would in fact lead to injustice or lead to multiple litigation; (v) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and (vi) as a general

rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application. The fact that the claim is barred by the law of limitation is but one of the factors to be taken into account by the court in exercising the discretion as to whether the amendment should be allowed or refused, but it does not affect the power of the court if the amendment is required in the interests of justice.

26. When I apply the principle laid down by the above judgments, the conclusion becomes irresistible that the view taken by the courts below in the impugned orders cannot be said to be unjustified.

27. I am tracing the legislative history, objects and reasons for incorporating Order 6 Rule 17 not because it is necessary to dispose of this case, but a large number of applications under Order 6 Rule 17 are filed and our courts are flooded with such cases. Indiscriminate filing of applications of amendments is one of the main causes of delay in disposal of civil cases.

28. I deem it appropriate to give the historical background of Rule 17 of Order 6 which corresponds to Section 53 of the old Code of 1882. It is similar to Order 21 Rule 8 of the English Law. Order 6 Rule 17 CPC is already quoted above.

29. In my considered view, Order 6 Rule 17 is one of the important provisions of CPC, but I have no hesitation in also observing that this is one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases. All civil courts ordinarily have a long list of cases, therefore, the courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases.

30. In a recently published unique, unusual and extremely informative book ***Justice, Courts and Delays***, the author Mr. Arun Mohan, a Senior Advocate of the High Court of Delhi and the Hon'ble Supreme Court, from his vast experience as a civil lawyer observed that 80% applications under Rule 17 of Order 6 are filed with the sole objective of delaying the proceedings, whereas 15% applications are filed because of lackadaisical approach in the first instance, and 5% applications are those where there is actual need of amendment. His experience further revealed that out of these 100 applications, 95 applications are allowed and only 5 (may be even less) are rejected. According to him, a need for amendment of pleading should arise in a few cases, and if proper rules with regard to pleadings are put into place, it would be only in rare cases. Therefore, for allowing amendment, it is not just costs, but the delays caused thereby, benefit of such delays and the additional costs which had to be incurred by the victim of the amendment. The court must scientifically evaluate the reasons, purpose and effect of the amendment and all these factors must be taken into consideration while awarding the costs.

31. To curtail delay in disposal of cases, in 1999 the legislation altogether deleted Rule 17 which meant that amendment of the pleadings would no longer have been permissible. But immediately after the deletion there was widespread uproar and in 2002 Rule 17 was

restored, but added a proviso. That proviso applies only after the trial has commenced. Prior to that stage, the situation remains as it was. According to the view of the learned author Mr. Arun Mohan as observed in his book, although the proviso has improved the position, the fact remains that amendments should be permissible, but only if a sufficient ground therefor is made out, and further, only on stringent terms. To that end, the rule needs to be further tightened.

32. The general principle is that courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties.

33. In ***Tildesley v. Harper (1878) 10 Ch D 393*** which was decided by the English court even earlier than Cropper case (supra), in an action against a lessee for setting aside a lease, in the statement of claim it was alleged that the power of attorney of the donee had received a specified sum as a bribe. In the statement of defence, each circumstance was denied but there was no general denial of a bribe having been given. A prayer for amendment of the defence statement was refused. The Court of Appeal held that the amendment ought to have been allowed. Bramwell, L.J. made the following pertinent observations:

"... I have had much to do in Chambers with applications for leave to amend, and | may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

(emphasis added)

34. In the leading English case of ***Cropper v. Smith (1884) 26 Ch D 700 (CA),*** the object underlying amendment of pleadings has been laid down by Browen, L.J. in the following words:

"... it is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right," (emphasis supplied)

35. In ***Steward v. North Metropolitan Tramways Co. reported in (1886) 16 QBD 556,*** the plaintiff filed a suit for damages against the tramways company for negligence of the company in allowing the tramways to be in a defective condition. The company denied the allegation of

negligence. It was not even contended that the company was not the proper party to be sued. More than six months after the written statement was filed, the company applied for leave to amend the defence by adding the plea that under the contract entered into between the company and the local authority the liability to maintain tramways in proper condition was of the latter and therefore, the company was not liable. On the date of the amendment application, the plaintiff's remedy against the local authority was time-barred. Had the agreement been pleaded earlier, the plaintiff could have filed a suit even against the local authority. Under the circumstances, the amendment was refused.

36. The rule, however, is not a universal one and under certain circumstances, such an amendment may be allowed by the court notwithstanding the law of limitation. The fact that the claim is barred by the law of limitation is but one of the factors to be taken into account by the court in exercising the discretion as to whether the amendment should be allowed or refused, but it does not affect the power of the court if the amendment is required in the interests of justice (see Ganga Bai v. Vijay Kumar and ***Arundhati Mishra v. Ram Charitra Pandey reported in (1994) 2 SCC 29).***

37. In another leading English case ***Weldon v. Neal (1887) 19 QBD 394***, A filed a suit against B for damages for slander. A thereafter applied for leave to amend the plaint by adding fresh claims in respect of assault and false imprisonment. On the date of the application, those claims were barred by limitation though they were within the period of limitation on the date of filing the suit. The amendment was refused since the effect of granting it would be to take away from B the legal right (the defence under the law of limitation) and thus would cause prejudice to him.

38. In the said case, Pollock, J. quoting with approval the observation of Bremwell, L.J. rightly observed in the case of Steward case (supra):-

"... The test as to whether the amendment should be allowed, is whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise."

According to him such an amendment ought not be allowed.

39. ***Kisandas Rupchand v. Rachappa Vithoba Shilwant reported in ILR (1909) 33 Bom 644*** is probably the first leading case decided by the High Court of Bombay under the present Code of 1908. There A, the plaintiff, averred that in pursuance of a partnership agreement, he delivered Rs 4001 worth of cloth to B, the defendant, and sued for dissolution of partnership and accounts. The trial court found that A delivered the cloth worth Rs 4001 but held that there was no partnership and the suit was not maintainable. In appeal, A sought amendment of the pleadings by adding a prayer for the recovery of Rs 4001. On that day, claim for recovery of money was barred by limitation. The amendment was allowed by the appellate court and the suit was decreed. B challenged the decree. The High Court upheld the order and dismissed the appeal.

40. Referring to leading English decisions on the point, Batchelor, J. stated: (Kisandas case (supra))

"... From the imperative character of the last sentence of the rule it seems to me clear that, at any stage of the proceedings, all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties."

41. In a concurring judgment, Beaman, J. observed that:

".. the practice is to allow all amendments, whether introducing fresh claims or not, so long as they do not put the other party at a disadvantage for which he cannot be compensated by costs."

42. His Lordship proceeded to state: (Kisandas case supra))

"In my opinion two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the principle. First, could the party asking to amend obtain the same quantity of relief without the amendment? If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows a his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed."

43. The basic principles of grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our courts have been following the basic principles laid down in those cases.

If I carefully examine all the cases, the statement of law declared by the Privy Council in **Ma Shwe Mya v. Maung Mo Hnaung reported in AIR 1922 PC 249** has been consistently accepted by the courts till date as correct statement of law. The Privy Council observed: (IA pp. 216-17):-

"... All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by a means of amendment, the subject-matter of the suit."

44. In ***Amulakchand Mewaram vy. Babulal Kanalal Taliwala (1933) 35 Bom LR 569*** the Bombay High Court again had an occasion to decide a case under Order 6 Rule 17. In that case, the Court approved the following observations of Beaumont, C.J. and observed: (Bom LR p. 571)

"... the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought is the name of a non-existent person, or whether it is merely a misdescription of existing c persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an

amendment where any loss to the opposing party can be compensated for by costs."

45. In ***L.J. Leach & Co. Ltd. v. Jardine Skinner & Co.' reported in AIR 1957 SC 357***, a suit for damages for "conversion of goods" filed by the plaintiff was decreed by the trial court but the decree was set aside by the High Court. In an appeal before this Court, the plaintiff applied for amendment of the plaint by raising an alternative claim for damages for breach of contract for "non-delivery of goods", The amendment was resisted by the defendant contending that it sought to introduce a new cause of action which was barred by limitation on e the day the amendment was sought and hence, it would seriously prejudice the defendant. Though the Court noticed "considerable force" in the objection, keeping in view the prayer in the amendment which was not "foreign to the scope of the suit" and all necessary facts were on record, it allowed the amendment.

46. In ***Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil AIR 1957 SC 363,*** A obtained a decree for possession against B. He was, however, obstructed in obtaining possession by C in execution. A then filed a substantive suit against B and C. In the plaint, except saying that he had obtained a decree against B, nothing more was stated by A. Hence, he filed an application for amendment which was rejected by the trial court but allowed by the High Court. C approached this Court. Dismissing the appeal and confirming the order of the High Court, this Court observed that the discretionary power of amendment was not exercised by the High Court on wrong principles. There was merely a defect in the pleading which was removed by the amendment. The quality and quantity of the reliefs sought remained the same. Since the amendment did not introduce a new case, the defendant was not taken by surprise.

47. In **Purushottam Umedbhai & Co. v. Manilal & Sons reported in AIR 1961 SC 325** a suit was instituted in the name of the firm by the partners doing business outside India. It was held that there was only misdescription of the plaintiff. The plaint in the name of the firm was not a nullity and could be amended by substituting the names of partners.

50. In similar circumstances, in a subsequent case ***Ganesh Trading Co. v. Moji Ram (1978) 2 SCC 91***, this Court reiterated the law laid down in ***Purushottam Umedbhai & Co. (supra)*** The Court observed:

"5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometimes

be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions such as payment of either any additional court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the courts should, ordinarily, refuse prayers for amendment of pleadings."

48. In ***Laxmidas Dayabhai Kabrawala vy. Nanabhai Chunilal Kabrawala AIR 1964 SC 11***, the defendant's prayer for amendment by treating a counterclaim as cross-suit was objected to by the plaintiff inter alia on the ground of limitation. The amendment, however, was allowed. When the matter reached this Court, while affirming the order of the High Court, the majority stated:

"14, ... It is, no doubt, true that, save in exceptional cases, leave to amend under Order 6 Rule 17 of the Code will ordinarily be refused when the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time. But this rule can apply only when either fresh allegations are added or fresh reliefs are sought by way of amendment. Where for instance, an amendment is sought which merely clarifies an existing pleading and does not in substance add to or alter it, it has never been held that the question of a bar of limitation is one of the questions to be considered in allowing such clarification of a matter already contained in the original pleading."

49. The Court in ***Laxmidas case (supra)*** further observed that since there was no addition to the averments or relief, it was not possible to uphold the contention of the plaintiff that by conversion of written statement into a plaint in a cross-suit, a fresh claim was made or a new relief was sought. "To the facts of the present case, therefore, the decisions holding that amendments could not ordinarily be allowed beyond the period of limitation and the limited exceptions to that rule have no application.

50. In ***Jai Jai Ram Manohar Lal v. National Building Material Supply reported in (1969) 1 SCC 869***, A sued B in his individual name but afterwards sought leave to amend the plaint to sue as the proprietor of a Hindu joint family business. The amendment was granted and the suit was decreed. The High Court, however, reversed the decree observing that the action was brought by a "non-existing person", Reversing the order of the High Court, this Court (per Shah, J., as he then was) made the following oft-quoted observations: (SCC p. 871, para 5)

"5, ... Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of e the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala

fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side." (emphasis added)

51. In ***Ganga Bai v. Vijay Kumar (1974) 2 SCC 393***, an appeal was filed against a mere finding recorded by the trial court. After a lapse of more than seven years, amendment was sought by which a preliminary decree was challenged which was granted by the High Court by a laconic order. Setting aside the order of the High Court, this Court stated:

"22. The preliminary decree had remained unchallenged since September 1958 and by lapse of time a valuable right had accrued in favour of the decree-holder. The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the court."

52. In ***Modi Spg. & Wvg. Mills Co. Ltd. v. Ladha Ram & Co. reported in (1976) 4 SCC 320,*** the trial court while rejecting an application under Order 6 Rule 17 said that the repudiation of clear admission is motivated to deprive the plaintiff of the valuable right accrued to him and it is against law. The High Court in revision affirmed the judgment of the trial court and held that by means of amendment the defendant wanted to introduce an entirely different case and if such amendments were permitted it would prejudice the other side. Paragraph 10 of the aforesaid judgement is reproduced herein below:-

"10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court."

53. In ***Haridas Aildas Thadani v. Godrej Rustom Kermani reported in (1984) 1 SCC 668*** this Court said that:

"1. ... It is well settled that the Court should be extremely liberal in granting prayer of amendment of pleading unless serious injustice or irreparable loss is caused to the other side. It is also clear that a Revisional Court ought not to lightly interfere with a discretion exercised in allowing amendment in absence of cogent reasons or compelling circumstances."

54. In Suraj Prakash Bhasin v. Raj Rani Bhas (1981) 3 SCC 652 the Hon'ble Apex Court held that:

"*... liberal principles which guide the exercise of discretion in allowing amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the*

character of an action should be readily granted while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted on the opposite party under pretence of amendment, that one distinct cause of action should not be substituted for another and that the subject-matter of the suit should not be changed by amendment."

55. In ***B.K. Narayana Pillai v. Parameswaran Pillai (2000) 1 SCC 712***, a suit was filed by A for recovery of possession from B alleging that B was a licensee. In the written statement B contended that he was a lessee. After the trial began, he applied for amendment of the written statement by adding an alternative plea that in case B is held to be a licensee, the licence was irrevocable. The amendment was refused. Setting aside the orders refusing amendment, the Hon'ble Apex Court stated:

"3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and [the Supreme Court]. It is true that the amendment cannot be claimed as a matter of right and under all circumstances, But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation."

56. This judgment has been referred in ***Usha Balashaheb Swami Vs. Kiran Appaso Swami (2007) 5 SCC 602*** and the Court observed that Modi Spe. Case (supra) was a clear authority for the proposition that once a written statement contained an admission in favour of the plaintiff, by amendment such an admission of the defendant cannot be withdrawn and if allowed, it would amount to totally displacing the case of the plaintiff.

57. In the same judgment of ***Usha Balashaheb Swami (supra),*** the Court dealt with a number of judgments of Hon'ble Apex Court and laid down that the prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute the cause of action or the nature of claim applies to amendments to the plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

58. Insofar as the pleadings in the petition are concerned, law in this connection is well settled as has been held by the Hon'ble Apex Court in the case of ***Bachhaj Nahar vs. Nilima Mandal*** *reported in* ***(2008) 17 SCC 49*** that no relief could be granted as claim for under the petition in case the same does not flow

from the facts as contained in the petition. It was further held in the aforesaid case that no amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. Relevant paragraph namely paragraph nos.10 & 12 reproduced below:-

"10. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are :

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.

(ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take."

59. Taking into consideration of the aforesaid decision in **Bachhaj Nahar (Supra),** another judgment was delivered by the Hon'ble Apex Court in the case of **V.Prabhakara vs. Basavaraj K. (Dead) By Legal Representatives and Another** reported in **2022 (1) SCC Page 115,** the relevant paragraph namely paragraph-21 of the aforesaid judgment reads as follows:-

"21. A relief can only be on the basis of the pleadings alone. Evidence is also to be based on such pleadings. The only exception would be when the parties know each other's case very well and such a pleadings implicit in an issue. Additionally, a court can take judicial note of a fact when it is so apparent on the face of the record."

60. In this view of the matter, I am of the opinion that in case there is no proper pleading to support the relief as claimed in the petition, then the respondent has no opportunity to resist or oppose such relief, and if the court considers and grant such relief, it will lead to miscarriage of justice.

61. In view of the aforesaid, the Court is of the opinion that the present petition is liable to be dismissed on both the grounds namely the amendment filed by the petitioner will change the nature of the case and secondly there is no pleadings whatsoever made by the petitioner in the entire petition while challenging the aforesaid orders. Further nothing has been

stated in the amendment application nor in the present petition regarding the latches in filing the amendment application since the suit was filed in this case in the year, 2000 and amendment was sought by him in the year 2009.

62. In this view of the matter, the Court is of the opinion that petition is without any merit, the same is liable to be dismissed and the same is hereby dismissed.

63. It further reveals from perusal of the record that the Civil Suit which was filed by the plaintiff-petitioner is pending consideration before the Trial Court since last 23 years. Written statements have already been filed by the parties.

64. In this view of the matter, Court is of the opinion that the Trial Court be directed to decide the aforesaid suit most expeditiously and positively within a period of six months from today strictly in accordance with law and without bring influenced with any observations made by this Court in this judgement.

65. The Registrar (Compliance) is directed to communicate a copy of this order to the Additional Civil Judge (Senior Division) Allahabad through District Judge Allahabad within three days.

66. Action taken report be filed by the Court below in this Court on or before 01.12.2023.

67. The petition stands disposed of in above terms, save and except for reporting compliance on 01.12.2023.

(2023) 4 ILRA 691
ORIGINAL JURISDICTION

CRIMINAL SIDE
DATED: LUCKNOW 11.04.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No. 276 of 2023

Bachcha Prasad Singh & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Kapil Misra

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure,1973-Section 311- FIR lodged-sanction for prosecution granted-chargesheet filed-prosecution filed supplementary case diary with amended sanction for prosecution-objection filed-sanction granted-impugned-prima-facie not a case of absence of sanction-applicant have raised certain illegality and invalidity in grant of sanction for prosecution-can be raised / assailed before the Trial Court-**Application dismissed.** (E-9)

List of Cases cited:

1. Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari Vs St. of U.P. & anr., 2021 LawSuit(All) 1115

2. Mansukhlal Vithaldas Chauhan Vs St. of Guj. (1997) 7 SCC 622

3. Central Bureau of Investigation & anr. Vs Dhirendra Kumar Agrawal & anr., (2020) 17 SCC 664

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

1. Heard Sri Jyotindra Mishra, learned Senior Advocate, assisted by Sri Kapil Mishra, Learned counsel for the applicants,

Sri Shiv Nath Tilhari, learned A.G.A.-I for the State and perused the material placed on record.

2. By means of instant application, the applicants have assailed the sanction orders dated 3.8.2010 & 2.2.2022 and entire proceedings in Sessions Trial Nos.1265 of 2010 and 1265A of 2010 arising out of Case Crime No.74 of 2010 under Sections 120B, 121, 121A, 420, 467, 468 I.P.C. & 13, 18, 20, 21, 23 (2), 38, 39, 40 UAPA (State Vs. Bachcha Prasad Singh and others) relating to Police Station Nauhasta, District Kanpur Nagar pending in the court of Special NIA/ATS Court, Lucknow as well as further proceedings of the case.

3. Factual matrix of the case is that on 8.2.2010, applicants Bachcha Prasad @ BR, Navin Prasad Singh, Rajendra Das @ Ambarish including two other co-accused persons, namely, Banshidhar @ Chintan and Deepak Ram were arrested by Uttar Pradesh State Task Force team, headed by Sub Inspector Rajeev Dwivedi at 10.00-11.00 am. The First Information Report was lodged at Police Station Naubasta on the complaint of ASP Manoj Kumar Jha of U.P. S.T.F. Thereafter, a letter was sent by Investigating Officer to DIG (ATS) Headquarter Lucknow on 7.7.2010 for grant of sanction of prosecution and the DIG (ATS) sent a letter to the Secretary, Department of Home, Government of UP making a request for grant of sanction for prosecution.

4. After considering the aforesaid request, sanction for prosecution was granted by the State Government, vide letter dated 3.8.2010. On 5.8.2010, the charge sheet was filed by the Investigating Officer and on 4.8.2011, charges were framed against applicants Naveen Prasad Singh and Rajendra Das @ Ambreesh including co-accused Deepak Ram in Sessions Trail No. 1265 of 2010. Applicant Baccha Prasad Singh was in juidical custody in Andhra Pradesh in some other case and his file was separated from original filed no.1265 of 2010 and it was assigned new number as 1265A of 2010. The prosecution witnesses, i.e., P.W. 1 to P.W. 12 were examined. On cross-examination the Investigating Officer (P.W.11) admitted that no literature is in hand writing of the accused; in literature, there is no mention of any criminal activity in Kanpur; and there is no evidence of extorting money in Kanpur Nagar. He further stated that there is no independent oral evidence about seizure of literature from accused, he could not recall the specific charges related to forgery; the sole basis of charge is seizure of materials, pamphlets which are without print line/non-published; technically anybody can print or publish these materials.

5. The two co-accused, namely, Banshidhar and Deepak Ram died during trial. The present applicants have been granted bail by this Court in the year 2013.

6. On 8.1.2022, both files, i.e., 1245 of 2010 and 1265 of 2010 were transferred to Special NIA/ATS Court, Lucknow. On 28.1.2022 ASJ-3/Special NIA/ATS Court Lucknow received file and ordered to register session case.

7. On 8.4.2022, prosecution filed supplementary case diary with amended sanction for prosecution, which was permitted. Thereafter, on 29.9.2022, an objection was filed by the accused with a request that trial court may cancel the supplementary case diary and the sanction order. The trial court took on record of this

objection. Reply to the said objection was also filed by the prosecution on 24.11..2022. and, thereafter, on 24.11.2022 itself, the trial court granted permission to the prosecution upon the application under Section 311 Cr.P.C. and, thus, the applicant being aggrieved by the sanction orders dated 3.8.2010 and 2.2.2022 including the entire proceedings initiated in aforementioned sessions trial, has instituted the instant application.

8. Learned Senior Counsel appearing for the applicants contends that at the very initial stage, intent of the prosecution is dubious, as on the basis of unconfirmed information, the applicants were arrested without cogent piece of evidence; as the First Information Report was lodged against the applicants and the charge sheet has also been filed. Thereafter, without prior intimation to the applicants, the case was transferred from Kanpur to Lucknow and, while taking the perplexing action supplementary case diary and the amended order of sanction dated 2.2.2022 was filed before the trial court. Although as soon as this fact came into knowledge of the applicants, they filed objections on 29.9.2022 but the trial court, without applying its judicial mind, has accepted the supplementary case diary and issued order of sanction for prosecution on 2.2.2022 which was about 12 years after the first sanction was granted.

9. Adding his arguments, he submits that from several dates fixed before the trial court and the order impugned passed thereafter, it is evident that the trial court has acted in a very cavaliar and supine manner. He submtis that first of all, when the matter was transferred from Kanpur to Lucknow, it was not intimated to the applicants and, thereafter, when the objection was filed by the applicants on 29.9.2022 for cancellation of supplemetary case diary and order of sanction on the ground of being unlawful sanction, the trial court granted time to the Investigating Agency to file objection, which was filed on 24.11.2022, and, thereafter, on 2.2.2022, an application on behalf of the accused was filed for haziri mafi on the ground of illness but on the same day, the trial court recorded statement of witness Kumar Prashant, who was Special Secretary, Home Government of U.P. and denied the opportunity of cross-examination. He submits that it is on 15.12.2022, when it came in the knowledge that on 24.12.2022, the prosecution is granted permission by the trial court upon its application under Section 313 of Cr.P.C. and that too without intimating the accused and without disposal of objection dated 29.9.2022.

10. Continuing with his arguments, he submits that provision of Section 45 (2) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'the Act 1967') clearly provides that 'sanction of prosecution shall be given only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government, which shall make an independent review of evidence'. He submits that from the aforesaid provision, it is very clear that sanction of prosecution can be given only after considering the report of authority. Meaning thereby that the sanctioning authority must have gone through the report of the authority appointed by the Central Government or the State Government as the case may be but in the instant matter the first sanction was granted in the year 2010 and there was no any review authority at the very point of time and, suddenly, on 2.2.2022 in the garb of

provisions of Section 173 (8) of Cr.P.C., the sanction for prosecution was granted and supplementary case diary was submitted before the trial court along with the order of sanction for prosecution, which is totally unlawful and against the mandate of Sub Section (2) of Section 45 of the Act 1967. He added that first sanction dated 3.8.2010 is invalid as the authority was not appointed by the Government for independent review of evidences gathered in the course of inviestigation and further there was no material before the sanctioning authority for considering the same as per the mandate of Sub Section (2) of Section 45 of the Act 1967.

11. Further argued that Investigating Officer filed the charge sheet against the applicants in a mechanical manner and that is without collecting any evidence and further no offence under Sections under Sections 120B, 121, 121A, 420, 467, 468 I.P.C. & 13, 18, 20, 21, 23 (2), 38, 39, 40 UAPA are made out against the applicants and the instant matter is an example of sheer abuse of process of law and, therefore, the entire criminal proceedings initiated against the applicants are liable to be quashed.

12. In support of his contention, he has placed reliance on a Judgment reported in ***2021 LawSuit(All) 1115, Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari Vs. State of UP & Another*** and has referred paras 35, 36 and 37 of the aforesaid Judgment. Paras 35, 36 and 37 of the aforesaid Judgment are quoted as under:-

"35. The main object of imposing condition of independent review by an authority appointed by the Central Government or the State Government as the case may be, was to prevent the misuse of the stringent provisions of UAPA by the law enforcing agencies. Further, when legislature in its wisdom has prescribed a specific mandatory procedure to accord sanction, it was the duty of sanctioning authority to follow that statutory procedure. But unfortunately, there is no material on record to show even prima-facie that the recommendation of any authority who have independently reviewed the evidence collected by the investigating authority was ever placed before the competent authority at the time of obtaining sanction under sub-section (1) of Section 45 of the UAPA. In other words, the competent authority while granting sanction, in the present case was deprived of the relevant material i.e. recommendation of independent authority that was mandatory to consider as to whether sanction should or should not be granted.

36. Now coming to the question as to whether this inherent violation of the mandatory procedure is to be taken care of by the trial Court in trial, as in this case trial has moved forward and many prosecution witnesses have been examined by the prosecution, or the defect in the sanction granted in this case is of such a nature, which should not wait till the conclusion of the trial. In order to appreciate this point it is desirable to have a look at the law with regard to the sanction.

37. Hon'ble Supreme Court in C.B.I. vs. Ashok Kumar Aggarwal , MANU/SC/1220/2013,relied on by Ld Additional Government Advocate, while deliberating the validity of sanction held as under:-

"7. The prosecution has to satisfy the court that at the time of sending the

matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority. This may also be evident from the sanction order, in case it is extremely comprehensive, as all the facts and circumstances of the case may be spelt out in the sanction order. However, in every individual case, the court has to find out whether there has been an application of mind on the part of the sanctioning authority concerned on the material placed before it. It is so necessary for the reason that there is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. Grant of sanction is not a mere formality. Therefore, the provisions in regard to the sanction must be observed with complete strictness keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

It is to be kept in mind that sanction lifts the bar for prosecution. Therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. Further, it is a weapon to discourage vexatious prosecution and is a safeguard for the innocent, though not a shield for the guilty.

Consideration of the material implies application of mind. Therefore, the order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that those facts were placed before the sanctioning authority and the authority had applied its mind on the same. If the sanction order on its face indicates that all relevant material i.e. FIR, disclosure statements, recovery memos, draft charge sheet and other materials on record were placed before the sanctioning authority and if it is further discernible from the recital of the sanction order that the sanctioning authority perused all the material, an inference may be drawn that the sanction had been granted in accordance with law. This becomes necessary in case the court is to examine the validity of the order of sanction inter-alia on the ground that the order suffers from the vice of total non-application of mind.

8. In view of the above, the legal propositions can be summarised as under:

(a) The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.

(b) The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.

(c) The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available

to the accused against whom the sanction is sought.

(d) The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.

(e) In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

13. Placing reliance on the aforesaid Judgment, learned counsel for the applicant submits that object of the provision regarding independent review by an autority appointed by the Central Government or State Government, is to prevent misuse of the stringent provisions of the Act 1967. Thus, the pvoisions of Sub Sections (1) and (2) of Section 45 of the 1967 are more relevant and important.

14. Further placing reliance upon a Judgment of the Apex Court rendered in case of ***Mansukhlal Vithaldas Chauhan Vs. State of Gujarat (1997) 7 SCC 622,*** he has referred paras 38 and 39 of the aforesaid Judgment. Paras 38 and 39 of the aforesaid Judgment are quoted as under:-

"38. From the notings of the Secretariat file, contained in Exhibit 70, as also the conflicting statement made by the Secretary and the Under Secretary, it is not possible to hold as to who actually granted the sanction. The Gujarat High Court has held that the Sanction was granted by the Deputy Secretary, Shri Lade (PW-8), ignoring the fact that the file was also placed before the Secretary and he had also put his signature thereon. The file had, admitted, been sent to the office of the Chief Minister from where it was received back on 30th January, 1985 and as such it is not understandable as to how sanction could be granted on 23rd January, 1985. This confusion also appears to be the result of the order passed by the High Court that the sanction must be granted within one month. Secretary being the head of the Department stated on oath that he had granted the sanction, particularly as the mandamus was directed to him and he had to comply with that direction Deputy Secretary, who actually issued the order of sanction, had signed it and, therefore, he owned the sanction and stated that he had sanctioned the prosecution. Both tried to exhibit that they had faithfully obeyed the mandamus issued by the High Court and attempted to save their skin, destroying, in the process, the legality and validity of the sanction which constituted the basis of appellant's prosecution with the consequence that whole proceedings stood void ab initio.

39. Normally when the sanction order is held to be bad, the case is remitted back to the authority for re-consideration of the matter and to pass a fresh order of sanction in accordance with law. But in the instant case, the incident is of 1983 and therefore, after a lapse of fourteen years, it will not, in our opinion, be fair just to direct that the proceedings may again be initiated from the stage of sanction so as to expose the appellant to another innings of litigation and keep him on trial for an indefinitely long period contrary to the mandate of Article 21 of the Constitution which, as a part of right to life,

philosophizes early and of criminal proceedings through a speedy trial."

15. Referring the aforesaid, he added that it is trite law that once it is found that sanction is not as per the law, the matter must be sent back to the authority for reconsideration of the matter and to pass fresh order but in the instant matter, contrary to the aforesaid proposition of law, even after passing of about 11 to 12 years, the order dated 3.8.2010 has been validated by way of further investigation, thereby filing supplementary charge sheet and a review order.

16. While concluding his argument, he contended that sanction for prosecution as envisaged in Sub Section (2) of Section 25 of the Act 1967 is materially different than the provision of sanction for prosecution provided under Section 19 of the Prevention of Corruption Act, 1947 (hereinafter referred to as 'the Act 1947'). He further added that looking into the stringent law, it appears that the intent of the legislature was very clear to specifically put the provisions that 'only after considering the report of such authority', the authorities would take decision with respect to sanction for prosecution and this provision is not given in 'the Act, 1947'. Thus, both the provisions are not similar and any ratio of Judgment, which was held, considering the provisions of Act 1947 would not be applicable in the present matter. Therefore, the order dated 3.8.2010 and 2.2.2022 including the entire proceeding of sessions trial aforementioned vitiate in the eyes of law and thus, the same are liable to be quashed.

17. Per contra, Sri Shiv Nath Tilahari, learned counsel appearing for the State has opposed the conention aforesaid with fullest vehemence and added that learned counsel for the applicants has tried to twist the actual fact and law and has interpreted the same in his own manner. He submits that provision of Section 45 of Act 1967 is very clear in its meaning and that mandates that the sanction for prosecution under Sub Section (1) of Section 45 shall be given within such time as may be prescribed considering the report of the authorities appointed by the Central or State Government who will have independently reviewed the evidences gathered during the course of investigation and then the recommendation is to be made to the Central Government or State Government as the case may be.

18. He further submits that the Investigating Agency has power to gather the evidence by further investigation and even prior permission by the trial court is not required. The Investigating Agency filed supplementary case diary including the letter dated 2.2.2022 and that was considered by the trial court as the same is permissible under the law. He further contended that vilidity of the sanction for prosecution can be considered during the trial and also submitted that there is material difference in between the 'invalid sanction' and 'absence of sanction'. He submits that it is settled law that absence of sanction can be looked into at the threshhold but as far as the validity of sanction is concerned that is the subject matter of the trial and so far as the present matter is concerned, admittedly, it is not a case of absence of sanction as evidently the prosecution sanction has been done and, therefore, it is not the stage where allegedly invalid sanction can be challenged.

19. In support of his submissions, he has placed reliance on a Judgment of the

Apex Court reported in ***(2020) 17 SCC 664, Central Bureau of Investigation and another Vs. Dhirendra Kumar Agrawal and another*** and has referred on paragraph 11 of the above said Judgment. Para 11 of the aforesaid Judgment is quoted as under:-

"11. Further the issue relating to validity of the sanction for prosecution could have been considered only during trial since essentially the conclusion reached by the High Court is with regard to the defective sanction since according to the High Court, the procedure of providing opportunity for explanation was not followed which will result in the sanction being defective. In that regard, the decision in the case of Dinesh Kumar Vs. Chairman, Airport Authority of India, (2012) 1 SCC 532 relied upon by the learned Additional Solicitor General would be relevant since it is held therein that there is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The absence of sanction no doubt can be agitated at the threshold but the invalidity of the sanction is to be raised during the trial. In the instant facts, admittedly there is a sanction though the accused seek to pick holes in the manner the sanction has been granted and to claim that the same is defective which is a matter to be considered in the trial."

20. Placing reliance on the aforesaid Judgment, he added that ratio of the Judgment aforesaid is very clear that validity of the sanction for prosecution could be considered during the course of trial and distinction has also been drawn in between 'absence of sanction' and 'invalidity of sanction' including non-application of mind. He further added that this is a case where the applicants have been charged for waging war against the Government of India and, thus, is of serious concern and, therefore, no liberal interpretation can be given so far as the procedure prescribed under the Act, 1967 is concerned.

21. He finally submits that law is very clear on this point and this case is not of 'absence of sanction' and if there is any invalidity or defect in 'the sanction for prosecution', the applicants have opportunity to raise it before the trial court at the time of trial, therefore, submission is that instant application is liable to be dismissed.

22. Having heard learned counsel for the parties and after perusal of the material placed on record, the conundrum is that whether the first sanction granted on 3.8.2010 and, later on, supplemented vide review order dated 2.2.2022, is a valid sanction of prosecution or not. At the very inception, when the sanction for prosecution was sought, the State Government, vide order dated 3.8.2010 granted sanction for prosecution with respect to the applicants. The matter proceeded and, thereafter, the Investigating Officer started further investigation and a supplementary case diary was submitted before the trial court appending therewith the copy of the order dated 2.2.2022 of the review authority and, thus, further question is that by way of deriving powers under Section 173 (8) of Cr.P.C., whether the further investigation can be done to fill up the gaps/lacunaes of the investigation.

23. It is borne out from the arguments advanced by the learned counsel for the applicants that on 3.8.2010, first sanction of prosecution was granted by the State. So far as the present matter is concerned, the provisions with respect to the sanction of

the prosecution contains in Section 45 (1) and (2) of the Act 1967 wherein the mandate of the provision is that at the time of grant of sanction of proseution, the authority granting such sanction, shall proceed 'only after considering the report' of an authority appointed by the Central Government or the State Government. The contention of the learned counsel for the applicants is that on 3.8.2010, there was no report of the authority appointed by the Central Government or the State Government before the sanctioning authority, as the review authority was appointed after the first sanction granted by the State Government on 3.8.2010 and further submission is that the provision of Section 45 (2) of the Act 1967 is not similar to the provisions of Section 19 of the Act 1947.

24. The crux of the contention of the State is that the sanction for prosecution has been granted and that too is in consonance with the provision of the Act 1967. Further since the matter was proceeded after framing of charges and, admittedly, there is an order of sanction for prosecution, thus, this cannot be said that there is absence of sanction and if there is any invalidity, which is being raised at this stage, the same can be looked into by the trial court.

25. When this Court examined this case on facts and law, it is decipherable that the Investigating Agency undoubtedly has power to proceed with further investigation and the prior approval for proceeding with such investigation is not required under the law. Of course, time and again, it has also been the view of the Hon'ble Apex Court, therefore, the supplementary case diary appending the order 2.2.2022, has rightly been submitted by the Investigating Officer before the trial court.

26. So far as the order dated 2.2.2022 passed by the review authority is concerned, the matter pertains to year 2010 and about 12 years have been passed. Further, it is settled that the grant of sanction is merely an administrative function and sanctioning authority is required to reach over satisfaction, at the first hand that acts and facts would constitute the offence and, now, after lapse of 12 years, it would not be just and fair to initiate proceeding of grant of sanction to put the applicants and other side for another innings of litigations and keep the trial pending indefinite long period.

27. It has been enuntiated that there is distinction between 'absence of sanction' and 'invalidity of sanction'. Absence of sanction can be raised and agitated at the very inception but the invalidity or illegality of the sanction is to be raised during the trial.

28. Admittedly, the sanction was granted on 3.8.2010 and, thus, prima facie it is not a case of absence of sanction but the applicants-accused persons have raised certain illegality and invalidity in grant of sanction for prosecution and those are three folds. Firstly, the Review authority was not in existence at the time of grant of sanction; secondly, there was no material before the sanctioning authority; and thirdly Section 173 (8) is not meant for filling the lacunaes. All the pleas are with respect to invalidity said to be creeping in the impugned order of sanction. As has been discussed in preceding paragraphs, the instant matter is not a case of absence of sanction and if there is any alleged invalidity prevailing in

the order of sanction, the same can be raised/assailed before the trial court.

29. In view of the aforesaid submissions and discussions, this Court does not find any merit in this application.

30. Consequently, the application is hereby **dismissed**.

31. However, the applicants-accused persons are at liberty to raise their grievance with respect to the invalidity of the sanction, if any, before the trial court concerned.

(2023) 4 ILRA 700
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.03.2023

BEFORE

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

Application U/S 482. No. 2556 of 2023

Nanhey Bhaiya @ Nanhan Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sanjay Singh Chauhan, Sri Alok Kumar Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law- Code of Criminal Procedure, 1973-Section 216-Addition of Section 304B I.P.C. against the applicant on the basis of an application moved by the first informant -Section 216 CrPC is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment-No party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge- Result-Impugned orders unsustainable and deserve to be quashed .
Application U/s 482 CrPC disposed off. (E-15)

List of Cases cited:

1. P. Kartikalakshmi Vs Sri Ganesh & anr. (2017) 3 SCC 347.

2. Hasanbhai Valibhai Qureshi Vs St. of Guj. & ors. (2004) 5 SCC 347.

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

1. Heard learned counsel for the applicants, Sri Alok Saran, learned A.G.A. for the State and perused the entire record.

2. In view of the order, which is proposed to be passed today, notice to opposite party No.2 is hereby dispensed with.

3. The instant application under Section 482 Cr.P.C. has been filed by the accused/ applicants praying inter alia following relief:-

"(i) To quash the impugned order dated 29.09.2022 passed in Case No. 2032/2015 arising out of Crime No.-144/1998 U/s- 498A/304B IPC & 3/4 D.P. Act P.S. Behta Gokul District Hardoi and the order dated 03.02.2023 by which revision petition of the petitioners has been rejected in Criminal Revision No. 209/2022 contained here with as Annexure No.2 & 3 to this affidavit."

4. Learned counsel for the applicants has submitted that the impugned order dated 29.09.2022, whereby the learned trial

court has held that the case under Section 304B I.P.C. is also made out against the present applicants, has been passed by the learned trial court in exercise of power vested in it by virtue of Section 216 Cr.P.C., which is evident from the impugned order dated 29.09.2022 itself. However, he submits that the same has been passed on an application moved either by the accused or the complainant/ first informant.

5. His next submission is that the impugned order dated 29.09.2022, in respect of addition of Section 304B I.P.C. against the present applicant on the basis of an application moved by the first informant of this case, is not maintainable. Therefore, the impugned order dated 29.09.2022 is patently illegal and against the law rendered by the Hon'ble Supreme Court in **P. Kartikalakshmi vs. Sri Ganesh and another** reported in **(2017) 3 SCC 347.**

6. His further submission is that the applicants have preferred a criminal revision bearing No.209 of 2022 against the impugned order dated 29.09.2022, which has been rejected by the learned revisional court without appreciating the aforesaid facts vide impugned order dated 03.02.2023, which is also an abuse of process of this Court. Therefore, the impugned orders dated 29.09.2022 and 03.02.2023 are liable to be quashed.

7. Per contra, learned A.G.A. for the State has vehemently opposed the prayer made by learned counsel for the applicants. However, he has been unable to dispute the aforesaid factual submissions advanced by the learned counsel for the applicants.

8. Having heard the learned counsel for the applicants, learned A.G.A. for the State and upon perusal of record, it transpires that the impugned order dated 29.09.2022 came to be passed on an application moved by the first informant, Sushil Kumar Singh, under Section 216 Cr.P.C. Thereafter, the applicants preferred a criminal revision bearing No.209 of 2022 against the impugned order dated 29.09.2022, which has also been rejected by the learned revisional court.

9. In **Hasanbhai Valibhai Qureshi vs. State of Gujarat and others** reported in **(2004) 5 SCC 347**, the Hon'ble Supreme Court, while dealing with scope of Section 216 Cr.P.C., in paragraph No.10 has held as under:-

"10. Therefore, if during trial the trial court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate."

10. Recently, the Hon'ble Supreme Court in **P. Kartikalakshmi's case (supra)** in paragraphs No.6, 7 and 8 has held as under:-

"6. Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent 1. Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was

an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.

7. We were taken through Sections 221 and 222 CrPC in this context. In the light of the facts involved in this case, we are only concerned with Section 216 CrPC. We, therefore, do not propose to examine the implications of the other provisions to the case on hand. We wish to confine ourselves to the invocation of Section 216 and rest with that. In the light of our conclusion that the power of invocation of Section 216 CrPC is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment, we make it clear that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 CrPC. If such a course to be adopted by the parties is allowed, then it will be well-nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardised.

8. In such circumstances, when the application preferred by the appellant itself before the trial court was not maintainable, it was not incumbent upon the trial court to pass an order under Section 216 CrPC. Therefore, there was no question of the said order being revisable under Section 397 CrPC. The whole proceeding, initiated at the instance of the appellant, was not maintainable. Inasmuch as the legal issue had to be necessarily set right, we are obliged to clarify the law as is available under Section 216 CrPC. To that extent, having clarified the legal position, we make it clear that the whole proceedings initiated at the instance of the appellant was thoroughly misconceived and vitiated in law and ought not to have been entertained by the trial court. As rightly pointed out by the learned Senior Counsel for Respondent 1, such a course adopted by the appellant and entertained by the court below has unnecessarily provided scope for protraction of the proceedings which ought not to have been allowed by the court below."

(emphasis supplied)

11. Having regard to aforesaid settled legal position, the impugned orders dated 29.09.2022 and 03.02.2023 are unsustainable as the same are abuse of process of this Court, which deserve to be quashed and the same are hereby quashed.

12. It is made clear that the learned trial court concerned shall be at liberty to pass appropriate order keeping in view the provisions contained in Section 216 Cr.P.C., on its own instance and also keeping in view the observations made

herein above after affording opportunity of hearing to all concerned parties.

13. With the aforesaid observations/ directions, the instant application under Section 482 Cr.P.C. stands **disposed of.**

(2023) 4 ILRA 703
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.03.2023

BEFORE

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

Application U/S 482. No. 2793 of 2023

Pankaj Yadav ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Ram Kinkar Upadhyay

Counsel for the Opposite Parties:
G.A.

Criminal Law- Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code-1860-Sections 376 -The Protection of Children from Sexual Offences Act, 2012-Sections 3 & 4-Offence of rape is not private in nature rather it has a serious adverse impact on society-No justification to quash the proceedings against the applicant on the basis of alleged compromise between the accused and the victim.

Application U/s 482 CrPC disposed off. (E-15)

List of Cases cited:

1. St. of Haryana Vs Bhajan Lal, 1992 Supp (1) SCC 335

2. Rathish Babu Unnikrishnan Vs St. (NCT of Delhi), 2022 SCC OnLine SC 513

3. Satish Kumar Jatav Vs St. of U.P., 2022 LiveLaw (SC) 488

4. Ramveer Upadhyay Vs St. of U.P., AIR 2022 SC 2044

5. Narinder Singh & ors. Vs St. of Punjab & anr. (2014) 6 SCC 466

6. Daxaben Vs St. of Guj. & ors. 2022 SCC OnLine SC 936

7. (Om Prakash Vs St. of U.P. & anr. - Application U/s 482 No.8514 of 2023)

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

1. Sri Jagendra, Advocate has put in appearance on behalf of opposite party No.2 by filing his *vakalatnama* in Court today, which is taken on record.

2. Counter affidavit filed today by the learned counsel for opposite party No.2 is also taken on record.

3. Heard Sri Ram Kinkar Upadhyay, learned counsel for the applicant, Sri Alok Saran, Advocate assisted by Sri Himanshu Suryavanshi, learned A.G.A. for the State, Sri Jagendra, learned counsel for opposite party No.2 and perused the entire record.

4. The instant application under Section 482 Cr.P.C. has bee filed by the accused/ applicant for quashing the entire criminal proceedings of Sessions Trial No.743 of 2019 (State vs. Pankaj) as well as charge sheet dated 12.11.2019 and the summoning order dated 06.12.2019 passed by the learned Additional District Judge-I/ Special Judge POCSO Act, Sultanpur arising out of Case Crime No.0447 of 2019, under Sections 363, 366, 376, 506 I.P.C. & Sections 3/4 POCSO Act, Police Station Jaisinghpur, District Sultnapur, pending in

the court of learned Special Judge POCSO Act/ Additional Sessions Judge, Court No.1, Sultanpur.

5. Learned counsel for the applicant has submitted that, in fact, a false first information report came to be lodged against the accused/ applicant by the first informant, who is the father of the victim. The accused/ applicant is innocent who has been falsely implicated in this case.

6. His further submission is that the victim, in her statement recorded under Section 161 Cr.P.C., has not supported the prosecution case. However, in her statement recorded under Section 164 Cr.P.C., the victim levelled the allegation of rape upon the present accused/ appellant also.

7. His next submission is that, in fact, presently, the accused/ applicant and the victim have married and are living happily together as husband and wife. Therefore, the impugned criminal proceeding deserves to be quashed.

8. His further submission is that having regard to the fact that the accused/ applicant and the victim are living together as husband and wife, therefore, no useful purpose would be served by keeping the impugned criminal proceeding pending against the accused/ applicant.

9. Per contra, though, the learned counsel for opposite party No.2 has not opposed the prayer, however, learned A.G.A. for the State has vehemently opposed the prayer by submitting that Protection of Children from Sexual Offences Act, 2012 has been enacted by the Legislature that it was formulated to effectively address the heinous crimes of sexual abuse and sexual exploitation of children. This act was introduced to provide for the protection of children from the offences of sexual assault, sexual harassment, etc. This act also provides for safeguarding the interests of the child at every stage of the judicial process by incorporating child-friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through designated Special Courts.

10. His further submission is that the alleged marriage between the applicant and the victim is not legal in the eye of law insofar as the annexure.4 is nothing but an agreement to marriage, which has no legal sanctity.

11. Learned A.G.A. for the State has also submitted that the victim was a child on the date of occurrence. Therefore, no compromise between such victim and the accused is permissible in law. Therefore, the present application is misconceived, which liable to be dismissed.

12. In **State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335** the Hon'ble Supreme Court in paragraph no.102 has held as under:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to

secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

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

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

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

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

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

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

13. The Hon'ble Supreme Court in the case of **Rathish Babu Unnikrishnan v. State (NCT of Delhi), 2022 SCC OnLine SC 513** in para nos.16, 17 and 18 has held as under:-

"16. The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

17. The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper

forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.

18. Situated thus, to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the trial court will not in our opinion be judicious. Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited."

14. It is no doubt true that the power of quashing of criminal proceedings should be exercised very sparingly and with circumspection and that too in rarest of the rare cases and it was not justified for the Court in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the inherent powers do not confer any arbitrary jurisdiction on the Court to act according to its whims and fancies.

15. Hon'ble Supreme Court in the case of **Satish Kumar Jatav vs. State of U.P., 2022 LiveLaw (SC) 488** has held that the ground that "no useful purpose will be served by prolonging the proceedings of the case" cannot be a good ground and/or a ground at all to quash the criminal proceedings when a clear case was made out for the offence alleged. Likewise i**n Ramveer Upadhyay vs. State of U.P., AIR 2022 SC 2044** the Hon'ble Supreme Court held that the jurisdiction under Section 482 Cr.P.C. is not to be exercised for asking. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint/F.I.R. except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. Entertaining a petition under Section 482 Cr.P.C. at an interlocutory stage itself might ultimately result in miscarriage of justice.

16. Adverting to the facts of the case at hand, this Court is able to notice that the Hon'ble Supreme Court in **Narinder Singh and others vs. State of Punjab and another reported in (2014) 6 SCC 466**, has specifically held that the matter under Section 376 I.P.C. is also such an offence, which, though committed in respect of a particular victim, cannot be termed to be a private dispute between the parties. It has serious adverse societal effect. Therefore, any proceeding on the basis of alleged compromise of the accused viz-a-viz the victim cannot be quashed. This principal of law came to be reiterated recently in the judgment of the Hon'ble Supreme Court in **Daxaben vs. State of Gujarat and others** reported in **2022 SCC OnLine SC 936** wherein the Hon'ble Supreme Court in Paragraphs No.34, 38, 47 and 49 has held as under:-

"34. In Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1, this Court observed:?

"46. The court must ensure that criminal prosecution is not used as an

instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 CrPC though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained."

38. ***However, before exercising its power under Section 482 of the Cr.P.C. to quash an FIR, criminal complaint and/or criminal proceedings, the High Court, as observed above, has to be circumspect and have due regard to the nature and gravity of the offence. Heinous or serious crimes, which are not private in nature and have a serious impact on society cannot be quashed on the basis of a compromise between the offender and the complainant and/or the victim. Crimes like murder, rape, burglary, dacoity and even abetment to commit suicide are neither private nor civil in nature. Such crimes are against the society. In no circumstances can prosecution be quashed on compromise, when the offence is serious and grave and falls within the ambit of crime against society.***

47. In State of Madhya Pradesh v. Laxmi Narayan, (2019) 5 SCC 688, a three-Judge Bench discussed the earlier judgments of this Court and laid down the following principles:?

"15. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

15.1. That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3. Similarly, such power is not to be exercised for the offences under the special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4. Offences under Section 307 IPC and the Arms Act, etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act, etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their

entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge-sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paras 29.6 and 29.7 of the decision of this Court in Narinder Singh [(2014) 6 SCC 466 : (2014) 3 SCC (Cri) 54] should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5. While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of noncompoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise, etc."

*(e*mphasis supplied)

49. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegation in the complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence."

17. Recently, a coordinate Bench of this Court in **Application U/s 482 No.8514 of 2023 titled as Om Prakash vs. State of U.P. and another,** has also held that the criminal proceedings under Section 376 I.P.C. and POCSO Act cannot be quashed on the basis of compromise entered into between the accused and the victim.

18. In view of the aforesaid settled law, this Court has keenly considered the rival submissions and has perused the entire record of this case. The submissions made by the applicant's learned counsel undoubtedly call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. The offence of rape is not an offence which is private in nature; rather it has a serious adverse impact on society. Therefore, this Court does not find any justification to quash the proceedings against the applicant arising out of Case Crime No.0447 of 2019, under Sections 363, 366, 376, 506 I.P.C. & Sections 3/4

POCSO Act, Police Station Jaisinghpur, District Sultanpur on the basis of alleged compromise between the accused/ applicant and the victim as the case does not fall in any of the categories recognized by the Hon'ble Supreme Court in **Bhajan Lal's case (supra), Rathish Babu Unnikrishnan's case (supra), Satish Kumar Jatav's case (supra), Ramveer Upadhyay's case (supra), Narinder Singh's case (supra)** and **Daxaben's case (supra),** which may justify their quashing.

19. However, it is needless to mention that, in case, the present accused/ applicant seeks anticipatory bail/ bail before the learned court below concerned, the same shall be disposed of by the learned court below concerned with utmost expedition having regard to the facts of this case and in accordance with settled law.

20. With the aforesaid observations/ directions, the instant application under Section 482 Cr.P.C. stands **disposed of.**

(2023) 4 ILRA 709
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.04.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482. No. 7721 of 2023

Smt. Hasina Khatoon ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Akshaya Kumar

Counsel for the Opposite Parties:
G.A.

Criminal Law- The Protection of Women from Domestic Violence Act-2005-Sections 12, 23, 31 & 32 - Code of Criminal Procedure, 1973-Section 300-Applicant along with her handicapped son was thrown out of her domestic unit - Proceedings under Section- 12 of the D.V Act initiated- Interim maintenance of Rs.8,000/- per month awarded-Opp. Party no.2 declined to adhere to the directions of executing court for the recovery of Rs.2.64 lacs and consequently was sent behind the bars for 30 days-Subsequent application u/s 31 moved for issuance of "fresh recovery warrants" rejected by the trail court taking recourse of Sec 300 CrPC-Reasoning adopted by the court below is palpably myopic and puerile-Impugned order is *per se* absurd and total non-application of correct law- Exercise of power u/s 31 of the Domestic Violence Act is a mode of enforcement of the alleged protection orders u/s 18 of the Act and it is distinguished from the mode of satisfaction and the liability which can only be made by means of the an actual payment -Result-Impugned order quashed-(Para 3 to 17)

Application U/s 482 CrPC disposed off. (E-15)

List of Cases cited:

1. Smt. Kuldip Kaur Vs Surender Singh & anr., 1989 SCC (1) 405

2. Shantha @ Ushadevi & anr. Vs B.G. Shivananjappa, (2005) 4 SCC 468

3. Poongodi & anr. Vs Thangavel, (2013) 10 SCC 618

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

(1). Heard Shri Akshay Kumar, learned counsel for applicant and learned A.G.A. for the State of UP. Perused the record.

(2). Extraordinary powers of this Court is being invoked by the applicant u/s

482 Cr.P.C. to quash order dated 23.01.2023 passed by the Civil Judge (Junior Division)/F.T.C. (Crime against Women), Moradabad in Execution Case No.697 of 2022 (Smt. Hasina Khatoon vs. Ahmad @ Ramzani) u/s 31 of the Domestic Violence Act, 2005, arising out of Case No.10095 of 2017 (Hasina Khatoon vs. Ahmad Ali) u/s 12 of the Domestic Violence Act by which the court below has rejected the claim of applicant for maintenance amount of Rs.2.64 lacs on the ground that the opposite party no.2 has undergone an imprisonment of one month, and thus, the balance amount cannot be claimed from the opposite party no.2.

(3). Before coming to the actual legal aspect of the issue, it is imperative to spell out the bare skeleton facts of the case to appreciate the controversy in its correct perspective.

(a). The applicant Hasina Khatoon got married with opposite party no.2 on 23.5.1990 as per the Muslim rites, rituals and customs. This couple was blessed with one son, unfortunately he was handicapped. It seems that there was deep rooted discord between the husband and wife on account of various factors, consequentially the opposite party no.2 kicked her out along with her handicapped son on 21.7.1995. Thus, a usual proceeding u/s 498A IPC and other allied sections was initiated against the opposite party no.2.

(b) After some time, on account of intervention of certain well-meaning persons of the society and respectable members and with the help and aid of their relatives, better sense prevailed upon the opposite party no.2 thereafter a compromise deed was executed inter-se. As a consequence thereof, the applicant started living with opposite party no.2. After sometime, the applicant was again thrown out of with her handicapped son from her domestic unit on 20.5.2017 and since then she is residing in a rented accommodation along with her handicapped son in most pathetic condition, having no fixed source of income.

(c). It is further contended by learned counsel for the applicant, that opposite party no.2 has sufficient source of income and by a rough estimate he is earning above Rs.50,000/- per month from various sources.

(d) The applicant was not having any means of earning, wholly dependent upon her husband, who is still willfully ignoring her and her handicapped son, thus, she was running from pillar to post. Under compelling circumstances, the applicant filed a proceeding under Section- 12 of the Domestic Violence Act having Case No.20095 of 2017 (Hasina Khatoon vs. Ahmad Ali) in the court of Additional Chief Judicial Magistrate-IV, Moradabad.

(e) As the applicant was in dire need of money so as to make both the ends meet for herself and her handicapped son, and therefore, she moved yet another application under Section- 23 of the Domestic Violence Act, seeking an ex-parte interim order keeping in view the exigency of the circumstances.

(f) After service of notice upon opposite party no.2, the opposite party no.2 has filed his objection denying the allegations made in the claim.

(g) Having thrashed the material on record, the court below vide order dated 19.7.2019 allowed applicant's application

for interim maintenance and directed opposite party no.2 to pay Rs.4,000/- to the applicant and Rs.4,000/- to his handicapped son, totalling Rs.8,000/- per month, payable on 10th day of every month.

(h) Aggrieved by the aforesaid interim order dated 19.7.2019, opposite party no.2 preferred an appeal having Criminal Appeal No.41 of 2019 (Ahmad Ali @ Ramzani vs. State of U.P. and others), but the Additional Session Judge, Moradabad vide its order dated 01.4.2022 have rejected the appeal preferred by opposite party no.2.

(i) Opposite party no.2, aggrieved by order dated 01.04.2022, again came to this Court by filing Crl. Misc. Application u/s 482 No.11881 of 2022 (Ahmad Ali @ Ramzani vs. State of U.P. and two others), but sensing the adverse observation of the Court, learned counsel for opposite party no.2 expressed his desire to enter into a compromise with the applicant and on this ground, without adverting anything on the merit of the case, aforesaid 482 application was dismissed on 02.11.2022.

(j) Opposite party no.2 have exploited all the avenues available to him and resorted to gimmicks and chicanery so that he had not to pay single penny to the applicant, under the circumstances left with no other option, applicant Hasina Khatoon has moved an execution case for compliance of order dated 19.7.2019 passed by the court below and has prayed for issuance of recovery warrant against opposite party no.2 for recovery of totalling amount of Rs.2.64 lacs for the period of July, 2019 to April, 2022 after computing at the rate of Rs.8,000/- per month.

(k) The court below on 29.9.2022 was pleased to pass a detailed order in Execution Case No.697 of 2022, whereby the recovery warrants were issued against opposite party no.2 Ahmad Ali @ Ramzani. Pursuant to aforesaid recovery warrant, when opposite party no.2 has failed to comply with the order, he was arrested by the police and produced before the court below on 30.10.2022 in police custody and was sent to district jail Moradabad.

(l) It was pleaded by learned counsel for the applicant that since opposite party no.2 declined to adhere to the directions of executing court and consequently he was sent behind the bars for 30 days vide order dated 21.11.2022. Order dated 21.11.2022 is being quoted hereunder :

"21.11.2022

आज विपक्षी अहमद अली उर्फ रमजानी पुत्र स्व० जुम्मा निवासी शाहपुर, मुबारकपुर उर्फ खोकरपुर थाना छजलैट जिला मुरादाबाद, को न्यायालय द्वारा जारी किए गए रिकवरी गिरफ्तारी वारंट मूल्य 2,64,000/- रूपये की वसूली हेतु दिनांक 30.10.2022 को रिमाण्ड मजिस्ट्रेट द्वारा जेल भेजा गया था। विपक्षी आज जेल से न्यायालय में उपस्थित आया। विपक्षी से न्यायालय द्वारा पूछा गया कि क्या वह उपरोक्त वर्णित धनराशि जमा करने के लिए तैयार है। विपक्षी द्वारा वर्णित संपूर्ण धनराशि जमा करने से इंकार किया गया। रिकवरी के सम्बन्ध में विपक्षी को 30 दिन की न्यायिक हिरासत में रखा जाना था परन्तु विपक्षी का धारा-309 सी०आर०पी०सी० का वारंट बन गया था। अतः धारा-309 सी०आर०पी०सी० का वारंट निरस्त किया जाता है। विपक्षी को 30 दिन की न्यायिक हिरासत में रखने हेतु आदेशित किया जाता है। अतः विपक्षी को दिनांक 30.11.2022 तक या उपरोक्त वर्णित धनराशि जमा करने तक सिविल कारागार में भेजा जाता है। वाद दीवानी प्रकृति का है।"

(m) Thus, from the aforesaid order it is clear that the court has directed to send the opposite party no.2 to a civil prison for 30 days i.e. up to 30.11.2021 or

till such time he deposits the outstanding maintenance amount. Thus, the underline idea to send opposite party no.2 in jail is to exert pressure upon him so that he may cough up the outstanding maintenance amount. In fact, this was a mode of enforcement of the order and not a mode of satisfaction. The court was insisting that the opposite party no.2 must pay the outstanding maintenance amount.

(n) From the aforesaid, it is culled out that the stubborn opposite party no.2 did not budge a single inch to pay the outstanding maintenance amount, rather he preferred to go behind the bars.

(o) After expiry of 30 days, on 30.12.2022 opposite party no.2 was released from jail, even though, he has not bothered to pay the outstanding maintenance amount of Rs.2.64 lacs to the applicant. Under compelling circumstances, the applicant moved yet another application on 17.1.2023 before the court below for issuance of "fresh recovery warrants" against opposite party no.2. This application, contended by learned counsel for the applicant, was surprisingly partly rejected by the court concerned vide order dated 23.01.2023 and issued recovery warrant for the period of October, 2022 to January, 2023 only for a sum of Rs.32,000/-. Relevant portion of the impugned order dated 23.01.2023, is being reproduced herein below :-

"सुना एवं पत्रावली का अवलोकन किया।

पत्रावली के अवलोकन से स्पष्ट है कि उक्त मुकदमें में न्यायालय द्वारा दिनांक 29.09.2022 को विपक्षी अहमद अली के विरूद्ध रिकवरी वारन्ट जारी किया था। दिनांक 30.10.2022 को वर्णित धनराशि जमा न करने के कारण विपक्षी को 30 दिन की न्यायिक हिरासत में भेजा गया था, जिसके सम्बन्ध में अभियुक्त एक माह कारावास में रह चुका है। धारा- 300 दं०प्र०सं० 1973 में उल्लिखित है कि यदि किसी अपराध में विपक्षी को दोषसिद्ध किया जा चुका है तो उसी अपराध के लिये दोबारा दोषसिद्ध घोषित नहीं किया जा सकता। मामले के तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुए विपक्षी के विरूद्ध देय धनराशि माह अक्टूबर 2022 से माह जनवरी 2023 तक के लिये रिकवरी वारन्ट जारी किया जाना न्यायोचित प्रतीत होता है। अतः ऐसी स्थिति में इस स्तर पर आन्तरिम भरण पोषण धनराशि 2,64,000/- की वसूली हेतु प्रार्थना पत्र निरस्त किया जाता है तथा देय धनराशि माह अक्टूबर 2022 से माह जनवरी 2023 तक 32.000/- रू० की वसूली हेतु रिकवरी वारंट जारी किया जाता है। विपक्षी के विरूद्ध रिकवरी वारंट जारी हो। "

(4). I have gone through the order impugned dated 23.01.2023 which indicates that the reasoning adopted by the court of F.T.C. (Crime Against Women), Moradabad is palpably myopic and puerile, inasmuch as, that the concerned court while passing impugned order has taken recourse of Section 300 of Cr.P.C., which speaks about the doctrine of "autrefois convict and autrefois acquit". The essentials of the applicability of aforesaid Section 300 of Cr.P.C. are :

(i) That he (the accused person) had previously been tried by a court for an offence.

(ii) That such Court was competent to try that offence.

(iii) That he was either convicted or acquitted of that offence, at the former trial.

(iv) That such conviction or acquittal still remains in force when a subsequent proceeding has been brought against him.

(v) That at the subsequent proceeding he is being tried again-(a) for

the same offence; or (b) on the same facts for any other offence for which a different charge might have been made under s. 221(1)-(2).

(5). Now comparing aforementioned essentials with the reasoning given in the impugned order, indicates that the earlier part of the order for sending the opposite party no.2 in jail is not for any offence nor he was convicted for any offence. Since he was a defaulter in paying the outstanding maintenance amount, that is why, he has to face civil prison so that he may pay the maintenance amount, and therefore, the reasoning adopted by the court concerned while passing impugned order is per se absurd and total non-application of correct law.

(6). Now coming to yet another aspect of the issue i.e. the application for execution under Section-31 of the Protection of Women from Domestic Violence Act, 2005 (Act No.43 of 2005). Before delving into this legal point, it is imperative to have a fleeting glance over the object of "The Protection of Women from Domestic Violence Act, 2005". The OBJECT speaks that aforesaid Bill seeks to provide the following objects :

"(i). It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, it does not enable any female relative of the husband or the make partner to file a complaint against the wife or the female partner.

(ii) It defines the expression "domestic violence" to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii). It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv). It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

(v). It provides for appointment of Protection Officers and registration of non-governmental organisations as service providers for providing assistance to the aggrieved person with respect to her

medical examination, obtaining legal aid, safe shelter, etc."

(7). Since the aforesaid application has been moved under Section-31 of the Protection of Women from Domestic Violence Act, as such, it is imperative to quote Sections 31 and 32 of this Act, which reads thus :

"31. Penalty for breach of protection order by respondent.--

(1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(2) The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who had passed the order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under sub-section (1), the Magistrates may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

32. Cognizance and proof.--

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offence under sub-section (1) of section 31 shall be cognizable and non-bailable.

(2) Upon the sole testimony of the aggrieved person, the court may conclude that an offence under sub-section (1) of section 31 has been committed by the accused."

(8). The provisions of aforesaid sections speak about the penalty for breach of protection by the respondents. Thus, it is evident that the breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(9). On this score, it has been submitted that vide order dated 29.9.2022 while issuing the recovery warrant against opposite party no.2, the police on 30.10.2022 have arrested the opposite party no.2 and sent him to District Jail, Moradabad by passing an order mentioned above, whereby it has been mentioned that the applicant was directed to remain in jail up to 30.11.2022 or till the deposit of outstanding amount of Rs.2.64 lacs. It seems that the opposite party no.2 has preferred earlier one and served out his time up to 30.11.2022 (say about one month) in jail to allegedly absolve him from the liability of paying outstanding maintenance amount.

(10). In this regard it has been contended by learned counsel for the applicant that this was not an object of the Protection of Women from Domestic Violence Act. This in fact is social legislation in tenting the wives and the children and levying the responsibility upon the shoulders of husbands to maintain their wives and children. Serving out in jail

for month, would not absolve the opposite party no.2 from the liability of maintaining his wife and children. Sending a person into jail is a mode of deterrence so that he may clear off the outstanding maintenance amount and keep on paying regularly so that his wife and children may not die in a destitute condition. This is the precise underline idea which has been expatiated upon by the Hon'ble Apex Court in the case of ***Smt. Kuldip Kaur vs. Surender Singh and another, 1989 SCC (1) 405.*** The ratio laid down in this case may be usefully recalled and applied in the present case. Exercise of power under Section-31 of the Domestic Violence Act is a mode of enforcement of the alleged protection orders under Section-18 of the Act and it is distinguished from the mode of satisfaction and the liability which can only be made by means of the an actual payment. Relevant portion of the order in Smt. Kuldip Kaur *(supra)* is being quoted herein below :

"A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is a `mode of enforcement'. It is not a `mode of satisfaction' of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance 'without sufficient cause' to comply with the order. It would indeed be strange to hold that a person who `without reasonable cause' refuses to comply with the order of the Court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail Sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability. The section does not say so. The Parliament in its wisdom has not said so commence does not support such a construction. From where does the Court draw inspiration for persuading itself that the liability arising under the order for maintenance would stand discharged upon an effort being made to recover it? The order for monthly allowance can be discharged only upon the monthly allowance being recovered....."

(11). In yet another case of ***Shantha @ Ushadevi & Anr vs. B.G. Shivananjappa, (2005) 4 SCC 468***, whereby it has been held that liability to pay the maintenance amount u/s 125 Cr.P.C. or in the instant enactment is in nature of continuing liability. The nature of right to receive the maintenance and the concomitant liability to pay goes hand in hand and it cannot be substituted by any civil imprisonment.

(12). In the case of ***Poongodi & Anr vs. Thangavel, (2013) 10 SCC 618*** it was held by the Hon'ble Apex Court that the proviso of Section 125(3) Cr.P.C. signifies that it is a mode of enforcement i.e. sending a defaulter to a civil prison and does not create any bar or affects the actual right of receiving maintenance amount from the said defaulter. It lays down the procedure for recovery of maintenance from a defaulter and compel him to clear off the dues. Sending a defaulter to jail is not going to serve the object of Enactment. It would not going to absolve the defaulter from liability accrued upon him by way of his status as husband.

(13). Thus, taking into account the help from the aforesaid decisions of the Hon'ble Apex Court, this Court is of the considered opinion that the order impugned dated 23.01.2023 can't be sustained in the eyes of law and the F.T.C. Court while passing the impugned order has grossly erred by re-issuing the recovery warrant for the revised period i.e. from October, 2022 to January, 2023. A defaulter has to be dealt with an iron hand as per the provisions of Section 31 that any violation of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(14). This offence being non-bailable and cognizable, therefore, the court ought to have penalized the alleged defaulter for imposing the maximum punishment according to the guilt, where the opposite party no.2 has got remarried with some other lady and enjoying the life, leaving behind the applicant and her handicapped son on road. This is an unpardonable offence and a sin whereby the extra-ordinary punishment has to be levied mercilessly. The Magistrate ought to have proceeded against opposite party no.2 under Section -31 of the Protection of Women from Domestic Violence Act and even if fails to recover the amount, he can put the immovable property to auction to recover the entire outstanding maintenance amount.

(15). Under these circumstances, I have no hesitation to say that the impugned order suffers from the vice of law mentioned above, and therefore, impugned order dated 23.01.2023 passed by the Civil Judge (J.D./F.T.C. (Crime against Women), Moradabad is hereby quashed, with the following direction :-

(i) The court below concerned will issue a fresh notice to the opposite party no.2 to the effect that he shall clear off the entire outstanding maintenance amount by 15.5.2023 pursuant to order dated 19.7.2019 i.e. from July, 2019 up to 30th April, 2023 @ Rs.4,000+4,000=Rs.8000/- per month by way of interim maintenance.

(ii) If the opposite party no.2 fails to deposit the entire outstanding amount of maintenance in this period, then the court concerned shall proceed against opposite party no.2 u/s 31 of the Protection of Women from Domestic Violence Act for penalizing him for imprisonment of one year and a fine of Rs.20,000/- or both.

(iii) Simultaneously, in case of failure to deposit the entire outstanding amount within time prescribed, the court concerned would attach the entire movable and immovable property belonging to the

opposite party no.2 and the said property shall put to auction in order to recover the outstanding maintenance amount to be paid to the applicant.

(iv) Since the court concerned has only fixed the interim maintenance, the court concerned is expected to gear up the matter and decide the Case No.10095 of 2017 (Hasina Khtoon vs. Ahmad Ali) u/s 12 of Domestic Violence Act on priority basis and while calculating the final figure of maintenance amount, the court concerned shall adjust the interim maintenance amount given by the opposite party no.2 and shall be paid to the applicant.

16. The aforesaid directions must be adhered strictly within the time specified above and no laxity would be tolerated in compliance of the above directions.

17. With the above observations, this application u/s 482 Cr.P.C. is disposed off.

(2023) 4 ILRA 717
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.02.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No. 9701 of 2022

Uday Pratap Singh ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Vinay Misra, Sri Anurag Shukla, Sri Birendra Pratap Singh

Counsel for the Opposite Party:
G.A., Sri Pankaj Kumar Singh

Criminal Law - Code of Criminal Procedure, 1973 - Section 482-Identical grievance raised in another Application u/s 482 Cr.P.C.-claim the C.D. & pen drive not provided-as send to the laboratory for examination-if found not tampered and if prosecution will rely upon then question of providing a copy will arise-though same prayer was made in the other Application and was granted-no changed circumstances.

Application dismissed. (E-9)

List of Cases cited:

1. OPTO Circuit India Ltd. Vs Axis Bank & ors., (2021)6 SCC, 701

2. Anita Kushwaha Vs Pushap Sudan, (2016) 8 SCC 509

3. U.O.I. Vs Prafulla Kumar Samal & anr., 1979(3) SCC4

4. Superintendent and Remembrance of Legal Affairs, West Bengal Vs Mohan Singh & ors., (1975)3 Supreme Court Cases, 706

5. Kanchan Kumar Vs St. of Bihar, (2022)9 SCC 577

6. Willie (William)Slaney Vs The St. of M. P., AIR 1956 SC 116

7. P.Gopalkrishnan @ Dileep Vs St. of Kerala & anr. ,Criminal Appeal (SC) No. 1794 of 2019

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

1. Heard Sri Anurag Shukla,Advocate and Sri Birendra Pratap Singh, learned counsel for the applicant, Sri Pankaj Kumar Singh, learned counsel for the opposite party no. 2 and Sri Anirudh Kumar Singh, learned A.G.A.-I for the State.

2. By means of the instant application, the applicant-petitioner has prayed that the learned Additional Sessions Judge/F.T.C.-

I,Sultanpur may be directed to proceed with the trial of the Sessions Trial No. 573 of 2022 (State Vs. Vijay Pratap Singh & Others), arising out of Case Crime No. 0257 of 2021, U/s 302,120-B I.P.C., Police Station-Munshiganj, District-Amethi, while following each and every mandatory and obligatory steps of the procedure prescribed in Code of Criminal Procedure for ensuring the very fair and transparent justice.

3. The factual matrix of the case is that an F.I.R. was lodged against the present applicant and his brother namely Vijay Pratap Singh at Police Station-Munshiganj, District-Amethi on 18-10-2021 and thereafter, the investigation conducted and Chargesheet was filed before the learned Trial Court on 16-12-2021 under sections 302 & 120-B of I.P.C. against the applicant-petitioner and the other co-accused persons. After filing of the Chargesheet, the concerned Magistrate took cognizance of the offences on 22-04-2022 and committed the matter before the learned Sessions Judge, Sultanpur.

4. The electronic evidences i.e. compact device and Pen Drive was allegedly not given to the present applicant and the other co-accused persons, which came into the knowledge of the applicant after perusal of the case diary. In the compact device and pen drive, the statement of the deceased is said to be copied from the mobile of the complainant, which as per the applicant, is an important document and that should have been given to the applicant, but, once an application was moved under section 207 of Cr.P.C. before the learned court below on 14-07-2022 for providing the aforesaid, prior to framing of the charges, the same was not given to the applicant and thus, the contention is that the trial court has violated the mandate of the provisions of section 207 of Cr.PC. and the trial court prior to framing of charges, did not apply its judicial mind on discharge of the applicant, which is a valuable right.

5. Learned counsel appearing for the applicant contends that even after an application moved before the court below on 14-07-2022, under sections 207/228 of Cr.P.C., the electronic devices i.e. the Compact Disc. as well as the Pen Drive was not provided to the applicant, though from perusal of the case diary, it reveals that the compact device and pen drive has been submitted with the case diary by the Investigating Officer.

6. Adding his arguments, he submits that since the compact device and pen drive is a part of the case diary and certainly, the prosecution shall rely on the same during the course of the trial and therefore, those are the important documents from the side of the prosecution, therefore, the copy of the same should have been provided by the trial court while following the proceedings under Section 207 of Cr.P.C. He further submits that vide order dated 20-07-2022, the application of the applicant dated 14-07-2022 has been rejected and a finding has been recorded that the copy of the Compact device and pen drive has already been provided to the applicant and thereafter, the matter was committed to the Sessions Court. He submits that in fact this is a perverse finding as uptil date the copy of the pen drive and compact disc. has not been given to the present applicant and there is no proof that the copy of the aforesaid documents was ever given to the applicant, thus, the order dated 20-07-2022 is perverse and vitiates in the eyes of law.

7. He further contended that apart from the aforesaid, the applicant has also

assailed the order dated 20-07-2022 as well as the further criminal proceedings of Sessions Case No. 573 of 2022 on the premise that the learned trial court prior to framing of the charges did not apply its judicial mind with respect to the mandate of the provisions of section 227 of Cr.P.C., i.e discharge of the accused. He next added that the discharge is the stage after which the trial starts and thus, it is valuable right of an accused and this provision also discloses that for application of mind on the discharge of an accused, the record of the case and the documents submitted therewith including the submissions of the accused and the prosecution be considered by the trial court and if it was found that it is not a case for discharge of the accused, the court will proceed for framing of charges. He submits that in the present matter, the charges were framed without application of judicial mind over the discharge of the accused,which is apparent on the record itself.

8. In support of his contentions, he has placed reliance on a Judgment ***reported in (2021)6 SCC, 701, OPTO Circuit India Limited Vs Axis Bank & Ors*** and has referred paragraph no. 15 of the aforesaid Judgment, which is quoted herein under :-

"15. This Court has time and again emphasised that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and in no other manner. Among others, in a matter relating to the presentation of an Election Petition, as per the procedure prescribed under the Patna High Court Rules, this Court had an occasion to consider the Rules to find out as to what would be a valid presentation of an Election Petition in the case of Chandra Kishor Jha Vs. Mahavir Prasad and Ors. (1999) 8 SCC 266 and in the course of consideration observed as hereunder:

"It is a well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner".

Therefore, if the salutary principle is kept in perspective, in the instant case, though the Authorised Officer is vested with sufficient power; such power is circumscribed by a procedure laid down under the statute. As such the power is to be exercised in that manner alone, failing which it would fall foul of the requirement of complying due process under law. We have found fault with the Authorised Officer and declared the action bad only in so far as not following the legal requirement before and after freezing the account. This shall not be construed as an opinion expressed on the merit of the allegation or any other aspect relating to the matter and the action initiated against the appellant and its Directors which is a matter to be taken note in appropriate proceedings if at all any issue is raised by the aggrieved party."

9. Referring the aforesaid, he submits that the Hon'ble Apex Court in the abovesaid case held that if the statute provides for a thing to be done in a particular manner, then, it has to be done in the manner prescribed and not otherwise. He added that Section 227 of the Code of Criminal Procedure envisages with respect to discharge and the opening sentence of the aforesaid provision says that 'upon consideration of the record of the case and documents and submissions' the court comes to the conclusion that if there are no sufficient grounds, it shall discharge the

accused and ***'shall record the reasons for so doing'.*** He added that the intent of the legislature is very clear that the trial court has to apply its mind on discharge, considering the records and submissions and therefore, the trail court has to proceed accordingly, otherwise, the same would be in sheer violation of law propounded by the Apex Court.

10. He has also placed reliance on the Judgment reported in ***(2016) 8 SCC 509, Anita Kushwaha Vs Pushap Sudan*** and has referred paragraphs no. 29 & 31 of the Judgment abovesaid. Paragraph nos. 29 & 31 are extracted hereinunder :-

"29. To sum up : Access to justice is and has been recognised as a part and parcel of right to life in India and in all civilized societies around the globe. The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. The Magna Carta, the Universal Declaration of Rights, the International Covenant on Civil and Political Rights, 1966, the ancient Roman Jurisprudential maxim of 'Ubi Jus Ibi Remedium', the development of fundamental principles of common law by judicial pronouncements of the Courts over centuries past have all contributed to the acceptance of access to justice as a basic and inalienable human right which all civilized societies and systems recognise and enforce.

31. Given the fact that pronouncements mentioned above have interpreted and understood the word "life" appearing in Article 21of the Constitution on a broad spectrum of rights considered incidental and/or integral to the right to life, there is no real reason why access to justice should be considered to be falling outside the class and category of the said rights, which already stands recognised as being a part and parcel of theArticle 21 of the Constitution of India. If "life" implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or other basis for holding that denial of "access to justice" will not affect thequality of human life so as to take access to justice out of the purview of right to life guaranteed underArticle 21. We have, therefore, no hesitation in holding that access to justice is indeed a facet of right to life guaranteed underArticle 21 of the Constitution. We need only add that access to justice may as well be the facet of the right guaranteed under Article 21of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. We say so because equality before law and equal protection of laws is not limited in its application to the realm of executive action that enforces the law. It is as much available in relation to proceedings before Courts and tribunal and adjudicatory fora where law is applied and justice administered. The Citizen's inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism or the inadequacy of such mechanism, needless to say, is bound to prevent those looking for enforcement of their right to equality before laws and equal protection of the laws from seeking redress and thereby negate the guarantee of equality before laws or equalprotection of laws and reduce it to a mere teasing illusion. Article 21 of

the Constitution apart, access to justice can be said to be part of the guarantee contained inArticle 14 as well."

11. Relying upon the abovesaid, he submits that the right to be heard on discharge is valuable right and if somehow the same is ignored, that hits the right guaranteed in Article 21 of the Constitution of India.

12. Placing reliance on the case reported in ***1979(3) SCC 4, Union of India Vs. Prafulla Kumar Samal and Another,*** he has referred paragraph no. 8 of the Judgment abovesaid, which is quoted hereinunder :-

"8. The scope ofSection 227 of the Code was considered by a recent decision of this Court in the case of State of Bihar V. Ramesh Singh (1) where Untwalia, J. speaking for the Court observed as follows:-

"Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor pro poses to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebut ted by the defence evidence; if any, cannot show that the accused committed the offence then there will be no sufficient ground for proceeding with the trial".

This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of ths Sessions Judge in order to frame a charge against the accused. Even under the Code of 1898 this Court has held that a committing Magistrate had ample powers to weigh the evidence for the limited purpose of finding out whether or not a case of commitment to the Sessions Judge has been made out."

13. He elaborated that the Apex Court has held that if proposed evidence do not show the committal of any offence, then there will be no sufficient ground to proceed with trial.

14. Further referred the Judgment reported in ***(1975)3 Supreme Court Cases, 706, Superintendent and Remembrance of Legal Affairs, West Bengal Vs Mohan Singh and Others*** and relied upon para no. 2.

15. Referring the aforesaid, he submits that Hon'ble Apex Court has settled the law that the successive applications under section 482 Cr.P.C. are maintainable and thus, he submitted that the instant application is also maintainable.

16. He next added and has placed reliance on a Judgment reported in ***(2022)9 SCC 577, Kanchan Kumar Vs. State of Bihar*** and has referred paragraph no. 12 onwards of the Judgment aforesaid and

added that the legal provisions and precedence with respect to Section 227 of the Code of Criminal Procedure has been settled by the Apex Court.

17. He has further placed reliance on the Judgment reported in ***AIR 1956 SC 116, Willie (William)Slaney Vs. The State of Madhya Pradesh*** and has referred paragraph no. 6 of the Judgment aforesaid, which extracted hereinunder :-

"6. Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision-of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice. Some of these matters are dealt with by the Code and wherever that is the case full effect must be given to its provisions. The question here is, does the Code deal with the absence of a charge and irregularities in it, and if so, into which of the two categories does it place them? But before looking into the Code, we deem it desirable to refer to certain decisions of the Privy Council because much of the judicial thinking in this country has been moulded by their observations. In our opinion, the general effect of those decisions can be summarised as follows."

18. Lastly, he has placed reliance on the case of ***P.Gopalkrishnan @ Dileep Vs State of Kerala & Another,Criminal Appeal (SC) No. 1794 of 2019*** has referred paragraph nos. 32 & 34 of the Judgment aforesaid, which are extracted hereinunder :-

"32. It is crystal clear that all documents including "electronic record" produced for the inspection of the Court alongwith the police report and which prosecution proposes to use against the accused must be furnished to the accused as per the mandate of Section 207 of the 1973 Code. The concomitant is that the contents of the memory card/pen drive must be furnished to the accused, which can be done in the form of cloned copy of the memory card/pen drive. It is cardinal that a person tried for such a serious offence should be furnished with all the material and evidence in advance, on which the prosecution proposes to rely against him during the trial. Any other view would not only impinge upon the statutory mandate contained in the 1973 Code, but also the right of an accused to a fair trial enshrined in Article 21 of the Constitution of India.

34. Reverting to the preliminary objection taken by the respondent for dismissing the appeal at the threshold because of the disclosure of identity of the victim in the memo of the special leave petition forming the subject matter of the present appeal, we find that the explanation offered by the appellant is plausible inasmuch as the prosecution itself had done so by naming the victim in the First Information Report/Crime Case, the statement of the victim under Section 161, as well as under Section 164 of the 1973 Code, and in the chargesheet/police report filed before the Magistrate. Even the objection regarding incorrect factual narration about the appellant having himself viewed the contents of the memory card/pen drive does not take the matter anyfurther, once we recognize the right of the accused to get the cloned copies of the contents of the memory card/pendrive as being mandated by Section 207 of the 1973 Code and more so, because of the right of the accused to a fair trial enshrined in Article 21 of the Constitution of India."

19. Placing reliance on the aforesaid judgment, he added that it has been held by the Apex court that the electronic records also comes under the purview of the documents and an accused must be furnished such electronic documents as per the mandate of Section 207 of the Criminal Procedure Code. He added that identically in the instant matter, the grievance of the applicant is that he has not been furnished the pen drive and compact device though the same have been submitted with case diary.

20. Concluding his arguments, he added that from perusal of the order dated 20-07-2022, it emerges that there is not a single whisper regarding any consideration with respect to discharge of the applicant and straightaway, the court has framed the charges against the applicant under section 302 readwith 120-B of I.P.C., which itself is decipherable that the learned trial court has passed the order while violating the mandate of the provisions of Section 227 of Cr.P.C.

21. Adding his argument, he further submitted that overtly the trial court has ignored the procedure prescribed under section 207 of Cr.P.C. as admittedly the copy of the pen drive and compact disc. has not been given to the applicant and thus, the submission of counsel for the applicant is that the order dated 20-07-2022 may be set aside and the trial court may be directed to comply with the provisions of Section 207/227 of Cr.P.C. while strictly following the same.

22. Per contra, learned A.G.A. appearing for the State has opposed the contentions aforesaid and submits that there is no perversity or unlawfulness in the order passed by the trial court. He submits that earlier an application under section 482 Cr.P.C. bearing no. 4903 of 2022 was filed by the applicant, with the following reliefs :-

"(i) quash the order dated 20-07-2022, passed by the court of learned Additional Sessions Judge/F.T.C.-I, Sultanpur in Sessions Trial No. 573 of 2022(State Vs. Vijay Pratap Singh & Others) rejecting the Application moved by the Petitioner under section 207/228 Cr.P.C. as is contained in Annexure No. -1 to this petition.

(ii) quash the order dated 20-07-2022, passed by the court of learned Additional Sessions Judge/F.T.C.-I, Sultanpur in Sessions Trial No. 573/2022(State Vs. Vijay Pratap Singh & Others) whereby an order has been passed for framing of the charges against the petitioner and two other co-accused U/s 302/34, 120-B IPC, as is contained in Annexure No.-2 to this petition;

(iii) quash the order dated 20.07.2022. passed by the court of learned Additional Sessions Judge/F.T.C.-1, Sultanpur in Sessions Trial No. 573/2022(State Vs. Vijay Pratap Singh & Others) whereby the petitioner and two other co-accused have been charged U/s-302/34,120-B IPC.

(iv) direct the court of learned Additional Sessions Judge/F.T.C.-I, Sultanpur, to proceed in Sessions Trial No. 573/2022(State Vs. Vijay Pratap Singh & Others) after following the due process of law i.e. after providing the accused persons requisite electronic evidences i.e. Compact Device and Pen-Drive(relief upon as evidence) and after providing full opportunity of hearing to them;

(v) direct the court of learned Additional Sessions Judge/F.T.C.-I,Sultanpur not to proceed in Sessions Trial No. 573/2022(State vs. Vijay Pratap Singh & Others) in furtherance of the orders dated 20-07-2022;

(vi)??????..."

23. Referring the aforesaid, he submits that the present applicant has already challenged the order dated 20-07-2022 passed by the court of learned Additional Sessions Judge/F.T.C-I,Sultanpur in Sessions Trial No. 573 of 2022. The court after hearing on the abovenoted application, passed an order on 26-07-2022, therefore, the second application under section 482 Cr.P.C. with same relief is not maintainable.

24. The operative portion of the order dated 26.07.2022 is extracted as under:-

"5. Considering the fact that there is sufficient material on record, the trial Court proceeded to frame charge. The trial Court has also observed that all the relevant documents, relied upon by the prosecution, have been given to the accused at the time of committal under Section 207 CrPC.

6. I have considered the submissions and perused the impugned order passed by the learned trial Court. I do not find that the learned trial Court has committed any error of law or jurisdiction. However, it is provided that if the prosecution is relying on the CD and Pen-drive, which have been sent for forensic examination, the accused shall be supplied the copies thereof along with the copy of the FSL report to enable accused to put their defence effectively.

7. Disposed of. "

25. He next submits that so far as the grievance with respect to non supply of the copy of the Compact Disc and Pen Drive is concerned, that has already been dealt with by this Court in earlier application and at the same time, the court has also observed that if the prosecution would rely upon the C.D. and Pen Drive, which are said to be not given to the present applicant at the stage of proceedings under Section 207 of Cr.P.C., the same shall be given, after receiving from the Forensic Science Laboratory, so that the accused could put his defence effectively. Court further directed that in such event the copy of the F.S.L. report will be given to the applicant. He contends that in fact the dispute/grievance of the applicant has already been dealt with by a coordinate Bench of this court, in application under section 482 Cr.P.C. bearing no. 4903 of 2022 and the present applicant is again challenging the order dated 20-07-2022 on the same pretext, thus, the instant application is nothing, but reiteration of reliefs which have earlier been sought, therefore, this application is being used as a tool of modification/correction in the order dated 26-07-2022 and added that if the present applicant is in fact feeling aggrieved with the order dated 26-07-2022, he may assail the same at an appropriate forum. Therefore, the present application is liable to be dismissed.

26. Having heard learned counsel for the parties and after perusal of material placed on record, it emerges that the present applicant has already filed an application under section 482 Cr.P.C. bearing no. 4903 of 2022, wherein the order dated 20-07-2022 was assailed and an identical grievance was raised in the

aforesaid application before the coordinate Bench of this court.

27. So far as the grievance of the present applicant that the documents i.e. C.D. & Pen Drive were not provided to him, is concerned, the fact remains that those documents have been sent to the Forensic Science Laboratory for its examination and if it is found that those are not tampered, the question would arise that whether the prosecution is relying upon the same or not and in case, the same would be relied upon by the prosecution and the copy is not been provided, certainly, there would be violation of law and therefore the instant application has been filed at premature stage.

28. This court has noticed the fact that the coordinate Bench of this court while passing the order on 26-07-2022, in application under section 482 Cr.P.C. bearing no. 4903 of 2022, provided that "if the prosecution is relying on the CD and Pen-drive, which have been sent for forensic examination, the accused shall be supplied the copies thereof along with the copy of the FSL report to enable accused to put their defence effectively." In this view of the matter, the grievance of applicant has already been exhausted, but, repeatedly almost the same prayer has been made in ambiguous manner, without mentioning the date of the order, but, the intent and content is the same, though it is trite law that subsequent application under section 482 of Cr.P.C. is maintainable, but, that is in the case of changed circumstances. So far as the present matter is concerned, the applicant has failed to demonstrate that what are the changed circumstances after the earlier order dated 26-07-2022 passed by the coordinate Bench of this court,

29. So far as the law propounded by the Apex Court in the case of P.Gopalkrishnan @ Dileep Vs State of Kerala & Another, Criminal (SC) No. 1794 of 2019 is concerned, the same is very clear in its conclusion as in para no. 44, it is provided that 'if the prosecution is relying on any electronic record(memory card/pen drive etc.), the accused must be given cloned copy. The wordings are very clear that the electronic records which are documents of evidenciary value, be provided if the prosecution relies on the same and thus, this verdict also supports the version of the prosecution.

30. Further so far as the law cited by the learned counsel for the applicant in case of OPTO Circuit India Limited Vs Axis Bank & Ors, reported in (2021) 6 SCC,701 is concerned, the Apex Court has categorically held and reiterated the settled law that if the statute provides for a thing to be done in a particular manner, then the same has to be done in that manner and not otherwise.

31. So far as bare reading of provisions of Section 227 of the Cr.P.C. is concerned, the intent of legislature is clear from its last line as it contains that 'he will discharge an accused and record his reasons for so doing' and thus, it is clear that the manner for discharging an accused has been prescribed and therefore, the trial court while discharging an accused, shall record reasons in writing, thus, after consideration of the records and after hearing of the submissions, if the trial court does not find sufficient grounds, it will proceed for framing of charges. At the stage of framing of charges, the court is not required to hold the detailed enquiry and only prima-facie, case is to be seen.

32. This court is also aware of the settled law in case of Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh and Others, reported in (1975) 3 SCC 706, which says that the second application under section 482 Cr.P.C. is maintainable but in the changed circumstances, which varies case to case and so far as the the present case is concerned, the applicant has failed to establish at this stage that there are changed circumstances.

33. In the light of the aforesaid submissions and discussions, this court is of the considered opinion that there is no merit in the instant application.

34. Resultantly, the application is hereby ***dismissed.***

35. Office shall communicate this order to the court below.

(2023) 4 ILRA 726
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

THE HON'BLE J.J. MUNIR, J.

Application U/S 482. No. 9973 of 2023

Narendra Pratap Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Surya Pratap Singh Parmar, Vadana Singh Parmar

Counsel for the Opposite Parties:
G.A., Sri Preyansh Mishra

Criminal Law - Indian Penal Code-Section 307-compromise-Application for compromise rejected-Applicant and informant are cousins-section 307 IPC-injuries sustained-four firearm wounds of entry and two of exit-conscience of society involved-not an offence in domain of private dispute.

Application rejected. (E-9)

List of Cases cited:

Narinder Singh & ors. v. St. of Pun. & anr., (2014) 6 SCC 466

(Delivered by Hon'ble J. J. Munir, J.)

Mr. Preyansh Mishra, Advocate has filed his vakalatnama on behalf of opposite party no. 2 along with a short counter affidavit, which are taken on record.

2. Heard Mr. Surya Pratap Singh Parmar, learned Counsel for the applicant and Mr. Preyansh Mishra, learned Counsel appearing on behalf of opposite party no. 2.

3. This is an application under Section 482 of the Code of Criminal Procedure, 19731 seeking to quash the entire proceedings of Sessions Trial No. 218 of 1991, State v. Narendra Pratap Singh (arising out of Case Crime No. 14 of 1991) under Section 307 of the Indian Penal Code, 18602, Police Station Sarai Inayat, District Prayagraj, pending in the Court of the Additional Sessions Judge, Court No. 22, Allahabad.

4. It is submitted by the learned Counsel for both parties that they have compromised the matter, inasmuch as the informant and the accused, that is to say, the applicant and opposite party no. 2 are cousins and now, the complainant does not want to pursue the prosecution any further. The learned Additional Sessions Judge vide order dated 15.02.2023 has rejected the

compromise application, holding that in this case, the charges against the accused are of assaulting the complainant-opposite party, the injured Chandra Narayan, with an intent to kill him. The case is of a heinous nature and is not compoundable. It is on that basis that the learned Judge has declined to verify the compromise and rejected the application.

5. It is quite another matter that the learned Judge could not have allowed the compromise application herself, because the offence is not compoundable. All that she could have done was to verify the compromise, on which, this Court could have acted. In connection with quashing of prosecutions by the Trial Court, where parties have compromised in exercise of powers under Section 482 of the Code, illuminating guidance is provided by the decision of the Supreme Court in **Narinder Singh and others v. State of Punjab and another, (2014) 6 SCC 466,** which was incidentally a case relating to an offence punishable under Section 307 I.P.C. In the context of the High Court's powers to quash proceedings under Section 307 I.P.C., it was held in **Narinder Singh** *(supra) :*

23. As there is a close relation between equality and justice, it should be clearly discernible as to how the two prosecutions under Section 307 IPC are different in nature and therefore are given different treatment. With this ideal objective in mind, we are proceeding to discuss the subject at length. It is for this reason we deem it appropriate to lay down some distinct, definite and clear guidelines which can be kept in mind by the High Courts to take a view as to under what circumstances it should accept the settlement between the parties and quash the proceedings and under what circumstances it should refrain from doing so. We make it clear that though there would be a general discussion in this behalf as well, the matter is examined in the context of the offences under Section 307 IPC.

24. The two rival parties have amicably settled the disputes between themselves and buried the hatchet. Not only this, they say that since they are neighbours, they want to live like good neighbours and that was the reason for restoring friendly ties. In such a scenario, should the court give its imprimatur to such a settlement? The answer depends on various incidental aspects which need serious discourse. The legislators have categorically recognised that those offences which are covered by the provisions of Section 320 of the Code are concededly those which not only do not fall within the category of heinous crimes but also which are personal between the parties. Therefore, this provision recognises where there is a compromise between the parties, the court is to act at the said compromise and quash the proceedings. However, even in respect of such offences not covered within the four corners of Section 320 of the Code, the High Court is given power under Section 482 of the Code to accept the compromise between the parties and quash the proceedings. The guiding factor is as to whether the ends of justice would justify such exercise of power, both the ultimate consequences may be acquittal or dismissal of indictment. This is so recognised in various judgments taken note of above.

25. In *Dimpey Gujral [Dimpey Gujral v. UT, Chandigarh, (2013) 11 SCC 497 : (2012) 4 SCC (Cri) 35]* , observations of this Court were to the effect that offences involved in that case were not

offences against the society. It included charge under Section 307 IPC as well. However, apart from stating so, there is no detailed discussion on this aspect. Moreover, it is the other factors which prevailed with the Court to accept the settlement and compound the offence, as noted above while discussing this case. On the other hand, in Shambhu Kewat [State of Rajasthan v. Shambhu Kewat, (2014) 4 SCC 149 : (2014) 4 SCC (Cri) 781 : (2013) 14 Scale 235] , after referring to some other earlier judgments, this Court opined that commission of offence under Section 307 IPC would be crime against the society at large, and not a crime against an individual only. We find that in most of the cases, this view is taken. Even on first principle, we find that an attempt to take the life of another person has to be treated as a heinous crime and against the society.

26. Having said so, we would hasten to add that though it is a serious offence as the accused person(s) attempted to take the life of another person/victim, at the same time the court cannot be oblivious to hard realities that many times whenever there is a quarrel between the parties leading to physical commotion and sustaining of injury by either or both the parties, there is a tendency to give it a slant of an offence under Section 307 IPC as well. Therefore, only because FIR/charge-sheet incorporates the provision of Section 307 IPC would not, by itself, be a ground to reject the petition under Section 482 of the Code and refuse to accept the settlement between the parties. **We are, therefore, of the opinion that while taking a call as to whether compromise in such cases should be effected or not, the High Court should go by the nature of injury sustained, the portion of the bodies where the injuries were inflicted (namely, whether injuries are caused at the vital/delicate parts of the body) and the nature of weapons used, etc. On that basis, if it is found that there is a strong possibility of proving the charge under Section 307 IPC, once the evidence to that effect is led and injuries proved, the Court should not accept settlement between the parties.** On the other hand, on the basis of prima facie assessment of the aforesaid circumstances, if the High Court forms an opinion that provisions of Section 307 IPC were unnecessarily included in the charge-sheet, the Court can accept the plea of compounding of the offence based on settlement between the parties.

(emphasis by Court)

6. Here, what the Court finds is that the injuries sustained by the applicant, as would appear from a perusal of the injury report dated 06.01.1991, are four firearm wounds of entry, and two of exit. None of the wounds show tattooing or charring. It is, no doubt, true that all gunshot injuries have been sustained on the limbs and not on the torso or any vital part of the complainant's body, but that does not show that the offence was not heinous or there was no intention to kill. If a man shoots another, inflicting as many as four gunshot wounds, notwithstanding the fact that the injuries were sustained on the limbs, where possibly, they would not have produced a fatal result, it does not detract in the least from the gravity of the crime. The fact that the victim did not receive injuries to one or other vital parts of the body can only be credited to the victim's good luck or providence smiling on him. In an offence of this kind, this Court is in absolute agreement with the learned Trial Judge that anything in aid of composition of the offence, cannot be permitted. This Court

too would not exercise its powers under Section 482 of the Code to quash the prosecution in an offence of this nature, where the conscience of the society is most certainly involved. It is not an offence which is in the domain of a kind of private dispute between parties, about which the society may have no substantial concern.

7. In view of the above, the prayer to quash proceedings of the aforesaid case is hereby refused.

8. It is, however, clarified that the remarks in this order may not be construed to mean that the applicant is guilty of the offences charged. That is to be tested at the trial, unaffected by any remark in this order.

9. In the result, this application **fails** and consequently, stands **rejected.**

10. Let this order be communicated to the Additional Sessions Judge, Court No. 22, Allahabad through the learned Sessions Judge, Allahabad by the Registrar (Compliance).

(2023) 4 ILRA 729
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.04.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482. No. 11043 of 2023

Devendra Yadav & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Mohit Singh

Counsel for the Opposite Parties:
G.A.

The SC and the ST Act, 1989-Application u/s 156 (3) Cr.P.C. converted into complaint case-summoned accused-impugned-without application of mind-parallel proceeding by way of FIR is already progressing -without holding mandatory inquiry u/s 202 (1) Cr.P.C.-impugned order passed-Application u/s 482 Cr.P.C. could be filed assailing the summoning order under SC/ST Act-impugned order quashed.

Application allowed. (E-9)

List of Cases cited:

1. Gulam Rasool Khan & ors. Vs St. of U.P. & ors. in Crl. Appeal No. 1000 of 2018 decided on 28.07.2022

2. Ramawatar Vs St. of M.P., 2021 SCC Online SC 966 decided on 25.10.2021 in Crl. Appeal No. 1393 of 2011

3. B.Venkateswaran & ors. Vs P. Bakthavatchalam 2023 SC Online SC 14

4. Priyanka Srivastava & anr. Vs St. of U. P. & ors. reported in (2015) 6 SCC 287

5. Lallan Kumar Singh & ors. Vs St. of Mah. 2022 LiveLaw (SC) 833

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

1. Heard Sri Mohit Singh, learned counsel for the applicants, learned AGA for the State and perused the material on record.

2. Since in the instant 482 application, on admitted facts, purely question of law has to be adjudicated, thus without inviting counter affidavit, the present 482 Cr.P.C. application is being decided with the aid and help of learned AGA at the admission stage itself.

3. The question of sustainability of the present 482 Cr.P.C. application against the impugned order of summoning under Sections 147, 148, 323, 354Kha, 452, 504 IPC and Section 3(1)(X) SC/ST Act, P.S. Bilhaur, District Kanpur Nagar pending in the court of Additional District & Sessions Judge, Court No.2/Special Judge, SC/ST Act, Kanpur Dehat and impugned summoning order dated 19.11.2022 passed by the same court.

4. The extra ordinary powers of this Court has been invoked by the applicants challenging the entire proceeding of SST No. 77 of 2019 (Geeta Devi Vs. Devendra Yadav & others) under the aforesaid sections of the IPC pending in the court of Additional District & Sessions Judge, Court No.2/Special Judge, SC/ST Act, Kanpur Dehat including the impugned summoning order dated 19.11.2022.

5. As the matter relates to the "maintainability of the present 482 Cr.P.C. application" in the light of the full Bench decision of this Court in the case of ***Gulam Rasool Khan and others Vs. State of U.P. and others*** in Crl. Appeal No. 1000 of 2018 decided on 28.07.2022, whereby learned Single Judge vide order dated 03.08.2018 has referred the matter to the larger bench and has framed the following question, which are quoted herein below:-

(i) Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017 In re : Rohit Vs. State of U.P. and another vide judgment dated 29.08.2017 correctly permitted the conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr.P.C.?

(ii) Whether keeping in view the judgment of Rohit (supra), an aggrieved person will have two remedies available of preferring an appeal under the provisions of Section 14 A of the Act, 1989 as well as a bail application under the provisions of Section 439 of the Cr.P.C.?

(iii) ***Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr.P.C.?***

(iv) What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed?

6. Learned AGA has further drawn the attention of the Court to the Section 14A(1), which speaks about the appeal in SC/ST Act, 1989, which reads thus:-

"14A.Appeals.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law."

7. While referring above mentioned legal questions, responding to the query no.3, whether an aggrieved person who has without availing of the remedy of an appeal under the provisions of Section 14A(1) of the Act, 1989, could be allowed to approach the High Court by preferring an

application under the provisions of Section 482 of the Cr.P.C. is justified ?.

8. The full bench in paragraph 13 and 14 of its judgment negated its reply by making a mention that :-

13. The answer to the aforesaid was in the negative. It was held that against the judgments or orders, for which remedy has been provided under Section 14A(1) of the 1989 Act, invoking the jurisdiction of this Court by filing petition under Articles 226 or 227 of the Constitution of India, a revision under Section 397 Cr.P.C. or an application under Section 482 Cr.P.C., will not be maintainable.

14. Hence, the answer to Question No.(III) will be in negative namely, that the aggrieved person having remedy of appeal under Section 14A(1) of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section 482 Cr.P.C..

9. Learned AGA has strenuously hammered his submissions that present 482 Cr.P.C. application is not maintainable in the light of the aforementioned observations made by full Bench of this Court in the case of ***Gulam Rasool Khan (supra).***

10. Responding to the aforesaid preliminary objection, Sri Mohit Singh, learned counsel for the applicants refuted the submissions by making a mention that there are catena of decisions of Hon'ble Apex Court with regard to the maintainability of the 482 Cr.P.C. application, even though the provisions of SC/ST Act is present.

11. Sri Mohit Singh, learned counsel for the applicant has cited a judgment of Hon'ble Apex Court in the case of ***Ramawatar Vs. State of Madhya Pradesh*** reported in 2021 SCC Online SC 966 decided on 25.10.2021 in Crl. Appeal No. 1393 of 2011, whereby the full Bench of Hon'ble Apex Court decided the issue in most lucid terms. The relevant paragraph nos. 9 and 16, which are quoted herein below:-

"9. Having heard learned Counsel for the parties at some length, we are of the opinion that two questions fall for our consideration in the present appeal. First, whether the jurisdiction of this Court under Article 142 of the Constitution can be invoked for quashing of criminal proceedings arising out of a ''noncompoundable offence? If yes, then whether the power to quash proceedings can be extended to offences arising out of special statutes such as the SC/ST Act?

16. On the other hand, where it appears to the Court that the offence in question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence is covered under a ''special statute' would not refrain this Court or the High Court, from exercising

their respective powers under Article 142 of the Constitution or Section 482 Cr.P.C."

12. Since the case of Gulam Rasool Khan was decided in the year 2022*28.07.2022) whereas Ramawtar case was decided in 2021, thus, it has been contended by the counsel that 482 Cr.P.C. application is maintainable even it relates to SC/ST Act.

13. Sri Singh, learned counsel for the applicant submitted that while deciding the case of ***Gulam Rasool Khan (supra)***, learned Division Bench of this Court has never relied upon or even considered the ratio laid down in the judgment of ***Ramawatar Vs. State of M.P.*** and thus could be safely be termed as per incuriam.

14. There is yet another judgment of Hon'ble Apex Court cited by learned counsel for the applicants in the case of ***B.Venkateswaran and others Vs. P. Bakthavatchalam*** reported in 2023 SC Online SC 14 decided on 05.01.2023 in Criminal Appeal No. 1555 of 2022. In so many words the, the Hon'ble Apex Court has opined that :-

"From the aforesaid, it seems that the private civil dispute between the parties is converted into criminal proceedings. Initiation of the criminal proceedings for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, therefore, is nothing but an abuse of process of law and Court. From the material on record, we are satisfied that no case for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is made out, even prima facie. None of the ingredients of Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 are made out and/ or satisfied. Therefore, we are of the firm opinion and view that in the facts and circumstances of the case, the High Court ought to have quashed the criminal proceedings in exercise of powers under Section 482 of the Code of Criminal Procedure. The impugned judgment and order passed by the High Court, therefore, is unsustainable and the same deserves to be quashed and set aside and the criminal proceedings initiated against the appellants deserves to be quashed and set aside."

15. Thus from the aforesaid discussions, it is clear that Hon'ble Apex Court has clearly and time and again have opined that elaborating the aforesaid provision of full bench of this Court as well as Hon'ble Apex Court and taking the help of the aforesaid judgments, the Court is of the considered opinion that 482 Cr.P.C. application could be filed assailing the summoning order.

16. Now coming to the main issue whereby the application under Section 156(3) Cr.P.C. converted into a complaint case vide order dated 08.05.2019 passed by Additional District & Sessions Judge, Court No.2/Special Judge, SC/ST Act, Kanpur Dehat.

17. The Sepcial Judge, SC/ST Act vide summoning order dated 19.11.2022 has summoned the applicants, namely, Devendra Yadav, Babulal Yadav, Laloo Yadav, Lakhan Raidas, Naresh, Amar Singh, Sonu and Arvind under Sections 147, 148, 323, 354Kha, 452 and 504 IPC

and Sections 3(1)(X) SC/ST Act to face the prosecution.

18. The genesis of the case starts from filing of the 156(3) Cr.P.C. application by opposite party no.2 on 27.09.2018 for the incident said to have been taken place on 05.04.2018. The said application was registered as Misc. Case No. 443/12/2018 (Geeta Devi Vs. Devendra Yadav and others). After filing of 156(3) Cr.P.C. application, the court concerned has called for the report from the concerned police station, whereby the concerned police station has submitted the detailed report, which is annexed as Annexure No.2 to the affidavit accompanying the application. The said report indicates that :-

*"आवेदिका श्रीमती गीता द्वारा अपने प्रार्थना पत्र धरा **156(3)** सी.आर.पी.सी. में दिनांकित **27.09.2018** में अंकित घटना के सम्बन्ध में श्रीमती गंगाजली पत्नी राजाराम निवासी बावनझाला थाना बिल्हौर कानपुर नगर में मु.अ.स. **159/18** धारा **147, 452, 504, 380** आई.पी.सी. की एफ.आई.आर. पंजीकृत करायी जा चुकी है। जो सभी सजातीय व्यक्तियों के विरुद्ध है। इसी अभियोग की घटना में आवेदिका श्रीमती गीता घायल हुयी थी जिसका अभियोग पंजीकृत हो चुका है। किन्तु आवेदिका श्रीमती गीता देवी ग्राम प्रधान देवेंद्र यादव एवं उसी परिवार के बाबूलाल यादव व लालू यादव के विरुद्ध एस.सी./एस.टी. एक्ट का अभियोग लिखवाना चाहती है। और पूर्व में भी प्रयास कर चुकी है। किन्तु सफल नहीं हुयी आवेदिका द्वारा अपने प्रार्थना पत्र में अंकित तथ्यों के सम्बन्ध में पूर्वे में ही दिनांक **10.04 .18** को मु.अ.स. **159/18** धारा **147, 452, 504, 380** आई.पी.सी. पंजीकृत हो चुका है। जिसमें आवेदिका श्रीमती गीता चश्मदीद साक्षी है।"*

19. Vide order dated 08.05.2019, the Special Judge has treated the application under Section 156(3) Cr.P.C as complaint case and proceed the said application case like complaint case adhering the procedure of Chapter XV of Cr.P.C.. In addition to this on 02.09.2019, the opposite party no.2 has recorded her statement and supported the version of the complaint, thereafter the statements of complainant's witnesses, namely, Bandana and Smt. Gangajali were recorded on 10.10.2019 and 25.11.2019.

20. Learned counsel for the applicant have accused that learned Trial Judge that he has passed the impugned summoning order with pre-meditated mind on 19.11.2022.

21. The Court has occasioned to to peruse the summoning order in which Special Judge, SC/ST Act have narrated the statements and have jumped into the conclusion that prima facie case is made out against the applicant under Section 147, 148, 323, 354Kha, 452, 504 IPC and Section 3(1)(X) SC/ST Act. It is contended by the counsel that there is no application of any judicial mind or judicial satisfaction of the court concerned, which is sine-quo-non and pre-requisite of summoning the accused as contemplated in the case of ***Lallan Kumar Singh and others Vs. State of Maharashra*** reported in ***2022 LiveLaw (SC) 833,*** paragraph 28 is quoted herein below:-

"28. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of

Sunil Bharti Mittal vs. Central Bureau of Investigation9, which reads thus:

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate 9 (2015) 4 SCC 609 taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

22. In addition to this, it is argued by learned counsel that the court below has passed an impugned order dated 08.05.2021 observing therein that the police have submitted a report that there is no FIR is registered at the police station. The aforesaid observation is nothing but a tissue of utter falsehood for the reasons best known to the concerned Special Judge. The aforesaid police report as mentioned in earlier paragraphs, which clearly indicates that there is a FIR lodged by Smt. Gangajali wife of Rajaram as case crime no. 159 of 2018, under Sections 147, 452, 504, 380 IPC. In the present case, opposite party no.2 Geeta also sustained injuries but she was adment to get the criminal case registered under the SC/ST Act, she is playing all the tricks and gimmicks with the court process and learned Special Judge, SC/ST Act is supporting her calls and therefore, the present proceeding would safely be termed as second complaint on the same facts, though its complainant is a different lady.

23. In addition to above, learned counsel for the applicant submits that the court below has not complied with the directions of Hon'ble Apex Court in the case of **Priyanka Srivastava and anothers Vs. State of Uttar Pradesh and others** reported in ***(2015) 6 SCC 287***, in which it is stated that no inquiry was conducted as contemplated in Section 202(1) Cr.P.C., which reads thus:-

"Section 202(1) Cr.P.C.-(1) Any Magistrate, on receipt of a complaint of

an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200."

24. In the instant case, where the contesting parties are resident of Kanpur Nagar. The Court wonders as to what circumstances, Special Judge, SC/ST Act, Kanpur Dehat has passed the impugned summoning order without holding the requisite mandatory inquiry as contemplated in Section 202(1) Cr.P.C. and therefore, the impugned summoning order is well short of aforesaid legal issues, which cannot be sustained in the eye of law.

25. The Court has occasion to peruse the observation of Hon'ble Apex Court in the case of **Priyanka Srivastava** (supra) and the relevant paragraphs which are useful for the present controversy are quoted herein below:-

"The instant case exemplifies in enormous magnitude to take recourse to Section 156(3) Cr.P.C., as if, it is a routine procedure. The Judicial Magistrate in the p resent case while exercising the power under Section 156(3) Cr.P.C. has narrated the allegation made in the application and, thereafter, without any application of mind, has passed an order to register an FIR for the offences mentioned in the application.

The duly cast on the Magistrate while exercising power under Section 156(3) Cr.P.C. cannot be marginalised. The power under Section 156(3) Cr.P.C. warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 Cr.P.C.. The Magistrate exercising power under Section 156(3) Cr.P.C. has to remain vigilant with regard to the allegation made and the nature of allegation and not to issue directions without proper application of mind. He has to bear in mind that sending the matter for investigation would be conducive to justice and then he may pass the requisite order. There has to be prior applications under Sections 154(1) and 154(3) Cr.P.C. while filing a petition under Section 156(3) Cr.P.C. Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. A litigant at this own whim cannot invoke the authority of the Magistrate under Section 156(3) Cr.P.C.. A principled and really aggrieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when perverted litigants take this route to harass their fellow citizens, efforts must be made to scuttle and curb the same. A number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases,

corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, are being filed. Consequently, in an appropriate case, the truth and veracity of the allegations made can be verified by the Magistrate, regard being had to the nature thereof."

26. Thus taking into account the totality of the circumstances and the observation made by the Hon'ble Apex Court in this regard, I have got no hesitation to quash the impugned summoning order dated 19.11.2022 passed by Additional District & Sessions Judge, Court No.2/Special Judge, SC/ST Act, Kanpur Dehat. Since parallel proceeding by way of FIR is already progressing and the present controversy is nothing but an arm twisting of the applicants by levelling more serious and grim allegation in it and therefore, it cannot be sustained and the present application stands **ALLOWED**.

(2023) 4 ILRA 736
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 15253 of 2022

Kajal ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Rohit Nandan Pandey

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 482-Applicant accused of aiding the prime accused of rape-criminal conspiracy-to provide due opportunity to prime accuse to conduct rape-being women will not exonerate her of criminal conspiracy-her role duly St.d in the St.ment of victim u/s 161 Cr.P.C. and u/s 164 Cr.P.C.-also evidence sufficient to file charge sheet.

Application dismissed. (E-9)

List of Cases cited:

1. Bable Vs St. of Chattisgarh A.I.R. 2012 SC 2621

2. Mukesh Vs NCT of Delhi & anr, AIR 2017 SC 2161

3. Mrityunjai Vishwas Vs Pranav @ Kutti Vishwas & anr. AIR 2013 SC 3334

4. St. of U.P. Vs Manoj Kr Pandey AIR 2009, SC 711

5. Santosh Mulya Vs St. of Karn., 2010 5 SCC 445

6. Priya patel Vs St. of M.P. (2006) 6 SCC 263

7. Criminal Appeal no. 64/2006 –Sarla Vs St. order date 06.02.2014

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

१. प्रार्थिनी की तरफ से विद्वान अधिवक्ता श्री रोहित नन्दन पाण्डेय तथा उत्तर प्रदेश राज्य की तरफ से विद्वान अपर शासकीय अधिवक्ता पंकज कुमार त्रिपाठी को सुना एवं पत्रावली का अवलोकन किया।

२. यह प्रार्थना पत्र वाद संख्या 211 वर्ष 2017 अपराध संख्या 290/2017 अन्तर्गत धारा 376, 120-बी एवं 3/4 पॉक्सो अधिनियम थाना सिहानी गेट जनपद गाजियाबाद द्वारा विशेष न्यायाधीश (पॉक्सो अधिनियम) में प्रस्तुत आरोप पत्र दिनाँकित 17.09.2017 तथा संज्ञान आदेश दिनाँकित 06.10.2017 एवं विशेष न्यायाधीश पाक्सो अधिनियम, गाजियाबाद द्वारा पारित

आदेश दिनाँकित 12.05.2022 को निरस्त करने हेतु प्रस्तुत किया गया है।

३. प्रार्थना पत्र में यह आधार लिया गया है कि प्रथम सूचना रिपोर्ट विलम्बित एवं अस्पष्ट है जिसमें प्रार्थिनी नामित नहीं है। वह पूर्णतया निर्दोष एवं झूंठी फंसायी गयी है। घटना के सम्बन्ध में पीड़िता की आयु चिकित्सक ने 21 वर्ष होना पाया परन्तु विवेचक ने शैक्षिक प्रमाण पत्र के अनुसार 17 वर्ष 2 माह होना माना है। धारा 161 एवं धारा 164 दं०प्र०सं० के बयानों में भिन्नता है। विवेचना सरसरी तौर पर की गयी है। आरोप पत्र मनमाना, अवैध एवं विधितः पोषणीय नहीं है। आरोपित अपराध नहीं बनते हैं। संज्ञान लेते समय विधिक मस्तिष्क का प्रयोग नहीं किया गया है। संज्ञान आदेश अप्रकट एवं मौन है। प्रक्रिया का पालन किये बिना अजमानतीय अधिपत्र निर्गत किया गया है। प्रथम सूचना रिपोर्ट दुर्भावनापूर्ण तथा दूरस्थ आशय से प्रपीड़ित करने तथा ब्लैकमेल करने के लिए दर्ज कराया गया है जिसकी जानकारी मुख्य

४ . संक्षेप में वाद के तथ्य यह हैं कि प्रार्थिनी मुकदमा अपराध संख्या 290/2017 थाना सिहानी गेट, जनपद गाजियबाद के अपराध संख्या 376, 120-बी भा0दं0सं0 तथा ¾ एवं 16/17 पाक्सो अधिनियम का वाद जो सी0जे0एम0 गाजियाबाद के न्यायालय में लम्बित है, वाँछित है। प्रथम सूचना रिपोर्ट के तथ्य यह हैं कि वादी की पुत्री आयु लगभग 15 वर्ष अपनी बड़ी बहन के ननद के विवाह में सम्मिलित होने हेतु दिनांक 18.02.2017 ग्राम अटोर आई थी। बड़ी पुत्री की सास श्रीमती कृष्णा देवी पत्नी स्वर्गीय कृष्णपाल जो बड़ी पुत्री की सास है, बहाने से उसे ग्राम अटोर में रोक लिया तथा दिनांक 22.02.2017 को रात्रि में उसके पुत्री को जितेन्द्र ऊर्फ राघव निवासी अटोर के घर सोने के बहाने ले गई जहाँ रात्रि में उसकी पुत्री के साथ जितेन्द्र ऊर्फ राघव ने दुष्कर्म किया है। जब वह अपनी पुत्री को लेने ग्राम अटोर आया तो उसकी पुत्री ने आपबीती बताई तो वह अपनी पुत्री को लेकर रिपोर्ट करने थाना आया है, रिपोर्ट लिखकर कानूनी कार्यवाही करें।

५. विवेचक द्वारा विवेचना की गई तथा पीड़िता वयस्का का धारा 161 एवं 164 दं0प्र0सं0 के अन्तर्गत बयान अंकित किया गया तथा उसका चिकित्सीय परीक्षण किया गया। चिकित्सीय परीक्षण आख्या के अनुसार उसकी आयु लगभग 21 वर्ष मानी गई। उसके लगभग सभी जोड़ फ्यूज पाये गए जिसके आधार पर पीड़िता को प्रार्थी के विद्वान अधिवक्ता द्वारा वयस्क होना कहा गया। मछानन्द इंटर कॉलेज बुलन्दशहर की प्रधानाचार्य की आख्या दिनाँक 04.03.2017 के अनुसार पीड़िता की जन्मतिथि 15.12.2000 अंकित है तथा घटना दिनांकित 22.02.2017 की है अतः पीड़िता को 18 वर्ष से कम आयु का होने के कारण विवेचक द्वारा विवेचनोपरान्त धारा 376/120-बी भा0दं0सं0 तथा धारा ¾ पाक्सो अधिनियम के अन्तर्गत आरोप पत्र प्रस्तुत किया गया।

६. प्रार्थिनी तथा श्रीमती कृष्णा देवी के विरुद्ध कार्यवाही दण्ड प्रकरण वाद संख्या 4438/2017 में पारित आदेश दिनाँकित 28.03.2017 के अनुपालन में विवेचना पूर्ण होने तक उनके विरुद्ध दाण्डिक कार्यवाही स्थगित की गई। आरोप पत्र प्रस्तुत करने के उपरान्त उनके विरुद्ध भी समन जारी किया गया तथा अभियुक्त को कारागार से आहूत कर धारा 309 दं0प्र0सं0 का आरोप विरचित करने के लिए आदेश पारित किया गया।

७. विपक्षीगण पर समन का तामीला पर्याप्त रहा परन्तु मात्र उत्तर प्रदेश राज्य की तरफ से प्रति शपथ पत्र दिनाँक 15.07.2022 को प्रस्तुत किया गया जिसमें विपक्षी ने यह कथन किया कि दिनाँक 06.10.2017 को इस मामले में संज्ञान लिया जा चुका है तथा समन आदेश पारित किया गया है, अतएव प्रार्थिनी को विचारण न्यायालय में उपस्थित होकर तर्क प्रस्तुत करना चाहिए एवं उपलब्ध उपचार प्राप्त करना चाहिए। यह प्रार्थना पत्र संधार्य नहीं है। पीड़िता ने अपने धारा 164 दं0प्र0सं0 के बयान में स्पष्ट रूप से प्रथम सूचना रिपोर्ट में वर्णित घटना का समर्थन किया है तथा यह कथन किया है कि विवेचनोपरान्त घटना के पूर्व मौसी की पुत्री काजल आई तथा उसे सिर दर्द का एक टेबलेट दी, जिसके लेने पर वह बेहोश हो गई तथा उसे चक्कर आने लगे और इसी बीच जितेन्द्र ने उसके साथ दुष्कर्म किया। पीड़िता ने अपने धारा 161 दं0प्र0सं0 के कथन में भी अभियोजन कथानक का समर्थन किया है। उक्त के अतिरिक्त विवेचक ने प्रार्थिनी के अपराध में संलिप्त होने सम्बन्धी अन्य विश्वसनीय साक्ष्य एकत्रित कर आरोप पत्र प्रस्तुत किया है। विवेचक ने उचित एवं निष्पक्ष विवेचना किया है। आरोप पत्र प्रस्तुत हो चुका है। प्रार्थिनी अपना पक्ष आरोप विरचन करते समय रख सकती है। यह प्रार्थना पत्र गुणहीन है तथा गलत तथ्यों पर प्रस्तुत की गई है। अतः खारिज किया जाए।

८. प्रार्थिनी के विद्वान अधिवक्ता ने निम्न तर्क प्रस्तुत किया-

I. यह कि प्रार्थिनी प्रथम सूचना रिपोर्ट में नामित नहीं है।

II. यह कि प्रार्थिनी पारिवारिक सदस्य है।

III. यह कि धारा 120-ख भा०दं०सं० सम्बन्धी अवयव प्रथमतः धारा 164 दं0प्र0सं0 के बयान में प्रकाश में आए हैं।

IV. यह कि चिकित्सीय परीक्षण आख्या के अनुसार पीड़िता की आयु लगभग 21 वर्ष है, अतः पाक्सो अधिनियम प्रयुक्त नहीं होता है क्योंकि घटना दिनांक 22.02.2017 की कही जाती है।

V. यह कि प्रथम सूचना रिपोर्ट 10 दिन विलम्ब से दर्ज कराई गयी है और

VI. यह कि प्रार्थिनी वर्तमान में 23 वर्ष की युवती है तथा उसका वर्ष 2021 में विवाह हो चुका है।

९. प्रार्थिनी के विद्वान अधिवक्ता द्वारा दिये गए तर्कों के आधार पर क्रमवार इस याचिका का निस्तारण किया जाता है-

क- प्रार्थिनी के विद्वान अधिवक्ता का यह तर्क है कि प्रार्थिनी प्रथम सूचना रिपोर्ट में नामित नहीं है। विद्वान अपर शासकीय अधिवक्ता द्वारा यह तर्क प्रस्तुत किया गया कि प्रथम सूचना रिपोर्ट पीड़िता के पिता द्वारा अंकित कराया गया था। अतः यदि उस समय उसने प्रार्थिनी के रोल के सम्बन्ध में संसूचित न किया हो अथवा संसूचित किया हो परन्तु ध्यान न देने के कारण अथवा अन्यथा उसे प्रथम सूचना रिपोर्ट में अंकित न किया गया हो तो यह कोई आधार नहीं है कि प्रार्थिनी को अभियुक्त न माना जाए यदि विवेचनोपरान्त अपराध कारित करने में उसका रोल भी प्रथम दृष्टया स्थापित हो रहा हो।

प्रथम सूचना रिपोर्ट के सम्बन्ध में बबले विरुद्ध छत्तीसगढ़ राज्य ए०आई०आर० 2012 उच्चतम न्यायालय 2621 में यह अवधारित किया गया कि प्रथम सूचना रिपोर्ट सारवान प्रकृति का साक्ष्य नहीं है तथा यह विश्वकोष नहीं है कि इसमें घटना से सम्बन्धित सभी तथ्य का समावेश किया जाए।

i. **मुकेश बनाम दिल्ली राज्य एवं अन्य में ए0आई0आर0 2017 उच्चतम न्यायालय 2161 (तीन न्यायमूर्तिगण) तथा**

ii. मृत्युंजय विश्वास विरुद्ध प्रणव ऊर्फ कुट्टी विश्वास एवं एक अन्य ए0आई0आर0 2013 उच्चतम न्यायालय 3334 में यह अवधारित किया जा चुका है कि यदि प्रथम सूचना रिपोर्ट में अभियुक्त का नाम अंकित नहीं है तो यह अभियोजन के लिए घातक नहीं है।

उपरोक्त विवेचना के आधार पर प्रार्थिनी की तरफ से प्रस्तुत प्रथम तर्क अस्वीकार किया जाता है।

ख- प्रार्थिनी की तरफ से उसके विद्वान अधिवक्ता ने दूसरा तर्क यह प्रस्तुत किया कि प्रार्थिनी भी पीड़िता के ही परिवार की सदस्य है। श्रीमती कृष्णा देवी पीड़िता के बहन की सास है तथा प्रार्थिनी काजल उसके मौसी की लड़की है तथा वह अभियुक्त जितेन्द्र ऊर्फ राघव की बहन है। काजल के पिता का नाम कृष्णपाल है तथा श्रीमती कृष्णा देवी स्वर्गीय कृष्णपाल की पत्नी है तथा अभियुक्त जितेन्द्र ऊर्फ राघव के पिता बिजेन्द्र हैं जिसके यहाँ सुलाने के लिए पीड़िता ले जाई गई थी।

ऐसा कोई प्रमाण प्रस्तुत नहीं किया गया कि पारिवारिक सदस्य होने के कारण वादी अथवा पीड़िता प्रार्थिनी अथवा अन्य अभियुक्तों को झूठा फंसा रहे हों। अतएव यदि वादी पीड़िता एवं अभियुक्तगण एक ही परिवार के सदस्य हैं तो भी यह निष्कर्ष नहीं दिया जा सकता कि ऐसे में कथित अपराध कारित नहीं किया जा सकता, वैसे भी वादिनी एवं पीड़िता अभियुक्तगण के परिवार के सदस्य नहीं है वरन् रिश्तेदार हैं, रिश्तेदारी में गई हुई लड़कियों के साथ ऐसी घटना कारित करने की सूचना करने के समाचार मिलते रहते हैं।

ग- प्रार्थिनी के विद्वान अधिवक्ता ने दूसरा तर्क यह प्रस्तुत किया कि सर्वप्रथम पीड़िता के धारा 164 दं०प्र०सं० के बयान के उपरान्त धारा 120-बी भा०दं०सं० की वृद्धि की गई। इस सम्बन्ध में पत्रावली के अवलोकन से ज्ञात होता है कि पीड़िता ने धारा 161 दं०प्र०सं० के बयान में भी यह कथन किया है कि जितेन्द्र ऊर्फ राघव(अभियुक्त) की बहन ने नींद की गोली खिला दी जिससे वह नींद में सो गई थी। यद्यपि धारा 161 दं०प्र०सं० के बयान में पीड़िता ने प्रार्थिनी काजल का नाम नहीं लिया है परन्तु ऐसा नहीं है कि उसके सम्बन्ध में कथन नहीं किया हो तथा सोची-समझी साजिश के अन्तर्गत धारा 164 दं०प्र०सं० के कथन में सर्वप्रथम प्रार्थिनी का नाम लिया हो। अतः प्रार्थिनी के विद्वान अधिवक्ता द्वारा प्रस्तुत यह तर्क भी खारिज किया जाता है।

घ- प्रार्थिनी के विद्वान अधिवक्ता ने यह तर्क प्रस्तुत किया कि पीड़िता के चिकित्सीय परीक्षण आख्या के अनुसार वह घटना के समय लगभग 21 वर्ष की थी। अतः पाक्सो अधिनियम के अन्तर्गत कोई कार्यवाही नहीं की जा सकती जबकि पूर्व में उल्लिखित पत्रावली पर विद्यमान अभिलेख के अनुसार घटना के

समय पीड़िता मछानन्द इंटर कॉलेज सरायघासी, बुलन्द शहर में कक्षा 10-ए की छात्रा थी तथा विद्यालय के अभिलेखों में उसकी जन्मतिथि 15.12.2000 अंकित है जिसके अनुसार घटना दिनाँकित 22.02.2017 को उसकी आयु 18 वर्ष से कम थी। इस न्यायालय के मतानुसार किशोर न्याय अधिनियम, के नियम के अनुसार यदि विद्यालय के अभिलेखों में अंकित जन्मतिथि तथा चिकित्सीय परीक्षण के आधार पर निर्धारित जन्मतिथि में अन्तर है तो विद्यालय अभिलेखों में अंकित जन्मतिथि को चिकित्सीय परीक्षण के आधार पर निर्धारित आयु पर वरीयता प्राप्त होगी तथा विद्यालय में अभिलिखित जन्मतिथि ही मान्य होगी। यदि जन्मतिथि के सम्बन्ध में अन्य कोई प्रमाण उपलब्ध नहीं है तो अन्तिम विकल्प के रूप में चिकित्सीय परीक्षण आख्या के आधार पर किसी व्यक्ति की आयु निर्धारित की जा सकती है। अतः विद्यालय के अभिलेखों में उल्लिखित जन्मतिथि के अनुसार पीड़िता घटना के समय अवयस्क थी। अतः विवेचक ने पाक्सो अधिनियम के अन्तर्गत भी आरोप पत्र प्रस्तुत किया है। यह प्रश्न धारा 482 दं0प्र0सं0 के अन्तर्गत निश्चित एवं निर्णीत नहीं किया जा सकता। इस सम्बन्ध में यदि कोई तर्क प्रस्तुत करना हो तो विचारण न्यायालय में यह तर्क प्रस्तुत करने एवं प्रार्थना पत्र प्रस्तुत करने के लिए प्रार्थिनी स्वतंत्र है।

ङ- प्रार्थिनी के विद्वान अधिवक्ता ने पंचम तर्क यह प्रस्तुत किया कि प्रथम सूचना रिपोर्ट 10 दिन के विलम्ब से अंकित कराई गई है। इस सम्बन्ध में पत्रावली के अवलोकन से ज्ञात होता है कि घटना दिनाँक 22.02.2017 की है तथा प्रथम सूचना रिपोर्ट दिनाँक 01.03.2017 को अंकित किया गया है। यह व्यवहार में प्रायः देखा जाता है कि नौजवान उम्र की लड़कियों के सम्बन्ध में कारित किये गए लैंगिक अपराधों के सम्बन्ध में प्रायः सोच-विचार कर प्रथम सूचना रिपोर्ट दर्ज कराई जाती है जबकि अन्य कोई विकल्प शेष न हो। प्रायः यह भी देखा जाता है कि धारा 376 भा०दं०सं० जैसे अपराधों में प्रथम सूचना रिपोर्ट दर्ज करने के सम्बन्ध में सम्बन्धित पुलिस थाने द्वारा हीला-हवाली किया जाता है क्योंकि इससे उस थाने के प्रशासन व्यवस्था को कमजोर माना जाता है तथा पुलिस के उच्च अधिकारियों द्वारा थानाध्यक्ष एवं सम्बन्धित हलके क्षेत्र के उपनिरीक्षक सिपाहियों के विरुद्ध प्रशासनिक कार्यवाही भी की जाती है। अतः सम्बन्धित पुलिस भी सर्वप्रथम यह प्रयास करती है कि किसी प्रकार से ऐसी धाराओं में प्रथम सूचना रिपोर्ट दर्ज न हो।

प्रथम सूचना रिपोर्ट सर्वदा विलम्ब से दर्ज कराया जाना अभियोजन के लिए घातक नहीं होता न ही अभियोजन कार्यवाही को निरस्त करने का आधार हो सकता है। विशेषकर धारा 376 भा०दं०सं० के सम्बन्ध में विलम्ब से प्रथम सूचना रिपोर्ट का दर्ज किया जाना कदापि घातक नहीं होता जैसा कि **उत्तर प्रदेश राज्य बनाम मनोज कुमार पाण्डेय ए०आई०आर० 2009 उच्चतम न्यायालय 711 (तीन न्यायमूर्तिगण) तथा संतोष मूल्या विरुद्ध कर्नाटक राज्य, (2010)** 5 एस०सी०सी० 445 में अवधारित किया गया है।

उपरोक्त आधारों पर प्रार्थिनी के विद्वान अधिवक्ता द्वारा प्रस्तुत उपरोक्त तर्क भी अस्वीकार किये जाते हैं।

च- प्रार्थिनी के विद्वान अधिवक्ता ने यह तर्क प्रस्तुत किया कि वर्तमान में प्रार्थिनी 23 वर्षीया वर्ष 2021 में विवाहिता लड़की है इस न्यायालय के मतानुसार यह कोई आधार नहीं है कि यदि उसने कोई अपराध कारित किया है तो उसके विरुद्ध प्रस्तुत आरोप पत्र खण्डित कर दिया जाए। पीड़िता भी एक अविवाहित युवती है तथा प्रार्थिनी का तो विवाह भी हो गया है परन्तु पीड़िता के विवाह आदि में अत्यन्त कठिनाइयों का सामना करना पड़ेगा तथा उसे सामाजिक तानों को भी सहना होगा। उसने अत्यन्त साहस दिखाकर अपने प्रति कारित अपराध के सम्बन्ध में प्रथम सूचना रिपोर्ट दर्ज कराने तथा अभियुक्तों को दण्डित कराने का प्रयास किया है। अतः प्रार्थिनी का युवती एवं विवाहिता होना धारा 482 दं०प्र०सं० के इस प्रार्थना पत्र को स्वीकार करने का कोई भी युक्तियुक्त आधार नहीं है।

१०. यह मान्य विधि सिद्धान्त है कि कोई महिला किसी महिला के बलात्कार की दोषी नहीं हो सकती। प्रस्तुत मामले में अभियुक्त जितेन्द्र ऊर्फ राघव धारा 376 भा०दं०सं० का मुख्य अपराधी है तथा श्रीमती कृष्णा देवी तथा प्रार्थिनी काजल को अभियुक्त जितेन्द्र ऊर्फ राघव द्वारा बलात्कार का अपराध कारित करने में सहायता देने, उसे सुकर बनाने तथा आपराधिक षड़यन्त्र कर रात्रि में सोने के बहाने अभियुकत के घर ले जाकर सुलाने एवं अपराध की पृष्ठभूमि तैयार करने तथा अभियुक्त जितेन्द्र ऊर्फ राघव को सुअवसर प्रदान करने हेतु दोषी मानते हुए उन्हें मात्र धारा 120-ख भा०दं०सं० का अपराधी माना गया है। यद्यपि इस सम्बन्ध में प्रार्थिनी के विद्वान अधिवक्ता ने तर्क प्रस्तुत नहीं किया कि कोई प्रार्थिनी या कोई महिला धारा 376 का अपराध कारित करने के सम्बन्ध में धारा 120-ख भा०दं०सं० के अन्तर्गत दोषी हो सकती है अथवा नहीं परन्तु इस पर विचार किया जाना आवश्यक है। ज्ञात हो कि ऐसी परिस्थितियों में यदि श्रीमती कृष्णा देवी एवं प्रार्थिनी के स्थान पर पुरुष होते तो वह भी गैंगरेप के दोषी होते भले ही उन्होंने पीड़िता के साथ कोई यौनाचार न किये होते।

११. **प्रिया पटेल बनाम मध्य प्रदेश राज्य, (2006) 6 एस०सी०सी० 263** के मामले में अवधारित किया गया है कि एक

महिला भले ही बलात्कार की सुविधा प्रदान करती हो, वह गैंगरेप की अभियुक्ता नहीं हो सकती जैसा कि धारा 376(2)(1) भा०दं०सं० से स्पष्ट है कि कोई महिला बलात्कार की अभियुक्त नहीं हो सकती है। धारा 375/376 भा०दं०सं० से भी स्पष्ट है कि एक महिला का बलात्कार मात्र पुरुष द्वारा ही कारित किया जा सकता है। इस मामले में यह भी प्रश्न उठा कि क्या किसी महिला को बलात्कार कारित करने के लिए उत्प्रेरित करने का दोषी माना जा सकता है, माननीय उच्चतम न्यायालय ने इस पर कोई मत व्यक्त करने के बजाय यह अवधारित किया कि यदि विधि में यह अनुमन्य है तथा तथ्यों के आधार पर ऐसी कार्यवाही की जा सकती हो तो विचारण न्यायालय को विधि अनुसार ऐसी दशा में कार्य करना चाहिए।

१२. दिल्ली उच्च न्यायालय की एकल पीठ ने **दण्ड अपील संख्या 64/2006 सरला विरुद्ध राज्य में दिनाँक 06.02.2014** के निर्णय में यह अवधारित किया है कि पीड़िता के बलात्कार के आरोप की सहयोगी महिला को धारा 120 भा०दं०सं० के अन्तर्गत दोषसिद्ध किया जा सकता है।

१३. प्रार्थिनी के विद्वान अधिवक्ता की तरफ से उक्त के अतिरिक्त अन्य कोई तर्क प्रस्तुत नहीं किया गया है। उपरोक्त विवेचना के आधार पर इस न्यायालय का यह निष्कर्ष है कि धारा 482 दं०प्र०सं० के अन्तर्गत प्रस्तुत यह याचिका गुणहीन है तथा निरस्त किये जाने योग्य है।

आदेश

१४. यह याचिका प्रस्तुत अन्तर्गत धारा 482दं०प्र०सं० उपरोक्तानुसार खण्डित की जाती है।

(2023) 4 ILRA 740
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 16831 of 2022

M/s Parsadi Lal Tulsiram Cold Agra Road, Bisana, Hathras & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sanjay Kumar Dubey

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 311-Alleged meter taken from premise of the Applicant no.1-sent for examination-examiner (private agency) not examined as witness-during the St.ment of PW-4-he admitted that report was not received-but complainant's counsel St.d in argument that report was produced in the court-examiner of the meter is necessary witness-application u/s 311 Cr.P.C. moved for calling the examiner for recording its evidence-rejected-duty of prosecution to prove such report –u/s 311 Cr.P.C.- Application be allowed at any stage before pronouncement of judgment-impugned order set aside.

Application allowed. (E-9)

List of Cases cited:

V.N. Patil Vs Niranjan Kumar & ors., (2021) 3 SCC 661

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

1. Heard Sri Sanjay Kumar Dubey, learned counsel for the applicants, Sri Pankaj Kumar Tripathi, learned Additional Government Advocate, learned counsel for opposite party no.2 and perused the record.

2. This application under Section 482 CrPC has been filed for quashing the order dated 26.04.2022 passed by the Additional Sessions Judge/Special Judge (Electricity Act), Court No.2, Hathras passed in ST No.109 of 2006 (H.S. Agrawal Vs. M/S Parsadi Lal and others), under Section 135 Electricity Act, 2003, Police Station Chandpa, District Hathras by which Application No.218(D) under Section 311

CrPC moved by the accused persons was rejected.

3. In brief, facts of the case in brief are that opposite party no.2 filed a complaint under Section 135 of the Electricity Act registered as Complaint Case No.109 of 2006 (Shri H.S. Agrawal Vs. M/S Parsadi Lal and others) against the complainant firm and its director regarding electricity theft by tampering the electric meter in which after completion of formalities, trial began, after completion of prosecution evidence, statement of the accused persons were recorded on 07.03.2013 under Section 311 CrPC, evidence of DW-1, DW-2 and DW-3 were recorded in defence and trial court provided opportunity to the prosecution for their cross-examinations.

4. The case of the complainant was that the alleged meter taken from the premises of applicant no.1, was sent to M/s Duke Ornex, Hyderabad and the examiner has not been examined as witness, during the statement of PW-4, Ramesh Chandra, the witness admitted that the report of Duke Ornex, Hyderabad has not been received, but the learned counsel for the complainant stated in his argument that the report of M/S Duke Ornext, Hyderabad was produced in the Court and the examiner of the meter is the necessary witness and he must be examined in the court to ascertain the truth.

5. On the above grounds, the aforesaid application under Section 311 CrPC was moved for calling M/S Duke Ornex, Hyderabad for recording its evidence in respect of report, but the trial court rejected the application recording perverse findings stating therein that it is the duty of the prosecution to set up their case beyond reasonable doubts and in the present case, the dispute with regard to the report of seal received or not, is the case of prosecution. There is dispute with regard to theft of electricity by tampering electric meter and in such circumstances, the evidence of M/s Duke Ornex, Hyderabad becomes essential for the just decision of the case. The order is absolutely illegal, arbitrary and against the provisions of law and has been passed without applying the judicial mind, hence the impugned order be quashed.

6. The relevant documents relating to the case have been filed as Annexures to the counter affidavit filed on behalf of opposite party nos.2 and 3 stating therein that M/S Parsadi Lal Tulsiram Cold Storage had taken electricity connection of 11 K.V. from the U.P. Power Corporation Ltd. On a sudden check by the team of power corporation on 18.11.2004, it was found that the cold storage was functioning and on suspicion all the seals of cubical meter were sent to the M/S Duke Ornex, Hyderabad for its examination on 20.11.2004. After receiving the report of said meter, it was found that the reading of meter was made lesser by the opposite party through remote and as such bill for payment has been sent on 27.09.2005 for Rs.56,79,572/-. The applicants were summoned, trial started, statement of the accused persons under Section 311 CrPC were recorded and the applicants examined three witnesses in defence. After a long gap of six years from the recording of statements under Section 313 CrPC, and at the verge of conclusion of trial, the applicants moved an application under Section 311 CrPC on 27.04.2019. This application was moved after closing of the defence evidence on 13.03.2013 only to delay the trial. The application was rejected

by the trial court on 26.04.2022 in which there is no illegality at all. Hence, the application is not maintainable and is liable to be quashed.

7. From the perusal of the para-6 of the impugned complaint, it is very much clear that the Executive Engineer, Hathras had sent the alleged tampered sealed meter to M/S Duke Ornex, Hyderabad for checking and after due checking, M/S Duke Ornex Hyderabad sent the report by letter no.2320 on 20.11.2004 which has also been clarified through its letter that the firm had stolen electricity by setting up sub-circuit in the said meter and running the meter high and low through remote. PW-4, Ramesh Chandra deposed that he has read over the report of the M/S Duke Ornex, Hyderabad and this is the basis of complaint.

8. It is not known to this Court as to whether M/S Duke Ornex, Hyderabad is a government laboratory or private, however, if a report has been obtained under Section 292 or under Section 293 CrPC, such report, being public document, would be admissible in evidence and would be accepted automatically and there would not be any need to examine the scientist who examined the material and prepared the report on behalf of the complainant except on the request of the defence but if any examination report has been obtained from any private agency, such report would be treated to be a private document.

9. In case of report of a private laboratory, it would be a private document in view of Section 75 of the Indian Evidence Act, 1872 and in that case, there would be need of examination of the Scientist who examined the subject-matter and submitted the report.

10. In view of the above discussion, this Court is of the view that since the report was obtained from a private agency i.e. M/S Duke Ornex, Hyderabad, hence it was the duty of the prosecution to prove such report in due course.

11. From the perusal of the impugned order, it does not disclose that whether the report of M/S Duke Ornex, Hyderabad is on record of the lower court or not. Since the alleged report is the basis of the concerned Criminal Complaint, hence it was duty of the learned trial court to order the prosecution to produce the same as in absence of that, there was no *prima facie* evidence to prosecute the applicants. Before passing the impugned order, it was duty of the lower court to ascertain as to whether the report of M/S Duke Ornex, Hyderabad is on record or not, but he simply based his conclusion on the evidence of PW-4, Ramesh Chandra without examining deeply and properly and concluded that the burden of proof is upon the complainant and rejected the application moved by the applicants.

12. In this case, if the defence evidence had been closed on 13.03.2013, why the concerned complaint could not be decided earlier, is also a matter of concern.

13. It would be proper to reproduce Section 311 CrPC which is as under:-

"311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine

or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."

14. Under Section 311 CrPC, for the ends of justice and just decision of the case, the Court may entertain and allow the application at any stage before the pronouncement of judgement. The second part of Section 311 CrPC is imperative and binding upon the Court. Therefore, if the report of M/S Duke Ornex, Hyderabad is not on record, it was also duty of the concerned trial court to direct the prosecution to file the same as in a criminal case a judge cannot be a silent spectator or referee and he has to take active part during the trial. He should order for production of document or the oral evidence either of the parties to enable the court for just, appropriate, full and final adjudication of the case. Merely saying that it is the duty of the prosecution to prove the case beyond reasonable doubt, is not sufficient for the trial court to commit an omission. If the view of the trial judge is so, a question arises as to why this criminal complaint was not rejected on the date of institution for the absence of report and evidence regarding tampering with the seals of the concerned meter.

15. In **V.N. Patil Vs. Niranjan Kumar and others, (2021) 3 SCC 661**, the Hon'ble Apex Court has held principles regarding Section 311 CrPC which are as under:-

"14. The object underlying Section 311 CrPC is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".

15. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar v. State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240 : (SCC p. 141, para 17)

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. This principle has been further reiterated in Mannan Shaikh v. State of W.B., (2014) 13 SCC 59 : (2014) 5 SCC (Cri) 547 and thereafter in Ratanlal v. Prahlad Jat, (2017) 9 SCC 340 : (2017) 3 SCC (Cri) 729 and Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 :

(2019) 4 SCC (Cri) 839 . The relevant paragraphs of Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839 are as under: Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839, SCC p. 331, paras 10-11)

"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine, or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 Cr.P.C has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice."

16. In the aforesaid case, the appeal was allowed by the Hon'ble Apex Court and the order of High Court was set aside and order of the trial court regarding summoning of the witnesses and production of document was restored.

17. On the basis of above discussion, this Court is of the view that the impugned order is not in accordance with law and it is nothing but avoidance of duty by the trial court, hence the application deserves to be allowed.

18. The present application under Section 482 CrPC is **allowed** and the impugned order dated 26.04.2022 passed by the trial judge is hereby set aside.

19. The trial judge is directed to first ascertain that the alleged report of M/S Duke Ornex , Hyderabad regarding tampering of seal of the impugned meter is on record or not and if it is on record whether the same has been proved in due course of law by the complainant or not and if it is on record, the learned trial court shall provide an opportunity to summon the concerned Scientist by whom the alleged report had been prepared. In absence of such report, the trial court would also think and act as to whether in absence of the basis of the complaint whether the present criminal complaint was liable to be instituted, the applicants were liable to be summoned and charged and would pass

appropriate order/judgment in accordance with law.

(2023) 4 ILRA 745
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.04.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Application U/S 482. No. 20368 of 2017

Dr. Mod. Iqbal Gaji ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Avnish Kumar Srivastava, Sri Anoop Trivedi

Counsel for the Opposite Parties:
G.A., Sri Brijesh Sahai, Sri Yogesh Kumar Srivastava, Sri Bhavya Sahai

Criminal Law - Code of Criminal Procedure, 1973 - Section 482-Applicant seeks quashing of order declaring the opposite party as juvenile-All the accused in the case were given capital punishment-Appeal-order modified to life imprisonment-one PIL filed for release of prisoners who may have been below 18 years of age on the date of commission-directions issued by High Court provide legal aid to such prisoners-opposite party applied –age determined by medical board-opposite party declared juvenile-pressence of remedy of Appeal will not render the Application u/s 482 non maintainable-impugned order reveals that complainant was neither served with notice-no opportunity of hearing-order quashed.

List of Cases cited:

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

2. Dhariwal Tobacco Products Ltd. & ors. Vs St. of Mah. & anr., (2009) 2 SSC 370

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Avnish Kumar Srivastava, learned counsel for the applicant and Sri Brijesh Sahai, learned Senior Advocate assisted by Sri Bhavya Sahai, learned counsel for the opposite party no. 2.

2. By moving this application under Section 482 Cr.P.C. the applicant seeks to invoke the inherent jurisdiction of this court to quash the order dated 19.05.2017 passed by the Juvenile Justice Board, Agra in Misc. Application No. 109 of 2017 (arising out of Crime No. 131 of 2003) under Sections 147, 148, 149, 307, 302 IPC, Police Station Kotwali, District Meerut by which the Juvenile Justice Board, Agra declared the convict/O.P. No. 2 a juvenile.

3. As per facts of the case Sessions Trial Nos. 668, 669 and 671 of 2003, Case Crime No. 131 of 2003 and 134 of 2003 respectively under Sections 147, 148, 149, 307, 302 IPC and 25/27 Arms Act, Police Station Kotwali, District Meerut were decided by the trial court vide judgement dated 04.08.2007 and all the four accused persons were found guilty. The case was decided into capital punishment. Criminal Reference No. 21 of 2007 - State Vs. Khalid and others, was made to this court to confirm the capital punishment. The accused persons also filed Criminal Appeal No. 5169 of 2007 - Khalid and others Vs. State of U.P. before this court. Both the reference and criminal appeal were heard together by the Division Bench of this court. The reference was dismissed and the appeal was partly allowed vide judgment and order dated 05.09.2008. The death

sentence was set aside and was commuted to life imprisonment i.e. imprisonment for whole life with this provision that the accused persons shall not be entitled to be considered for remission of sentence unless, they have undergone actual term of 20 years imprisonment including the period already undergone by them. The sentence of fine awarded to the appellants under Sections 302/149 IPC as well as sentence of imprisonment and fine awarded to them under Sections 307/149 and 148 IPC and the conviction of accused appellants Tahir and Moinuddin and the sentence awarded to them under Section 25 Arms Act were upheld. All the sentences of imprisonment were to run concurrently. The convict/opposite party no. 2 along with other co-accused persons was thereafter transferred to Central Jail, Agra to serve the sentence.

4. One Sister Sheeba Jose, a lawyer and human right activist, filed a Public Interest Litigation No. 855 of 2012 (Sister Sheeba Jose Vs. State of U.P. and others) before this Court for release of the prisoners, who may have been below 18 years of age on the date of commission of the offence and were detained in various district or Central Jail. For Agra, Central Jail a list of 18 prisoners was made for grant of such relief. This writ petition was decided by the division bench of this Court vide order dated 24.05.2012 and directions were issued to the District Judges, who were also the Chairpersons of their Legal Services Authorities, to see that the efficient lawyers were appointed for the purpose of providing legal aid to the prisoners, who were unable to engage private lawyers and who were mentioned in the list furnished by the State Government and described to be below 18 years in age on the date of commission of offence. The present applicant applied on 25.02.2017 (through Jail Superintendent, Central Jail, Agra) before the Secretary, District Legal Services Authority for providing him legal aid. On his application, the District Legal Services Authority appointed one Sri Pal Singh, Advocate for providing him legal aid and thereafter on behalf of the applicant, an application was moved on 06.04.2017 before the Juvenile Justice Board, Agra claiming therein that he was a juvenile at the time of incident. He was not literate and had no documentary evidence regarding his age, so his age may be determined by constituting a medical board. His medical was done by the medical board and on the basis of report of medical board dated 17.05.2017 the Principal Magistrate, Juvenile Justice Board, Agra vide order dated 19.05.2017 declared the convict/opposite party no. 2 a juvenile on the date of incident. This order dated 19.05.2017 is the subject matter of the present proceedings.

5. The opposite party no. 2 along with one co-accused filed a Writ Petition (Criminal) No. 155 of 2022 under Article 32 of the Constitution of India, before the Apex Court, which was disposed of vide order dated 06.09.2022 with the direction to this court to dispose of the Criminal Misc. Application U/S 482 Cr.P.C. No. 20368 of 2017 against the present accused and the Criminal Revision No. 2913 of 2019 filed by the co-accused, expeditiously and not later than six months.

6. After these directions of the Apex Court, the Application U/S 482 No. 20368 of 2017 against convict - opposite party no. 2 along with Criminal Revision No. 2913 of 2019 filed by the co-accused/convict for the first time were placed before this court on 22.03.2023. On this date, learned

counsel for the applicant in the application under Section 482 Cr.P.C. above seeked time so that he may inform the counsel for the revisionist and accordingly date 28.03.2023 was fixed and on 28.03.2023 the arguments in the present Application U/S 482 No. 20368 of 2017 were heard.

7. The impugned order dated 19.05.2017 was assailed by the learned counsel for the applicant on the grounds that the judgment in Crime No. 131 of 2003 was passed on 04.08.2007 by the District Court, Meerut and only to undergo the sentence awarded therein the convict - opposite party no. 2 was lodged in Central Jail, Agra. The Principal Magistrate, Juvenile Justice Board, Agra had no jurisdiction to determine the age of the juvenile. Vide order dated 24.05.2012 the division bench of this Court in Criminal Writ - Public Interest Litigation No. 855 of 2012 directed the Juvenile Justice Board to determine the age of the person in question, after providing an opportunity to the prosecution and the complainant of being heard but the applicant was not given an opportunity of being heard. He was not given any notice by the Juvenile Justice Board, Agra, so he could not oppose the application of the opposite party no. 2 for declaring him juvenile. In fact, the opposite party no. 2 put before the Board wrong facts that he was illiterate, while on his statement under Section 313 Cr.P.C. on 16.05.2006 he had put in signatures this fact falsifies his claim of being illiterate. Further, it is argued that in his statement under Section 313 Cr.P.c. on 16.05.2006 the opposite party no. 2 has disclosed his age to be 21 years. Thus, on the date of incident in the year 2003 he could be said to be of 18 years of age. In the voter list of the year 2017 his age is mentioned as 41 years. Thus, in the year 2003 his age becomes 27 years. He had also executed two agreements to sale on 15.09.2000 and 20.09.2000 respectively and a power of attorney on 27.08.1998. All the documents were executed under his own signatures independently and not as a minor under guardianship of any other person. Thus, on the basis of above admissions he was major on the date of incident i.e. 07.06.2003, as a person cannot make the claim against his own admissions. Hence, the impugned order is prayed to be set aside.

8. This application of the applicant under Section 482 Cr.P.C. was opposed by the learned counsel for the opposite party no. 2 on the ground that as per Section 52 of Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'Act') any person aggrieved by an order made by a competent authority under this Act may, within thirty days from the date of such order, prefer an appeal to the Court of Sessions. It was claimed that as a remedy was available to the applicant in the statute itself then he could not invoke the inherent jurisdiction of this court under Section 482 Cr.P.C. If the Act was silent about the remedy, only then the application under Section 482 Cr.P.C. could have been moved.

9. It is further submitted by the learned counsel for the opposite party no. 2 that by the same Juvenile Justice Board another co-accused was also declared juvenile vide order dated 22.04.2017 and against that order, though, the present applicant initially took the same recourse of filing the application under Section 482 Cr.P.C. No. 18718 of 2017 before this court, but later on as under the statue the remedy of appeal had been provided and that application was wrongly filed by the applicant. His application under Section

482 Cr.P.C. was dismissed and in the light of specific statutory provision under the Act the applicant filed an appeal against the order dated 22.04.2017. It was further argued by the learned counsel for the opposite party no. 2 that the learned counsel for the applicant, who happened to be the counsel of that another co-accused also, could not avail two different remedies regarding the same cause of action in the same matter in the two cases of two co-accused persons. It was also submitted that while as per Section 7A of the Act and Rule 12 of Rules, 2017 if the person is illiterate having no educational certificate or having no birth certificate issued by a corporation or municipal board or panchayat, the only recourse before him to get his age determined was to sought the medical opinion from a duly constituted medical board and that board would have to declare the age of juvenile or child and as is the case here that by moving an application the opposite party no. 2 got himself declared juvenile on the date of incident vide impugned order dated 19.05.2017 passed by the Principal Magistrate, Juvenile Justice Board, Agra on the basis of the medical report by medical board. It is further submitted that as the convict/opposite party no. 2 was minor on the date of incident so his admission, either in his statement under Section 313 Cr.P.C. or on the basis of other documents like agreement to sale or power of attorney cannot, be said to be of any importance being admission on the part of a minor.

10. Learned counsel for the applicant submitted in reply that though he had filed Application U/S 482 Cr.P.C. No. 18718 of 2017 in case of co-accused of this case, during pendency of that application he came to know about the release of that co-accused, so he had to withdraw that application under Section 482 Cr.P.C. and had to file an appeal before the District Judge, which was allowed by that court and the order in favour of that co-accused declaring him to be juvenile on the date of incident was set aside. But in the present case when this application under Section 482 Cr.P.C. was moved the accused had not been released from the judicial custody, so he proceeded with the present application under Section 482 Cr.P.C. in case of the present accused/convict.

11. If we go through the record, it is found that the present accused and co-accused both were ordered to be released on bail by the Apex Court vide order dated 17.05.2022 passed in Writ Petition (Criminal) No. 155 of 2022 above. Thus, as both the co-accused persons were released by the same order and that too in the year 2022 the argument of the learned counsel for the applicant that at the time of withdrawal application u/s 482 No. 18718 of 2017, co-accused, the opposite party no. 2 in that application, had been released, so they had to withdraw that application under Section 482 Cr.P.C. on 11.10.2017 with a prayer to avail appropriate legal remedy against the impugned order, becomes wrong.

12. Otherwise also the learned counsel for the applicant failed to show any provision that if a person is released on bail, the application against that person moved under Section 482 Cr.P.C., becomes infructuous.

13. Now it is to be seen that whether in the presence of remedy provided under the statute/clear provision of appeal, against the impugned order the application under Section 482 Cr.P.C. of the present applicant is maintainable?

14. It is apposite to reproduce Section 482 Cr.P.C. which is as under:-

482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

15. As per this section, the only purpose to proceed under Section 482 Cr.P.C. is to prevent the abuse of the process of any Court and otherwise to secure ends of justice. Thus, in the section itself, there is no bar that if a simultaneous/equally efficacious remedy is available to a person in the statute itself, he cannot avail the remedy provided under Section 482 Cr.P.C.

16. If we go through the order passed in Application U/S 482 No. 18718 of 2017 dated 11.10.2017 of the coordinate bench of this court, in case of co-accused of the present case, that application under Section 482 Cr.P.C. of the applicant was not rejected on the ground that equally efficacious relief is available to the applicant in the statute itself nor that application under Section 482 Cr.P.C. was converted into appeal by this court, as submitted by the learned counsel for the opposite party no. 2, rather the applicant himself did not press his application and prayed to withdraw that application with liberty to avail appropriate legal remedy and on the basis of such prayer only, the coordinate bench of this court passed order dated 11.10.2017 and permitted the applicant to withdraw his application under Section 482 Cr.P.C. No. 18718 of 2017 with liberty to avail appropriate legal remedy.

17. Learned counsel for the opposite party no. 2 could not place before the court any law/judgement that if a person is having equally efficacious relief he cannot avail the remedy under Section 482 Cr.P.C.

18. The Apex Court in judgment ***Prabhu Chawla Vs. State of Rajasthan and another (2016) 16 Supreme Court Cases 30,*** held that there is no total ban on exercise of inherent power where abuse of process of court or other extraordinary situation warrants exercise of inherent jurisdiction. Availability of alternative remedy of Criminal Revision under Section 397 by itself cannot be a good ground to dismiss an application under Section 482 Cr.P.C.

19. In ***Dhariwal Tobacco Products Limited and others Vs. State of Maharashtra and another, (2009) 2 Supreme Court Cases 370,*** the Apex Court held that availability of alternative remedy of filing revision under Section 397 would not be a ground to dismiss the application under Section 482 Cr.P.C.

20. Thus, in the opinion of the court, the argument of learned counsel for the opposite party no. 2 in this regard has not force. If the court considers that to prevent the abuse of the process of any court or otherwise to secure the ends of justice it is appropriate the court can very well entertain the application under Section 482 Cr.P.C.

21. It is submitted by the learned counsel for the applicant that vide impugned order dated 19.05.2017 the Principal Magistrate, Juvenile Justice Board, Agra declared the opposite party no. 2 a juvenile, on the date of incident. But while deciding the application of the opposite party no. 2 to declare him

juvenile, the applicant was not given a chance of being heard. No notice was issued to him by the Principal Magistrate, Juvenile Justice Board. The attention of the court is drawn towards the judgment of division bench of this court dated 24.05.2012 passed in Criminal Writ - Public Interest Litigation No. 855 of 2012 whereby an order was made for the Principal Magistrate, Juvenile Justice Board for determining the age of the victim, there was a clear direction that the prosecution and the complainant would also be given an opportunity to examine their own witness and to cross-examine the witnesses, who have been examined on behalf of the accused and for that purpose notices of the proceedings before Juvenile Justice Board shall be served on the complainant or prosecution. Thus, in the order dated 24.05.2012 of the division bench of this court it was a mandatory condition that before determining the age of the accused notices shall compulsorily be served on the complainant and the complainant had to be given liberty to examine his own witnesses and cross-examine the witnesses of the accused. But the perusal of the impugned order dated 19.05.2017 clearly reveals that the complainant was neither served with a notice nor was given an opportunity of being heard or to oppose the application of the accused for declaring him juvenile on the date of incident. Thus, the complainant or his counsel could not appear before the Principal Magistrate, Juvenile Justice Board to cross-examine the accused witnesses and examine their own witnesses and raise any objection on the medical report filed by the medical board.

22. As the Principal Magistrate, Juvenile Justice Board, Agra in compliance of order dated 24.05.2012 passed by the division bench of this court, did not issue notice for the complainant and as a result did not provide him an opportunity of being heard or adduce his evidence or cross-examine the witnesses, it was a blunder on the part of the Principal Magistrate, Juvenile Justice Board, Agra. Thus, the order dated 19.05.2017 is found to be against the specific directions of the Division Bench of this court given by order dated 24.05.2012.

23. So far as the argument of learned counsel for the applicant that the Juvenile Justice Board, Agra had no jurisdiction to determine the age of the accused as the matter belonged to District Meerut is concerned it was after conviction from Meerut District Court only that the accused was lodged in Central Jail, Agra and this fact does not give authority to Juvenile Justice Board, Agra to hear the application of age determination of the accused.

24. In this regard, para-2 of Section 7A(1) is apposite to mention here:-

[7A. Procedure to be followed when claim of juvenility is raised before any court.- (1) .....

Provided that a claim of juvenility may be raised before <u>any court</u> and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

25. In the above provision, the word 'any court' means the trial court/High Court/Apex Court. It does not mean that any court in U.P. wherever

a person wants his application to be moved. As the case belonged to District Meerut and it was decided by the District Court Meerut, the District Court, Meerut/Principal Magistrate, Juvenile Justice Board, Meerut only had jurisdiction to decide the question of juvenility of the applicant. Thus, the order dated 22.04.2017 passed by the Principal Magistrate, Juvenile Justice Board, Agra was an order passed without jurisdiction.

26. The order dated 19.05.2017 passed by the Principal Magistrate, Juvenile Justice Board, Agra in Misc. Application No. 109 of 2017 (State Vs. Munna) arising out of Crime No. 131 of 2003, under Sections 147, 148, 149, 307, 302 IPC, Police Station Kotwali, District Meerut being without jurisdiction and passed without issuing notice to the applicant, is hereby quashed.

27. The application under Section 482 Cr.P.C. is, thus, allowed.

(2023) 4 ILRA 751
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Application U/S 482. No. 20982 of 2017

Sanesh Thakur & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Harish Kumar Yadav, Sri Suved Kumar Sharma

Counsel for the Opposite Parties:
G.A., Sri Vinod Kumar Yadav

Dispute between parties-relating to grant of advertisements to the newspaper published by the Applicant no.1 from the opposite party no.2-present prosecution is incidental and not natural consequence-compromise between the parties-Application for compromise rejected-impugned-section 385 IPC not mentioned in either tables u/s 320 Cr.P.C.-power of a Court u/s 320 IPC is different from power u/s 482 Cr.P.C.-opposite party no.2-a key prosecution witness-declared his unequivocal intent to turn hostile at the Trial-allowing proceedings-waste of time – compromise accepted-proceedings quashed-**Application allowed.** (E-9)

List of Cases cited:

1. Ram Lal & anr Vs St. of J& K, (1999) 2 SCC 213

2. St. of Rajasthan Vs Shambhu Kewat & anr , (2014) 4 SCC 149

3. Gian Singh Vs St. of Pun. & anr, (2012) 10 SCC 303

4. Narinder Singh & anr Vs St. of Pun. & anr (2014) 6 SCC 466

5. Parbatbhai Aahir Vs St. of Guj. (2017) 9 SCC 641

6. St. of M.P. Vs Laxmi Narayan & ors, (2019) 5 SCC 688

(Delivered by Hon'ble Manish Kumar Nigam, J.)

The brief facts of the case are that :

1. F.I.R. under Sections 385, 323, 504, 506 IPC was registered on 13.8.2015 at P.S.-Civil Lines, District-Moradabad against the applicants who are four in number. After conducting the investigation, the Police has submitted charge-sheet No.286 of 2015 dated 14.9.2015 under Sections 385, 323, 504, 506 IPC against all

the applicants. On 18.2.2016, Chief Judicial Magistrate, Moradabad has taken cognizance under Sections 385, 323, 504, 506 IPC and summoned the accused applicants. Copy of the order is at page 30 of the paper book and Criminal Case No.1146 of 2016 (State Vs. Sanesh Thakur and others) was registered.

2. The present application under Section 482 Cr.P.C. has been filed by the accused applicants challenging the order of cognizance dated 18.2.2016 as well as the entire proceedings of Criminal Case No.1146 of 2016 (State of U.P. Vs. Sanesh Thakur and others) pending before the Additional Chief Judicial Magistrate, Court No.2, Moradabad. Apart from other grounds taken in the application, the Counsel for the applicant submitted that opposite party no.2 namely Asheesh Agrawal who was the informant, moved an application before the court below that the matter has been compromised between the parties and he does not want to proceed with the case. It was prayed in the aforesaid application which is at page 38 of the paper book that in light of the compromise, proceedings in case no.1146 of 2016 be quashed.

3. This Court vide order dated 11.7.2017 stayed the further proceedings against the applicants in case crime no. 586/2015, criminal case no. 1146 of 2016 under Sections 385, 323, 504, 506 IPC P.S.-Civil Lines, District-Moradabad and issued notice to the opposite party no.2.

4. Again when the matter was taken up on 4.11.2022, the Counsel for the parties submitted that the parties have entered into a compromise and have settled their dispute. On the aforesaid submission, this Court vide order dated 4.11.2022 directed that the compromise shall be verified within a period of four weeks. The order dated 4.11.2022 is quoted as under :-

"Learned counsel for the parties submits that parties have entered into compromise and have settled their dispute. A copy of compromise was placed before the court concerned, however in absence of specific order it was not verified.

Therefore, it is directed that the compromise shall be verified within a period of 4 weeks and thereafter a report shall be send to this Court within a period of two wee

Put up this case after 6 weeks."

5. After the order dated 4.11.2022, learned Additional Chief Judicial Magistrate, Court No.2, Moradabad submitted a report before this court mentioning therein that matter has been compromised between the parties and the same has been verified on 03.01.2023.

6. In this regard, a supplementary affidavit has also been filed by the applicants which has been taken on record on 21.02.2023 reiterating the position that matter has been compromised between the parties and the same has been verified.

7. Learned Counsel for the applicants submitted that as the dispute has been settled amicably outside the court and compromise entered into the parties has been verified before the court below, the present application u/S 482 be allowed and proceedings of Case No.1146 of 2016 (State Vs. Sanesh Thakur and others)

arising out of Case Crime No.586 of 2015 under Sections 385, 323, 504, 506 IPC, P.S.-Civil Lines District-Moradabad be quashed.

8. Learned A.G.A. submitted that it is correct that the matter has been compromised between the parties. Learned AGA further submitted that offence under Section 385 IPC is not compoundable in view of Section 320 Cr.P.C. and the list appended to Section 320 of Cr.P.C. and therefore, the proceedings of Case No.1146 of 2016 (State Vs. Sanesh Thakur and others) cannot be quashed. In support of his contentions, learned AGA relied upon the judgment of Apex Court in case of ***Ram Lal and another Vs. State of J&K reported in (1999) 2 SCC 213*** and the judgment of Apex Court in case of ***State of Rajasthan Vs. Shambhu Kewat and another*** reported in ***(2014) 4 SCC 149.***

9. The Hon'ble Supreme Court in case of Ram Lal and another Vs. State of J&K (supra) has held that Section 320 Cr.P.C. which deals with "compounding of offences" provides two Tables therein, one containing descriptions of offences which can be compounded by the person mentioned in it, and the other containing descriptions of offences which can be compounded with the permission of the court by the persons indicated therein. Only such offences as are included in the said two Tables can be compounded and non else. Sub-section 9 of Section 320 of Code of Criminal Procedure, 1973 imposes a legislative ban on compounding except as provided in the section.

10. In State of Rajasthan (supra), the Hon'ble Supreme Court in paragraph no.15 of the judgment has held as follows:-

"15. We are not prepared to say that the crime alleged to have been committed by the accused persons was a crime against an individual, on the other hand it was a crime against the society at large. Criminal law is designed as a mechanism for achieving social control and its purpose is the regulation of conduct and activities within the society. Why Section 307 IPC is held to be non-compoundable, is because the Code has identified which conduct should be brought within the ambit of non-compoundable offences. Such provisions are not meant, just to protect the individual, but the society as a whole. The High Court was not right in thinking that it was only an injury to the person and since the accused persons (sic victims) had received the monetary compensation and settled the matter, the crime as against them was wiped off. Criminal justice system has a larger objective to achieve, that is, safety and protection of the people at large and it would be a lesson not only to the offender, but to the individuals at large so that such crimes would not be committed by any one and money would not be a substitute for the crime committed against the society. Taking a lenient view on a serious offence like the present, will leave a wrong impression about the criminal justice system and will encourage further criminal acts, which will endanger the peaceful co-existence and welfare of the society at large."

11. In reply, it has been contended by learned Counsel for the applicant that there is no impediment in exercise of powers of the High Court under Section 482 Cr.P.C. in quashing criminal proceedings where the parties have settled their dispute amicably.

12. It is correct that Section 385 IPC is not an offence mentioned in either of the

Tables referred in Section 320 Cr.P.C. In case of ***Gian Singh Vs. State of Panjab and another*** reported in ***(2012) 10 SCC 303***, the Hon'ble Supreme Court has held that Section 320 of the Code articulates the public policy with regard to compounding of offences. It catalogues the offences punishable under IPC which may be compounded by the parties without permission of the Court and certain offences can be compounded only with the permission of Court. The offences punishable under the special statutes are not covered by Section 320.

13. While considering the question with regard to the inherent powers of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which, he is allegedly involved, is not compoundable under Section 320 of the Code, the Hon'ble Supreme Court in Para 57 of the judgment in case of Gian Singh (supra) has held that quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence, they are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a Court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the Court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequences may be acquittal or dismissal of indictment.

14. In paragraph 58 of the judgment in case of Gian Singh (supra), the Hon'ble Apex Court has laid down that where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does show that in its opinion, continuation of criminal proceeding will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored, securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the Court. In respect of serious offences like murder, rape, dacoity etc or other offences of mental depravity under IPC or offences of moral turpitude under special statues, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry etc. or family dispute, where the wrong is basically to the

victim and the offender and the victim have settled all disputes amicably, irrespective of fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceedings or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and end of justice shall be defeated.

15. The Hon'ble Apex Court in ***Narindra Singh and another Vs. State of Punjab and another*** reported in ***(2014) 6 SCC 466*** in paragraph no.29 has laid down the guidelines by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. The guidelines as provided in paragraph no.29.1 to 29.7 are quoted as under:-

"29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime. "

16. In case of ***Parbatbhai Aahir Vs. State of Gujarat*** reported in ***(2017) 9 SCC 641,*** the Supreme Court again considered that whether the High Court can quash the FIR/complaint/criminal proceedings, in exercise of the inherent jurisdiction under Section 482 Cr.P.C. After considering the various judgments of the Apex Court on the

point, the Hon'ble Supreme Court summarised the following propositions in para 16.1 to 16.10 which are quoted as under:-

"16.1. Section 482 Cr.P.C. preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 Cr.P.C. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482 the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court.

16.5. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned.

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences

involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

17. Again, in case of ***State of Madhya Pradesh Vs. Laxmi Narayan and others*** reported in ***(2019)5 SCC 688***, the Hon'ble Supreme Court, considered the law on the aforesaid point and in paragraph nos. 15.1 to 15.5 observed as follows:-

"15.1. That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3. Similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4. Offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5. While exercising the power under Section 482 of the Code to quash the

criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc. "

18. In case of State of Madhya Pradesh Vs. Laxmi Narayan and others (supra), the Supreme Court has considered the judgment in case of State of Rajasthan Vs. Shambhu Kewat and another (supra).

19. From the perusal of the record it appears that the real dispute between the parties is relating to grant of advertisements to the newspaper published by applicant no.1 from the opposite party no.2 who is running an institute, which is private in nature. The present criminal prosecution arose incidently between the parties and is not a natural consequence of the real occurrence. It is apparent that the parties have entered into a compromise and they further appear to have settled their dispute amicably. The opposite party no.2 who would be a key prosecution witness, if the trial were to proceed, has declared his unequivocal intent to turn hostile at the trial. In these circumstances, it is apparent that the merits and truth apart, the proceedings in trial, if allowed to continue, may largely be a waste of precious time by the learned court below.

20. The court cannot remain oblivious to the hard reality that the facts of the present case and other similar cases present where, though the allegations made in the FIR do appear to contain the ingredients of a criminal offence, however, in view of settlement having been reached, the chances of conviction are not only bleak but, if such trials are allowed to continue along with all other trials which are piled up, practically in all criminal courts in the state, the continuance of trials in cases such as the instant case may only work to the huge disadvantage of other cases where litigants are crying for justice.

21. Thus, looking at the prevalent tendencies in the society, a more pragmatic, and less technical approach commends to the court - to let some criminal prosecutions such as the present case be dropped, for the sake of more effective, efficient and proper trial in other cases where the litigants appear to be serious about their rights and more consistent in their approach.

22. Considering the facts and circumstances of the case and submissions advanced by learned Counsel for the parties, regarding the compromise entered into between the parties and taking all these factors into consideration cumulatively, the compromise between the parties be accepted and further taking into account the legal position as laid down by the Apex Court in case of Narindra Singh and others Vs. State of Punjab and another (supra), Parbatbhai Ahir Vs. State of Gujrat (supra) and State of Madhya Pradesh Vs. Laxmi Narayan and others (supra), the entire proceedings of the aforesaid case are hereby quashed.

23. The present application u/S 482 thus is allowed, subject however to payment of cost to be deposited by the parties before the High Court Legal Services Committee, Allahabad, within a

period of three weeks from today. Such cost has to be imposed to let the parties (in this case) in particular and the society in general know that the courts cannot remain a mute spectator to unscrupulous and errant behaviour of certain persons. A society that will allow its members to misuse its courts, will ultimately suffer and pay a huge cost. Litigants, both genuine and bogus, will always continue to stand in a common queue. The courts have no mechanism to pre-identify and distinguish between the genuine and the bogus litigants. That differentiation emerges only after the hearing is concluded in any case and hearing requires time. In fact, even if the courts were to take punitive action against a bogus litigant, then, being bound by rules of procedure and fairness, such cases are likely to take more time than a case of two genuine litigants.

24. In such circumstances, though no useful purpose would be served in allowing the prosecution to continue any further, however, no firm conclusion may be reached, at this stage, as to complete falsity of the allegations made against the applicants. The present Section 482 Cr.P.C. application thus stands allowed, subject however to payment of cost of Rs. 12,500/- (2,500 on each party) to be deposited before the High Court Legal Services Committee, Allahabad, within a period of three weeks from today.

(2023) 4 ILRA 760
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 21174 of 2022

Bindu & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Madhaw Prasad

Counsel for the Opposite Parties:
G.A., Sri Rajnish Shukla

Criminal Law - Code of Criminal Procedure, 1973 - Section 482-After lodging of the FIR-I.O. submitted the charge sheet-witnesses have supported prosecution version-corroborated by medical evidence-criminal proceedings cannot be cancelled lightly and inherent power u/s 482 Cr.P.C. cannot be exercise.

Application dismissed. (E-9)

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

1. Heard Sri Madhaw Prasad, learned counsel for the applicants, Sri Rajnish Shukla, learned counsel for opposite party no.2 and perused the record.

2. This application under Section 482 CrPC has been moved to quash the entire proceedings of Criminal Case No.124217 of 2021 (State Vs. Bindu Chaudhary and others) arising out of Case Crime No.77 of 2021, under Sections 323, 504, 308 IPC, Police Station Compierganj, District Gorakhpur pending in the Court of Judicial Magistrate-III, Gorakhpur as well as charge sheet dated 08.08.2021 and also NBW dated 05.04.2022 issued against applicant no.1.

3. In brief, facts of the case are that opposite party no.2, Sanjay Kumar lodged an NCR on 01.04.2021 about the incident dated 09.03.2021 that on account of old enmity applicants accused had beaten him

by lathi-danda and caused several injuries to him. He was medically examined on the same day at 11:40 a.m. in which the doctor found three injuries of complaint of pain and one injury of lacerated wound on the top of head, 12 cm above of left ear which was kept in observation.

4. A CT scan was done of opposite party no.2 in which hemorrhagic contusion was seen in left high frontal region and fracture of outer table of left frontal bone was also seen. Finally head injury was concluded and thereafter the present FIR has been lodged under Sections 323, 504, 308 IPC. The bail application of applicant nos.2 to 4 had been rejected by the Additional Sessions Judge, Court No.2, Gorakhpur. After investigation charge sheet has been submitted in the aforesaid sections in which applicant nos.2 to 4 appeared and summon was issued for presence of applicant no.1.

5. By way of this petition the applicants have sought aforementioned remedy and have taken ground that applicant no.1 has also lodged an NCR No.105 of 2021, under Sections 323, 504 IPC in the concerned police station on 09.03.2021 at 12:38 p.m. against the villagers but not against opposite party no.2. The allegations therein are that due to old enmity, he was abused, beaten with lathi-danda whereby he received much injuries on his body. The applicants and opposite party no.2 had been arrested by the concerned police station under Sections 151, 107, 116 CrPC on 09.03.2021 at 02:50 p.m. and the concerned police submitted challani report dated 09.03.2021 in Criminal Case No.1736 of 2021 (State Vs. Bindu Kumar and others) and in Case No.17371 of 2021 (State Vs. Sanjay Kumar and others) pending in the Court of SDM, Campierganj, Gorakhpur, under Sections 107, 116, 151 CrPC which are still pending. In the reports it is stated that no incident happened on 09.03.2021 and only on apprehension of the incident police had arrested them.

6. Opposite party no.2 has been medically examined by the CMO and CT scan of head has been done on 12.03.2021 without mentioning any time. On the basis of injury report and CT scan report Section 308 IPC has been added to the NCR No.104 of 2021 and the NCR has been converted into FIR No.77 of 2021, under Sections 323, 504 and 308 IPC on 22.03.2022 without showing the place of occurrence.

7. The courts below have rejected the bail applications seeing the injury report. Both the reports (challani and injury) contradict each other and prove that the case is false and abuse of process of the court. It is impossible to write the application by opposite party no.2 having such injury as brain haemorrhage and he was arrested in connection of Sections 107, 116 and 151 CrPC. The investigating officer has recorded the statement of opposite party no.2 on 01.04.2021 and evidence of two witnesses Basmati and Kishlawati on 20.04.2021. The witnesses have not disclosed the place of occurrence. The investigating officer has prepared the site plan on 22.03.2021 which is false and fabricated. The investigating officer has recovered a lathi from applicant no.4, Ranjeet after three months later of the incident on 11.06.2021. The recovery is false because there is no bush around the applicant's house and the recovered lathi is unknown to the applicant no.4. The I.O. has submitted the false charge sheet based on imaginary story. NBW has been issued

against applicant no.1, Bindu and all the applicants are facing trial. After submission of charge sheet cognizance has been taken and NBW has been issued against him

8. First of all, opposite party no.2 forced the applicants to not press the civil suit no.297 of 2021 (Jairam and others Vs. Sanjay Kumar and others) pending in the court of Civil Judge (Junior Division)-III, Gorakhpur but when he failed, he wanted to compromise the civil suit but when he again failed then he lodged this false NCR/FIR. There is delay of 13 days in lodging the FIR. As per challani report no incident has taken place on 09.03.2021. Two proceedings cannot ran for the same offence. One in the Court of SDM and another in the Court of Judicial Magistrate and it is in violation of Article 20(2) of the Constitution of India. Hence, the entire proceedings be quashed.

9. By way of supplementary affidavit it has been clarified that the name of applicant no.4 is "Ranjeet" not "Ramjeet".

10. Counter affidavit dated 14.09.2022 has been filed by opposite party no.2 denying the averments and allegations of the instant petition and has been averred that NCR has been converted into FIR after medical report. Witnesses have supported the prosecution version. It is also supported by the medical report and thereafter charge sheet has been filed. The application is devoid of merit and is liable to be dismissed.

11. Applicants have filed a rejoinder affidavit dated 19.09.2022 denying the averments of counter affidavit and affirming the averments of this petition.

12. Heard and perused the record.

13. From perusal of the record it transpires that the applicants have taken following grounds:

(i) Opposite party no.2 has falsely implicated the applicants for pressurizing to enter into compromise in respect of Civil Suit No.297 of 2021.

(ii) Neither in the FIR nor in the evidence of the witnesses there is any averment or evidence regarding place of occurrence.

(iii) If opposite party no.2 was so injured, it was not possible for him to write the complaint.

(iv) As per proceedings under Sections 107, 116, 151 CrPC there was no injury to opposite party no.2. Hence, in view of that also the version of opposite party no.2, evidence and medical report are false and fabricated.

(v) There is undue delay in lodging the FIR.

14. This application would be decided as under.

15(i). There is no previous version or evidence that opposite party no.2 has ever pressurized the applicants to compromise the civil case even in his NCR it has not been written that on the pretext of compromise opposite party no.2 and other accused persons attacked upon applicant no.1 and caused severe injuries. In his NCR a similar name Sanju son of Hari Ram has been mentioned as one of the accused. Here opposite party no.2 is Sanjay Kumar son of Sriram. However, from the NCR lodged by applicant no.1 it has been established that on 09.03.2021 at about 09:00 a.m. the

incident had taken place as alleged by opposite party no.2. Hence, at this stage it cannot be concluded that opposite party no.2 was pressurizing applicant no.1 for compromising the civil suit.

16(ii). Certainly in the NCR lodged by opposite party no.2 no place of occurrence has been mentioned but from its perusal it is very much clear that the incident had taken place in the concerned village. It is also true that after conversion of NCR into FIR there is no reference of place of occurrence in FIR. However, on the pointing of applicants, site plan has been prepared by the I.O. where the place of occurrence has been shown to be the patta land of opposite party no.2, Sanjay. An FIR is not an encyclopedia. It is only a mode to accelerate the police machinery to come into motion. If place of occurrence, name of the witnesses or even some accused persons have been left, the same is not fatal for the prosecution. Hence, this argument is also rejected.

17(iii). The next argument of the applicants is that if opposite party no.2 was so injured how he wrote the complaint. According to this Court, there is no evidence that at the time of writing NCR/FIR opposite party no.2 was bed ridden or was unable to write complaint himself. Some patients remain mobile even during the course of treatment. It is not the case of prosecution that opposite party no.2 was bed ridden or unconscious or his hand was so badly injured that he was unable to write the complaint. Hence, this argument is also rejected.

18(iv). So far as the fourth argument is concerned it is very much clear from the report of SI Bismillah Khan that both the parties were adamant to fight with each other and were not ready to keep calm and were adamant to kill each other and also threatened to see in future. There was apprehension of commission of cognizable offence hence Bindu, Ranjeet and Sujeet from the applicants side and Sanjay and Jitendra Kumar from the side of opposite party no.2 were booked under Section 151 CrPC on 09.03.2021 at about 02:50 p.m.

19. Generally it is seen that police avoids lodging the NCR/FIR to avoid increasement of crime numbers of their police station. Therefore, they do not like to register the case under the Indian Penal Code. If opposite party no.2 taken in police station and he was medically examined on 12.03.2021, certainly he would be in police custody if he would not have been released on bail. Challani under Sections 107, 116 and 151 CrPC is not the basis to judge the credibility of the fact that opposite party no.2 was not beaten by the applicants because in due course of business he has been examined in District Hospital, Gorakhpur and has also undergone to CT scan in which the aforesaid injury has been found. At this juncture only on the basis of challani report under Sections 107, 116 and 151 CrPC it cannot be concluded that the injury, the CT scan report, conversion of NCR into FIR and after due investigation submission of charge sheet and taking cognizance by the concerned Magistrate, all are false and forged and without any basis.

20. Opposite party no.2 has filed the statement of Dr. Vijay Kumar, Radiologist in which he has stated that he found head injury as described above in CT scan. He has confirmed his signature on the report. On the basis of above discussion this argument of counsel for the applicants is also rejected.

21(v). Certainly there is delay in lodging the FIR but it appears that since proceedings under Sections 107, 116 and 151 CrPC had been initiated by the concerned police and opposite party no.2 would have been busy in his treatment and getting the legal recourse in respect of Sections 107, 116 and 151 CrPC hence mere delay in lodging the FIR is not the sole ground to quash the case of prosecution. Hence, this argument is also rejected.

22. On the basis of above discussion this Court is of the view that there is no material substance in the argument of the applicants. After lodging the FIR, the I.O. has submitted the charge sheet under Sections 323, 504 and 308 IPC. The witnesses have supported the prosecution version which has also been corroborated by the medical evidence. On the one hand where the police is not showing any injury to either of the parties even to applicant no.1, Bindu also, on the other hand applicant no.1, Bindu himself accepts that injuries had been caused to him and the I.O. of the concerned police station is admitting that an attempt to cause homicidal death has been committed by the applicants.

23. Criminal proceedings, charge sheet and the cognizance order cannot be cancelled lightly and inherent power under Section 482 CrPC cannot be exercised if Court does not find that the charge-sheet and the entire criminal proceeding is the abuse of process of Court or there is any need to secure the ends of justice or there is any necessity to give effect to any order under the Code by implication of Section 482 CrPC.

24. The present petition under Section 482 CrPC is devoid of merit. Justice requires complete trial of the matter to ascertain the truth. Hence, the present petition is dismissed

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(2023) 4 ILRA 764
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2023

BEFORE

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

Application U/S 482. No. 22789 of 2022

Vishram & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Saurabh Yadav

Counsel for the Opposite Parties:
G.A.

F.I.R. lodged after delay –allege dowry death-under section 482 Cr.P.C., the Court cannot examine the correctness of the allegations-to be decided by the Trial court-power u/s 482 Cr.P.C. to be exercised in exceptional cases-death within seven years of marriage-unnatural death-at in law's place.

Application rejected. (E-9)

List of Cases cited:

1. Haryana & ors. Vs Bhajan Lal & ors. reported in 1992 Suppl.(1) SCC 335

2. Ramveer Upadhyay & anr. Vs St. of U.P. & anr. reported in 2022 Livelaw (SC) 396

3. St. of Andhra Pradesh Vs Gourishetty Mahesh & ors. (2010) 11 SCC 226

4. R.P. Kapur Vs St. of Pun. AIR 1960 SC 866

5. SC 866 & St. of Har. Vs Bhajan Lal 1992 SCC(Cr.) 426

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

1. Supplementary affidavit filed by learned counsel for the applicants today in the Court, is taken on record. Office is directed to register the same.

2. Heard Mr. Saurabh Yadav, learned counsel for the applicants, Mr. K.P. Pathak, learned A.G.A. for the State as well as perused the entire material available on record.

3. The present 482 Cr.P.C. application has been filed to quash the summoning order dated 10.12.2021 passed by Chief Judicial Magistrate, Budaun in Complaint Case No.1087 of 2021 (Awadhesh vs. Avanish & Others), under Sections 304B, 342 IPC, Police Station-Ushait, District-Budaun, pending before the court of learned Chief Judicial Magistrate, Budaun.

4. As per the prosecution case, an application under Section 156(3) Cr.P.C. was moved on 08.01.2021 by brother of the deceased against the applicants and three others alleging therein that the marriage of his sister was solemnized with applicant no.2 (Avanish) on 26.06.2018 according to Hindu Rites and Rituals and the family members of the opposite party no.2 had given dowry as per their capacity, but the deceased was being harassed for non-fulfilment of additional dowry demand. On 31.12.2020 at about 03:00 p.m., an information was received by the informant/opposite party no.2 from the villager that the deceased was done to death by her in-laws. On receiving the information, when the informant, his father Naresh and brother Ramesh reached at in-laws' place, they were wrongly confined by family members of the in-laws of the deceased and without informing the police, the last rites were performed. It is also alleged that the deceased was done to death for non-fulfilment of additional dowry demand. Thereafter, the informant went to the concerned police station for lodging the FIR, but no attention was paid, therefore, the present complaint has been filed. Subsequently, after recording the statements under Sections 200 and 202 Cr.P.C., the applicants have been summoned. Hence, the present application U/s 482 has been filed.

5. Learned counsel for the applicants submits that the applicants are innocent and have been falsely implicated in the present case due to the reasons best known to him. He further submits that the complaint has been lodged after a delay of about eight days of the incident without giving any plausible explanation for the same. The allegations as made in the complaint are false and frivolous against the applicants because the deceased died a natural death as she was suffering from some ailment for which document has been annexed as Annexure No.7 to the affidavit. He further submits that father and other family members of the deceased as well as the police were present at the time of cremation, video has been recorded, however, after participating in the cremation, the present complaint has been lodged in order to harass the applicants though the deceased died a natural death. He further submits that no offence against the applicants is disclosed and the present prosecution has been instituted with a mala fide intention for the purpose of causing harassment. He pointed out certain documents and statements in support of his contention. He, therefore, submits that the summoning order as well as entire

proceedings be quashed by this Court as the same is an abuse process of Court.

6. Learned A.G.A. for the State has opposed the submissions made by the learned counsel for the applicants by submitting that the applicant nos.1&2 are the father-in-law and husband of the deceased respectively. The death of the victim was within seven years from her marriage. She has died in her in-laws' house and it was unnatural death. She was subjected to cruelty due to non fulfilment of demand of dowry. He further submits that the document annexed at page 81 of the application goes to show that the applicants have returned the belongings of the deceased as well as gifts, which are given at the time of marriage, which goes to show that there were some disputes between the parties and after death of the deceased in order to save their skin, the applicants have returned the aforesaid things. From the documents regarding treatment, it cannot be analyzed as to whether the deceased was suffering from such serious disease which resulted in her death. He further submits that there are specific allegations against the applicants in the complaint as well as statements under Sections 200 and 202 Cr.P.C. He further submits that all the contentions raised by the applicants' counsel relate to disputed questions of fact. From perusal of the records, prima facie, it can not be said at this stage that no offence has been committed by the applicants.

7. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present application.

8. All the contentions raised by the learned counsel for the applicants relate to disputed questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details, which have been touched upon by learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded.

9. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint, except, in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. The Court can not look into the fact as to whether the allegations in the complaint are true or untrue and the same has to be decided by the trial court, thus no interference is required in such cases as the present one. Even though, the inherent power of the High Court under Section 482 Cr.P.C., to interfere with criminal proceedings is wide, such power has to be exercised with circumspection, in exceptional cases.Jurisdiction under Section 482 of the Cr.P.C. is not to be exercised for the asking.

10. The aforesaid has been held by the Apex Court in the case of State of ***Haryana and Ors. vs. Bhajan Lal and Ors. reported in 1992 Suppl.(1) SCC 335***. The relevant paragraph of the aforesaid judgment reads as under:-

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as

to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

11. The following observations has also been made by the Apex Court in the latest judgment of ***Ramveer Upadhyay & another vs. State of U.P. & another reported in 2022 Livelaw (SC) 396***. Paragraph no.39 of the aforesaid judgment reads as under:-

"39. In our considered opinion criminal proceedings cannot be nipped in the bud by exercise of jurisdiction under Section 482 of the Cr.P.C. only because the complaint has been lodged by a political rival. It is possible that a false complaint may have been lodged at the behest of a political opponent. However, such possibility would not justify interference under Section 482 of the Cr.P.C. to quash the criminal proceedings. As observed above, the possibility of retaliation on the part of the petitioners by the acts alleged, after closure of the earlier criminal case cannot be ruled out. The allegations in the complaint constitute offence under the Atrocities Act. Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence....."

12. Hon'ble Apex Court in a case of ***State of Andhra Pradesh Vs. Gourishetty Mahesh & Ors***. reported in ***(2010) 11 SCC 226*** has held that though the powers possessed by the High Court under Section 482 CrPC are wide, however, such powers require care/caution in its exercise. The interference must be on sound principles and the inherent power should not be exercised to stifle a legitimate prosecution. It was clarified that if the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it was open to the High Court to quash the same in exercise of inherent powers under Section 482 CrPC.

13. In fact while exercising the inherent jurisdiction under Section 482 Cr.P.C. or while wielding the powers under Section 226 of the Constitution of India the quashing of the complaint can be done only if it does not disclose any offence or if there is any legal bar which prohibits the proceedings on its basis. The Apex Court decisions in ***R.P. Kapur Vs. State of Punjab reported in AIR 1960 SC 866 and State of Haryana Vs. Bhajan Lal reported in 1992 SCC(Cr.) 426*** make the position of law in this regard clear recognizing certain categories by way of illustration which may justify the quashing of a complaint or charge sheet.

14. In the instant case, perusal of the complaint as a whole, this Court finds that the death of the victim was within seven years from her marriage. She has died in her in-laws' house and it was unnatural death. She was subjected to cruelty due to non fulfilment of demand of dowry. The Court also finds it difficult to hold that a case, for quashing of the complaint under Section 482 CrPC, has been made out. Criminal proceedings cannot be nipped in the bud by exercise of jurisdiction under Section 482 CrPC only because the

compliant has been lodged by malicious intention. In exercise of power under Section 482 CrPC, the Court does not examine the correctness of the allegations in a compliant except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. The compliant before the learned Magistrate is not such a case which should be quashed at the inception without further trial.

15. Considering the facts and circumstances of the case, this Court finds that the present matter does not fall in any of the categories recognized by the Apex Court, which might justify interference by this Court in order to quash the proceedings. Therefore, the prayer for quashing the summoning order as well as the entire proceedings of aforesaid complaint case is refused as I do not see any abuse of the court's process either.

16. The present application lacks merit and is, accordingly, **rejected**.

(2023) 4 ILRA 768
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2023

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Application U/S 482. No. 23735 of 2022
connected with
Application U/S 482. No.13494 of 2021

Sayed Ahmad ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Atul Sharma, Sri Ajay Kumar Sharma, Sri Kartikeya Saran

Counsel for the Opposite Parties:
G.A., Sri Shamsuddin Ahmad

Concealment of fact-Applicant earlier approached the Court u/s 482 Cr.P.C. for quashing summoning order and charge-sheet-filed another Application u/s 482 Cr.P.C. for quashing of one revisional order-then he went before Apex Court for expediting the proceedings of the Application- further filed an Application in pending Application u/s 482 Cr.P.C. to dismiss it with liberty to file better petition-did not wait for logical conclusion of any one petition-Criminal revision was not filed with full disclosure-act of concealment-**Application rejected.** (E-9)

List of Cases cited:

1. Bhaskar Laxman Jadhav Vs Karamveer Kakasaheb Wagh Education Society : (2013) 11 SCC 531

2. Moti Lal Songara Vs Prem Prakash @ Pappu : (2013) 9 SCC 199

3. Vijay Kumar Ghai Vs St. of W.B. : (2022) 7 SCC 124

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

1. The present two applications under Section 482 Cr.P.C. are connected together as they are of the same accused in the same case and as such are being decided together by a common judgement.

2. The applicant Sayeed Ahmad initially filed a Criminal Misc. Application U/S 482 Cr.P.C. No. 13494 of 2021 (Sayeed Ahmad Vs. State of U.P. and another) with the following prayers :-

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow this application under Section 482 of Cr.P.C. and quash the charge-sheet dated 23.06.2019 as well as summoning order

dated 27.11.2020 arising out of Case Crime No. 0734 of 2017, under Sections 406, 420 IPC, P.S. Civil Lines, District Allahabad pending in the court of CJM, Allahabad.

It is further prayed that this Hon'ble Court may be pleased to stay the entire proceedings of Case Crime No. 0734 of 2017, under Sections 406, 420 IPC, P.S. Civil Lines, District Allahabad, during the pendency of the present application u/s 482 Cr.P.C."

3. The applicant Sayeed Ahmad also filed another Criminal Misc. Application U/S 482 Cr.P.C. No. 23735 of 2022 (Sayeed Ahmad Vs. State of U.P. and another) with the following prayers :-

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the application and pleased to quash the impugned order dated 15.04.2022 passed by Sessions Judge, Allahabad as well as entire proceeding arising out of Case Crime No. 0734 of 2017, under Sections 406, 420 IPC, P.S. Civil Lines, District Allahabad pending in the court of CJM, Allahabad.

It is further prayed that further proceedings in Case No. 05 of 2020 (State Vs. Sayeed Ahmad) arising out of Case Crime No. 0734 of 2017, under Sections 406, 420 IPC, P.S. Civil Lines, District Allahabad pending in the court of CJM, Allahabad be stayed during the pendency of this application before this Hon'ble Court."

4. The facts arising in the present case in brief are that a FIR was lodged on 25.11.2017 by Nabi Bakhsh as Case Crime No. 734 of 2017 under Sections 406, 420 IPC against Sayeed Ahmad (the present applicant), Kavi Ahmad S/o Sayeed Ahmad and Shameem Ahmad. The allegation in the same was that from 15.05.2008 to 08.06.2008, the first informant purchased the property from Sayeed Ahmad for which he gave several cheques from different bank accounts of different accounts totalling Rs. 80 lakhs. When the first informant requested the applicant to execute a sale-deed for the same, he continued delaying it on one or the other pretext. Subsequently when he demanded back his money, he was threatened. After fixing the deal with the applicant, the said land was decided to be sold to one Sardar Jogendar Singh of Hotel Milan and advance money was taken by the accused and with an intention to cheat, he is trying to get a map sanctioned for getting a building constructed. He has also got an agreement to sale executed and registered with other persons. The matter was investigated and a charge sheet dated 23.06.2019 was submitted under Section 406 IPC against the applicant Sayeed Ahmad. In so far as Kavi Ahmad and Shameem Ahmad are concerned, they were the accused persons not charge sheeted and their names were in column 12 of the charge sheet. The trial court subsequently on 27.11.2020 took cognizance upon the charge sheet and summoned the accused applicant under Section 406 IPC. Subsequently a supplementary charge sheet dated 07.03.2021 was submitted against the applicant adding Section 420 IPC also. The applicant moved an application being paper no. 16-Kha before the concerned court challenging the validity of the second charge sheet. The present petitions have thus been filed with the prayers as stated above. The applicant is shown to be involved in 11 other criminal cases which have been disclosed and explained in para 37 of the affidavit filed in support of the

connected Criminal Misc. Application U/S 482 Cr.P.C. No. 13494 of 2021, the same is quoted here-in-below :-

"37. That the criminal history against the applicant is being narrated here in below along with the status :-

I. Case Crime No. 363 of 2014, under Sections 406, 420, 467, 468, 471 IPC, P.S. Civil Lines, District Allahabad in which the applicant has been granted bail.

II. Case Crime No. 412 of 1993, under Sections 365, 347, 386, 506 IPC, P.S. Civil Lines, District Allahabad in which the applicant has been granted bail.

III. Case Crime No. 707 of 2008, under Sections 120-B, 420, 467, 468 IPC, P.S. Colonelganj, District Allahabad in which on 16.03.2009, the final report was filed.

IV. Case Crime No. 706 of 2008, under Sections 120-B, 420, 467, 468 IPC, P.S. Colonelganj, District Allahabad in which on 19.04.2009, the final report was filed.

V. Case Crime No. 706 of 2008, under Sections 120-B, 420, 467, 468 IPC, P.S. Colonelganj, District Allahabad in which on 26.03.2009, the final report was filed.

VI. Case Crime No. 697 of 2008, under Sections 120-B, 420, 467, 468 IPC, P.S. Colonelganj, District Allahabad in which on 26.03.2009, the final report was filed.

VII. Case Crime No. 696 of 2008, under Sections 120-B, 420, 467, 468 IPC, P.S. Colonelganj, District Allahabad in which on 19.04.2009, the final report was filed.

VIII. Case Crime No. 80 of 2008, under Section 420 IPC, P.S. Jhunsi (Civil Lines), District Allahabad in which on 19.04.2009, the final report was filed.

IX. Case Crime No. 80 of 2008, under Sections 384, 420, 467, 468, 471, 504, 506, 120-B IPC, P.S. Civil Lines, District Allahabad in which on 02.05.2008, the final report was filed.

X. Case Crime No. 75 of 2001, under Sections 64, 302, 201 IPC, P.S. Karchana, District Allahabad in which on 30.10.2012, the final report was filed.

XI. Case Crime No. 1038 of 1992, under Sections 147, 148, 149, 307, 506 IPC, P.S. unknown, District Allahabad in which the final report was filed.

5. In para 36 of the affidavit it is stated that the applicant is an Ex-MLA and a reputed person in society. He is said an old and sick person suffering from various diseases and has been hospitalized for number of times.

6. Subsequently a Criminal Misc. Application U/S 482 Cr.P.C. No. 23735 of 2022 was filed challenging the order dated 15.04.2022 passed by the Sessions Judge, Allahabad and also the entire proceedings of the case as pending before the trial court.

7. A Criminal Revision was filed by the applicant before the Sessions Judge, Allahabad against the order dated 27.11.2020 by which the CJM Allahabad took cognizance of the offence under Section 406 IPC. The said Criminal Revision was numbered as Criminal Revision No. 71 of 2022. The said revision as was filed before the Sessions Judge, Allahabad, the memo of which has been

annexed as Annexure No. 1 to the Supplementary Affidavit dated 19.09.2022 is dated 27.01.2022 with the following prayer:-

"It is therefore most respectfully prayed that Hon'ble Court kindly be pleased to summon the record from the Court below and set-aside order dated 27.11.2020 passed by A.C.J.M. Court No. 4, Allahabad in Criminal Case No. 05 of 2020, U/s 406 IPC, P.S. Civil Lines, Crime No. 0734 of 2017, District Prayagraj/Allahabad."

8. In Criminal Misc. Application U/S 482 Cr.P.C. No. 13494 of 2021, an application for withdrawal dated 18.01.2022 was filed with the following prayer:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the application and be please to dismiss the Criminal Misc. Application (Under Section 482 of Cr.P.C.) as withdrawn with liberty to file a fresh so that justice be done."

9. Para 4 of the said affidavit in support of the withdrawal application states the reason for getting the same withdrawn which reads that there are some typing errors as well as clerical errors which cannot be corrected by supplementary affidavit and as such the applicant does not press the said criminal misc. application which is liable to be dismissed as withdrawn with liberty to file a fresh. Para 4 of the said affidavit reads as follows:-

"4. That during the pendency of the aforementioned Criminal Misc. Application before this Hon'ble Court, it is pointed out that there are some typing as well as clerical errors in the affidavit, the same cannot be corrected by supplementary affidavit. Therefore the applicant does not want to press the present Criminal Misc. Application and same is liable to be dismissed as withdrawn with liberty to file a fresh."

10. The said application was ordered to be listed with previous papers at an early date vide order dated 20.01.2022 and was also pending for disposal.

11. In the meantime the said Criminal Revision was filed before the Sessions Judge in which the disclosure of the said application u/s 482 Cr.P.C. has been done. In para 6 under the heading of "Fact in brief" which consist of six paragraph before the "Grounds" as taken in the revision a disclosure has been done regarding the pendency of a petition under section 482 Cr.P.C. before this Court. Para 6 of the same reads as follows:-

"6. That the Revisionist has filed a petition U/S 482 Cr.P.C. before the Hon'ble High Court to quash the charge sheet of the case the same has been pending."

12. Heard Sri Kartikeya Saran and Sri Atul Sharma, learned counsel for the applicant in Criminal Misc. Application U/S 482 Cr.P.C. No. 23735 of 2022 and Sri Atul Sharma, learned counsel for the applicant in Criminal Misc. Application U/S 482 Cr.P.C. No. 13494 of 2021, Sri Shamsuddin Ahmad, learned counsel for the first informant and Sri J.B. Singh, learned counsel for the State in both the Applications U/S 482 Cr.P.C.

13. This Court has perused the entire records of both the petitions.

14. Learned counsel for the applicant in Criminal Misc. Application U/S 482 Cr.P.C. No. 13494 of 2021 (Sayeed Ahmad Vs. State of U.P. and another) presses his application for withdrawal dated 18.01.2022.

15. Learned counsels for the applicant in Application U/S 482 No. 23735 of 2022 (Sayeed Ahmad Vs. State of U.P. and another) argued that the proceedings as initiated against the applicant are totally an abuse of process of Court. It is argued that the revisional court has illegally dismissed the revision vide impugned order dated 15.04.2022 without going into the merits of the matter and in an illegal and arbitrary manner. It is argued that the Investigating Officer found no evidence against the co-accused Kavi Ahmad and Shameem Ahmad and as such exonerated them. The same goes to show that the prosecution evidence is false and concocted as they were also named in the FIR and there were allegations against them. It is argued that the trial court in a mechanical manner without applying judicial mind, took cognizance upon the charge sheet and summoned the applicant vide order dated 27.11.2020. It is argued that the 2nd charge sheet as submitted by the Investigating Officer is totally illegal and the same cannot be permitted to be considered by the trial court. It is argued that even the trial court which took cognizance on the supplementary charge sheet u/s 420 IPC vide order dated 15.09.2021 has stated in the same that the same is illegal and irregular. It is argued that in the entire case, no original document, receipt or bank statement have been filed and there is no report of any forensic expert to prove the authenticity of the documents and as such the said case cannot proceed. It is argued while placing para 29, 30, 31, 33 of the affidavit filed in support of application U/S 482 Cr.P.C. that the applicant aggrieved by the summoning order dated 27.11.2020 as well as charge-sheet dated 23.06.2019 and had filed a Criminal Misc. Application U/S 482 Cr.P.C. No. 13494 of 2021 before this Court on 03.07.2021, however, due to Covid-19, the said application could not be taken up on several dates and on 17.01.2022, an application for withdrawal with an affidavit was filed which is dated 17.01.2022. The said application for withdrawal supported by an affidavit is pending for final disposal. The applicant had no option except to challenge the summoning order as well as charge sheet before the revisional court. The revisional court vide order dated 15.04.2022 has dismissed the revision without going into the facts that the summoning order is bad. It is argued that the court below vide order dated 19.05.2022 has issued NBW against the applicant. Para 34 of the affidavit has been placed before the Court for the same. It is argued that the applicant was in the process of selling his land to one Sardar Jogendar Singh, a close associate of the first informant/opposite party no. 2 and Sardar Jogendar Singh has paid some part of money to him but due to delay of approval of map by the Development Authority, the money was refunded to Sardar Jogendar Singh. Thereafter Sardar Jogendar Singh with bad intention tried to take possession on some land and submitted forged papers in the Development Authority. The applicant on coming to know of it moved an application under Section 156(3) Cr.P.C. in which he was summoned under Section 420 IPC but in the meantime in May, 2021, Jogendar Singh died. When Joginder Singh came to know about financial transaction between the applicant and the first informant, he immediately approached the first informant

and persuaded him not to accept money upon re-payment. It is argued that the first informant and the applicant are known to each other and have cordial relationship and owing to the same, the applicant had sought a loan from the first informant. The present case is a false case. It is further argued that the applicant had moved an application under the Right to Information Act, 2005 before the S.S.P. Prayagraj to provide the details of the criminal cases pending against him on which a reply was received stating therein that there are seven cases pending against the applicant. The same have been mentioned in para 44 of the affidavit which are as follows :-

(I) Case Crime No. 80 of 2008 under Sections 323, 406, 420, 504, 506 IPC, Police Station Jhunsi, District Prayagraj.

(II) Case Crime No. 568 of 2019, under Section 3/5 Damages of Public Property Act, Police Station Kareli, District Prayagraj.

(III) Case Crime No. 734 of 2017, under Section 406, 420 IPC, Police Station Civil Lines, District Prayagraj.

(IV) Case Crime No. 363 of 2014, under Section 419, 420, 406 IPC, Police Station Civil Lines, District Prayagraj.

(V) Case Crime No. 1038 of 1992, under Section 147, 148, 149, 307, 506 IPC, Police Station Civil Lines, District Prayagraj.

(VI) Case Crime No. 412 of 1993, under Sections 363, 368, 384, 468, 506 IPC, Police Station Civil Lines, District Prayagraj.

(VII) Case Crime No. 80 of 2008, under Section 384, 420, 467, 468, 471, 504, 506, 120-B IPC, Police Station Civil Lines, District Prayagraj.

16. As such the present petition deserves to be allowed and the proceedings deserves to be quashed.

17. Per contra learned counsel for the first informant and learned A.G.A. opposed the prayer for quashing and vehemently argued that the applicant is involved in the present case. He is named in the FIR and there are allegations against him. It is argued that inasmuch as the transaction between the applicant and opposite party no. 2 are concerned, the fact of the same are admitted by the accused applicant in both the applications under Section 482 Cr.P.C. It is argued that the applicant had been resorting to filing petitions in courts for the same relief without even waiting patiently for decision of a petition. It is argued that the first petition under Section 482 Cr.P.C. was filed for quashing of the Charge Sheet dated 23.06.2019, summoning order dated 27.11.2020 and the entire proceedings of the trial court which remained pending in which even the applicant approached the Apex Court in Writ Petition (s) (Criminal) No. 483 of 2021 with the grievance that his petition is pending before the High Court and has not been heard since long and as such the matter was directed to be expedited vide order dated 26.11.2021. Learned counsel for the first informant/opposite party no. 2 has placed before the Court the order dated 26.11.2021 of the Apex Court which has been filed as annexure no. 1 to his objection affidavit dated 08.02.2022. The said order reads as follows:-

"The grievance of the petitioner is that his petition under Section 482 Cr.P.C.

is pending before the High Court and has not been heard since long.

Considering the facts and circumstances of this case, we find it appropriate that the petitioner may approach the High Court for expeditious disposal of his petition In case such application is filed, the High Court may consider expediting the matter and decide in accordance with law.

With the aforesaid observation the writ petition stands dismissed."

18. It is argued that then the applicant moved an application for withdrawal of the application under Section 482 Cr.P.C. on the ground that it contains typographical and clerical errors which were not possible to be corrected by means of an affidavit and then filed Criminal Revision before the Sessions Judge concerned against the summoning order dated 27.11.2022 and then on dismissal of the same, again approached this Court in Criminal Misc. Application U/S 482 Cr.P.C. No. 23735 of 2022, Sayeed Ahmad Vs. State of U.P. and another. It is argued that the applicant had been filing multiple petitions for the same reliefs and had been hunting different forums. It is argued that the conduct of the applicant was totally irrational and the present application deserves to be dismissed.

19. After having heard learned counsel for the parties and perusing the records, it is evident that the applicant initially filed Criminal Misc. Application U/S 482 Cr.P.C. No. 13494 of 2021 on 13.07.2021 for quashing of the charge sheet dated 23.06.2019, summoning order dated 27.11.2020 and the entire proceeding as pending before the trial court. The said petition remained pending before this Court and aggrieved by the pendency, the applicant approached the Apex Court for expediting its hearing which was expedited vide order dated 26.11.2021. Subsequently an application for withdrawal dated 17.01.2022 was filed by the applicant stating therein in para 4 that the application u/s 482 Cr.P.C. suffers from typographical and clerical errors which cannot be corrected through an affidavit and as such the said application be dismissed as withdrawn with liberty to file a better fresh petition. On the said application, an objection was moved by the first informant/opposite party no. 2. The said application remained pending for disposal. In the meantime a Criminal Revision No. 71 of 2022 was filed before the Sessions Judge, Allahabad on 27.01.2022 with the prayer to set-aside the order dated 27.11.2020 passed by the trial court. In para 6 of the same, there is a passing reference of an application under Section 482 Cr.P.C. being filed before the High Court to quash the charge sheet of the case which is pending. The said revision stood dismissed vide judgment and order dated 15.04.2022 passed by the concerned revisional court. Subsequently a Criminal Misc. Application U/S 482 Cr.P.C. No. 23735 of 2022, Sayeed Ahmad Vs. State of U.P. and another was filed on 03.08.2022 before this Court with the prayer to quash the order dated 15.04.2022 passed by the Sessions Judge, Allahabad and to quash the entire proceedings of the trial court. The same has been addressed before the Court. The applicant with the above discussions was approaching this Court twice and the Sessions Judge concerned in its revisional jurisdiction in substance for the termination of the court proceedings which in either manner may be with the prayers of quashing the charge sheet, summoning

order, entire proceedings of the trial court. The grounds as taken for getting Criminal Misc. Application U/S 482 Cr.P.C. No. 13494 of 2021 withdrawn despite the applicant approaching the Apex Court for his grievance of the matter not being decided expeditiously is that the same suffers from serious typographical and clerical errors which cannot be corrected by an affidavit. Before the revisional court, the only disclosure of filing the said application U/S 482 Cr.P.C. is by reading para 6 of the memo of revision which is only a passing reference of the said fact. After dismissal of the revision against it the Criminal Misc. Application U/S 482 Cr.P.C. No. 23735 of 2022 has been for termination of the proceedings of the trial court.

20. In the case of **Bhaskar Laxman Jadhav Vs. Karamveer Kakasaheb Wagh Education Society : (2013) 11 SCC 531** the Apex Court while dealing with a situation of suppression of fact held as follows:

"42. While dealing with the conduct of the parties, we may also notice the submission of learned counsel for Respondent 1 to the effect that the petitioners are guilty of suppression of a material fact from this Court, namely, the rejection on 2-5-2003 of the first application for extension of time filed by the trustees and the finality attached to it. These facts have not been clearly disclosed to this Court by the petitioners. It was submitted that in view of the suppression, special leave to appeal should not be granted to the petitioners.

43. The learned counsel for the petitioners submitted that no material facts have been withheld from this Court. It was submitted that while the order dated 2-5-2003 was undoubtedly not filed, its existence was not material in view of subsequent developments that had taken place. We cannot agree.

44. It is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of a case and leave the decision making to the Court. True, there is a mention of the order dated 2-5-2003 in the order dated 24-7-2006 passed by the JCC, but that is not enough disclosure. The petitioners have not clearly disclosed the facts and circumstances in which the order dated 2-5-2003 was passed or that it has attained finality.

45. We may only refer to two cases on this subject. In Hari Narain v. Badri Das, AIR 1963 SC 1558 stress was laid on litigants eschewing inaccurate, untrue or misleading statements, otherwise leave granted to an appellant may be revoked. It was observed as follows: (AIR p. 1560, para 9)

".....It is of utmost importance that in making material statements and setting forth grounds in applications for special leave care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. That is why we have come to the conclusion that in the present case, special leave granted to the appellant ought to be revoked. Accordingly, special

leave is revoked and the appeal is dismissed. The appellant will pay the costs of the respondent."

46. More recently, in Ramjas Foundation v. Union of India, (2010) 14 SCC 38 the case law on the subject was discussed. It was held that if a litigant does not come to the Court with clean hands, he is not entitled to be heard and indeed, such a person is not entitled to any relief from any judicial forum. It was said: (SCC p. 51, para 21)

"21. The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case."

47. A mere reference to the order dated 2-5-2003, en passant, in the order dated 24-7-2006 does not serve the requirement of disclosure. It is not for the Court to look into every word of the pleadings, documents and annexures to fish out a fact. It is for the litigant to come upfront and clean with all material facts and then, on the basis of the submissions made by learned counsel, leave it to the Court to determine whether or not a particular fact is relevant for arriving at a decision. Unfortunately, the petitioners have not done this and must suffer the consequence thereof."

(emphasis supplied)

21. Further in the case of Moti Lal Songara Vs. Prem Prakash @ Pappu : (2013) 9 SCC 199 the Apex Court again while dealing with a situation of suppression of a fact has held as follows:

"19. The second limb of the submission is whether in the obtaining factual matrix, the order passed by the High Court discharging the accused-respondent is justified in law. We have clearly stated that though the respondent was fully aware about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. Anyone who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim supressio veri, expressio falsi, i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. We are compelled to say so as there has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused-respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum.

20. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure

is bound to collapse". However, as the order has been obtained by practicing fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand. That apart, we have dealt with regard to the legal sustainability of the order in detail. Under these circumstances, we are disposed to think that the power under Article 142 of the Constitution is required to be invoked to do complete justice between the parties. Cognizance of the offences had been rightly taken by the learned Magistrate and charges, as we find, have been correctly framed by the learned trial Judge. A victim of a crime has as much right to get justice from the court as an accused who enjoys the benefit of innocence till the allegations are proven against him. In the case at hand, when an order of quashment of summons has been obtained by suppression, this Court has an obligation to set aside the said order and restore the order framing charges and direct the trial to go on. And we so direct."

(emphasis supplied)

22. The Apex Court in the case of **Vijay Kumar Ghai v. State of W.B. : (2022) 7 SCC 124** has in paragraphs 11, 12, 13, 14 and 17 while dealing with the issue of forum shopping and deprecating it has stated as follows:

"11. Predominantly, the Indian Judiciary has time and again reiterated that forum shopping takes several hues and shades but the concept of "forum shopping" has not been rendered an exclusive definition in any Indian statute. Forum shopping as per Merriam-Webster Dictionary is:

"The practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based on determination of which court is likely to provide the most favourable outcome."

12. The Indian Judiciary's observation and obiter dicta has aided in streamlining the concept of forum shopping in the Indian legal system. This Court has condemned the practice of forum shopping by litigants and termed it as an abuse of law and also deciphered different categories of forum shopping.

13. A two-Judge Bench of this Court in Union of India v. Cipla Ltd. [Union of India v. Cipla Ltd., (2017) 5 SCC 262] has laid down factors which lead to the practice of forum shopping or choice of forum by the litigants which are as follows : (SCC pp. 318-20, paras 148-51 & 155)

"148. A classic example of forum shopping is when litigant approaches one court for relief but does not get the desired relief and then approaches another court for the same relief. This occurred in Rajiv Bhatia v. State (NCT of Delhi) [Rajiv Bhatia v. State (NCT of Delhi), (1999) 8 SCC 525] . The respondent mother of a young child had filed a petition for a writ of habeas corpus in the Rajasthan High Court and apparently did not get the required relief from that Court. She then filed a petition in the Delhi High Court also for a writ of habeas corpus and obtained the necessary relief. Notwithstanding this, this Court did not interfere with the order [Priyanka Bhatia v. State (NCT of Delhi), 1999 SCC OnLine Del 192] passed by the Delhi High Court for the reason that this Court ascertained the views of the child and found that she did not want to even talk to her adoptive parents and therefore the custody of 12 the child granted by the

Delhi High Court to the respondent mother was not interfered with. The decision of this Court is on its own facts, even though it is a classic case of forum shopping.

149. In Arathi Bandi v. Bandi Jagadrakshaka Rao [Arathi Bandi v. Bandi Jagadraksha"148. A classic example of forum shopping is when litigant approaches one court for relief but does not get the desired relief and then approaches another court for the same relief. This occurred in Rajiv Bhatia v. State (NCT of Delhi) [Rajiv Bhatia v. State (NCT of Delhi), (1999) 8 SCC 525] . The respondent mother of a young child had filed a petition for a writ of habeas corpus in the Rajasthan High Court and apparently did not get the required relief from that Court. She then filed a petition in the Delhi High Court also for a writ of habeas corpus and obtained the necessary relief. Notwithstanding this, this Court did not interfere with the order [Priyanka Bhatia v. State (NCT of Delhi), 1999 SCC OnLine Del 192] passed by the Delhi High Court for the reason that this Court ascertained the views of the child anka Rao, (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475] this Court noted that jurisdiction in a court is not attracted by the operation or creation of fortuitous circumstances. In that case, circumstances were created by one of the parties to the dispute to confer jurisdiction on a particular High Court. This was frowned upon by this Court by observing that to allow the assumption of jurisdiction in created circumstances would only result in encouraging forum shopping.

150. Another case of creating circumstances for the purposes of forum shopping was World Tanker Carrier Corpn. v. SNP Shipping Services (P) Ltd. [World Tanker Carrier Corpn. v. SNP Shipping Services (P) Ltd., (1998) 5 SCC 310] wherein it was observed that the respondent/plaintiff had made a deliberate attempt to bring the cause of action, namely, a collision between two vessels on the high seas within the jurisdiction of the Bombay High Court. Bringing one of the vessels to Bombay in order to confer jurisdiction on the Bombay High Court had the character of forum shopping rather than anything else.

151. Another form of forum shopping is taking advantage of a view held by a particular High Court in contrast to a different view held by another High Court. In Ambica Industries v. CCE [Ambica Industries v. CCE, (2007) 6 SCC 769] the assessee was from Lucknow. It challenged an 13 order [Ambica Industries v. CCE, 2003 SCC OnLine CESTAT 1365] passed by the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") located in Delhi before the Delhi High Court. CESTAT had jurisdiction over the State of Uttar Pradesh, NCT of Delhi and Maharashtra. The Delhi High Court did not entertain the proceedings initiated by the assessee for want of territorial jurisdiction. Dismissing the assessee's appeal this Court gave the example of an assessee affected by an assessment order in Bombay invoking the jurisdiction of the Delhi High Court to take advantage of the law laid down by the Delhi High Court or an assessee affected by an order of assessment made at Bombay invoking the jurisdiction of the Allahabad High Court to take advantage of the law laid down by it and consequently evade the law laid down by the Bombay High Court. It was said that this could not be allowed and circumstances such as this would lead to some sort of judicial anarchy.

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155. The decisions referred to clearly lay down the principle that the court is required to adopt a functional test vis-à-vis the litigation and the litigant. What has to be seen is whether there is any functional similarity in the proceedings between one court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not."

14. Forum shopping has been termed as disreputable practice by the courts and has no sanction and paramountcy in law. In spite of this Court condemning the practice of forum shopping, Respondent 2 filed two complaints i.e. a complaint under Section 156(3) CrPC before the Tis Hazari Court, New Delhi on 6-6-2012 and a complaint which was eventually registered as FIR No. 168 under Sections 406, 420, 120-B I.P.C. before P.S. Bowbazar, Calcutta on 28-3-2013 i.e. one in Delhi and one complaint in Kolkata. The complaint filed in Kolkata was a reproduction of the complaint filed in Delhi except with the change of place of occurrence in order to create a jurisdiction.

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17. A two-Judge Bench of this Court in K. Jayaram v. BDA [K. Jayaram v. BDA, (2022) 12 SCC 815 : 2021 SCC OnLine SC 1194] observed : (SCC para 14)

"14. It is necessary for us to state here that in order to check multiplicity of proceedings pertaining to the same subject-matter and more importantly to stop the menace of soliciting inconsistent orders through different judicial forums by suppressing material facts either by 14 remaining silent or by making misleading statements in the pleadings in order to escape the liability of making a false statement, we are of the view that the parties have to disclose the details of all legal proceedings and litigations either past or present concerning any part of the subject matter of dispute which is within their knowledge. In case, according to the parties to the dispute, no legal proceedings or court litigations were or are pending, they have to mandatorily state so in their pleadings in order to resolve the dispute between the parties in accordance with law."

23. In the present case also, the fact that the applicant has approached this Court earlier in its jurisdiction under section 482 Cr.P.C. for quashing of the charge-sheet dated 23.06.2019, quashing of the summoning order dated 27.11.2020 and then filed another application under section 482 Cr.P.C. for quashing the order dated 15.04.2022 passed by the Sessions Judge concerned in a Criminal Revision challenging the order dated 27.11.2020 and in the meantime he had filed an application in the second 482 Cr.P.C. petition with the prayer to dismiss it as withdrawn with a liberty to file a fresh petition by stating in para 4 of the affidavit of it that it has typographical and clerical errors for which correction is not possible and even before it had approached the Apex Court for expediting the hearing of the first 482 Cr.P.C. petition which was allowed and directions were issued for it. The applicant impatently did not wait for the logical conclusion of one petition filed by him despite an order of the Apex Court in a petition filed by the applicant himself but filed an application for withdrawing it with liberty to file a better petition and without even awaiting for the disposal of the said withdrawl application preferred a Criminal

Revision before the Sessions Judge stating in para 6 of a passing reference of the pendency of a 482 Cr.P.C. petition before this Court and then after dismissal of his revision filed another 482 Cr.P.C. petition although challenging the order of the Sessions Judge but with a further prayer to quash the proceeding of the trial court.

24. In substance the prayers made in the two 482 Cr.P.C. petitions and the Criminal Revision before the Sessions Judge were for termination of the trial court proceedings against him with whatsoever prayer it may have been filed (i.e. quashing the charge-sheet dated 23.06.2019, quashing of summoning order dated 27.11.2020, setting aside the order dated 27.11.2020, quashing of the order dated 15.04.2022 and quashing of the entire proceedings). The filing of the Criminal Revision before the Sessions Judge was not with full and complete disclosure of relevant and material facts of the matter. The details of the 482 Cr.P.C., the order of the Apex Court, the filing of application for withdrawl with a prayer to grant liberty for filing a better petition and its pendency before this Court were not at all disclosed in the Revision and has been supressed. It was an act of concealment as held by the Apex Court in the case of **Bhaskar Laxman Jadhav** (supra). The conduct of the applicant in not fair in pursuing his matters in Courts.

25. This Court thus comes to the conclusion that the applicant had not been fair in approaching courts and has not approached the Courts with clean hands.

26. The present applications u/s 482 Cr.P.C. stands **rejected**.

(2023) 4 ILRA 780

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.02.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 27651 of 2022

Vivek Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Krishna Gopal

Counsel for the Opposite Parties:
G.A., Sri Niklank Kumar Jain

Indian Evidence Act- Section 65 B- Applicant moved an Application for submission of pen-drive and C.D. to confront St.ment of victim-rejected-as no certificate u/s 65B of the Evidence Act is issued-if proposed document is primary evidence-no certificate required for admission-no conclusion by the Trial Court-impugned order bad.

Application allowed. (E-9)

List of Cases cited:

1. Vikram Singh @ Vikky Wali & anr. Vs St. of Punjab & anr., A.I.R. 2017 (Supreme Court) 3227

2. Anwar P.V. Vs P.K. Busheer, (2014) 10 S.C.C 473 (three Judge Bench)

3. St. of U.P. Vs Ajay Kumar Sharma, 2016 (92) A.C.C 981 (SC)

4. Mukesh Vs St. (N.C.T) of Delhi & ors., A.I.R 2017 (Supreme Court) 2161 (three judge bench)

5. R.M. Malkani Vs St. of Mah. A.I.R 1973, Supreme Court 157

6. Ram Singh & ors. Vs Col. Ram Singh 1985 (Supp.) S.C.C 616

7. Arjun Pandit Rao Kholkar Vs Kailash Kushan Rao Gorantyal & ors., A.I.R 2020 (S.C) 4908

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

1. Heard Sri Krishna Gopal, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned A.G.A for the State and perused the record.

2. The learned counsel for opposite party no. 2 neither appeared nor has the learned A.G.A filed any counter affidavit, hence heard the argument and perused the record.

3. The applicant has filed the present Application U/s 482 Cr.P.C to quash the order dated 02.08.2022 passed by A.S.J / Special Judge (Rape & POCSO Act), Etah in Special Trial No 552 of 2021 ? State vs. Vivek Kumar arising out of Case Crime No. 35 of 2020 under Sections 363, 366 I.P.C and POCSO Act, 2012 Act, Police Station Pilua, District Etah.

4. In brief, facts of the case are that opposite party no. 2 lodged an F.I.R which was registered as Case Crime No. 35 of 2020 under Sections 363, 366, 368, 506 I.P.C and POCSO Act, in Police Station Pilua, District Etah. After investigation the I.O. submitted charge-sheet against the applicant and other co-accused persons under Sections 363, 366, 368, 506, 376 I.P.C and POCSO Act. Statement of the victim has been recorded under Section 164 Cr.P.C, which is annexed as annexure no. 3 to the affidavit. In this statement the victim has specifically stated that she had gone with the applicant with her own sweet will and has solemnized the marriage with him.

5. The learned court has taken cognizance and thereafter the trial proceeded. During the trial the victim has been examined as P.W. 2 and her statement is annexed as Annexure No. 4 to the affidavit. During the cross-examination the applicant's counsel moved an application for the submission of pen-drive and C.D to confront the statement of the victim and also to play it in the court. The application is annexed as Annexure No. 5 to the affidavit. The trial court vide its order dated 02nd August, 2022 rejected the application on the ground that electronic evidences are admissible only when a certificate under Section 65-B of the Evidence Act has been issued and in the present case no certificate is being filed therefore the same cannot be taken on record. A copy of the impugned order is annexed as Annexure No. 6 to the affidavit. The court below has rejected the application without applying its judicial mind, which is wholly illegal and arbitrary. The trial court may examine the electronic record as to whether it has substance or not, but the court rejected the same without applying judicial mind in a routine manner.

6. As per Section 138 of the Evidence Act, the examination-in-chief of the witnesses must relate to the relevant fact, but the cross-examination need not be confined to the fact to which the witness testifies in his examination-in-chief, therefore, the order dated 02.08.2022 passed by A.S.J / Special Judge (Rape & POCSO Act) ? II, Etah in Special Trial No. 552 of 2021 ? State Vs. Vivek Kumar be set aside.

7. From the perusal of the impugned order dated 02.08.2022 it transpires that the trial court did not accept the Pen-drive and C.D. like electronic documents on the ground that until a certificate under Section

65-B of the Indian Evidence Act is not produced, the proposed pen-drive and C.D. cannot be taken on record.

8. From perusal of the record it is very much clear that the learned trial court without coming to the conclusion as to whether the proposed C.D and Pen-drive is primary evidence or secondary evidence required the certificate before admitting the said electronic documents.

9. This Court is of the view that first of all it was duty of the learned trial court to ascertain as to whether the proposed document is primary document or the secondary document. If the proposed documents would be primary evidence, there is no need to seek certificate under Section 65-B for its admission.

10. In ***Vikram Singh @ Vikky Wali and another Vs. State of Punjab and another, A.I.R. 2017 (Supreme Court) 3227,*** it has been held that tape-recorded conversation is not secondary evidence and for that the desired certificate is not required under Section 65-B and there is no need to comply with Section 65-B when an electronic evidence is produced in the court as primary evidence.

11. Further, the trial court was also of the opinion that since the C.D pertains to such conversation, which has been down-loaded through a licensed soft-ware, there is not even an iota of doubt about the genuineness of the conversation present in the C.D.

12. Certainly in ***Anwar P.V. Vs. P.K. Busheer, (2014) 10 S.C.C 473 (three Judge Bench)*** it has been ruled that under Section 65-B (4) certificate is necessary for admissibility of the secondary evidence.

Section 65-B (4) of the Indian Evidence Act, 1872, is as under:

"(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,?

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

13. In this regard the judicial precedents in ***State of U.P. Vs. Ajay Kumar Sharma, 2016 (92) A.C.C 981 (SC) (para-14) and Mukesh Vs. State (N.C.T) of Delhi and others, A.I.R 2017*** (Supreme Court) 2161 (three judge bench) are also relevant.

14. Under Section 3 (2) of the Evidence Act, electronic records or the

documents are relevant and admissible under Sections 17, 22-A, 34, 35, 39, 45-A, 47-A, 59, 65-A, 65-B, 67-A, 73-A, 81-A, 85-A, 85-B, 85-C, 88, 88-A, 90-A, 131 of the Evidence Act.

15. In ***R.M. Malkani Vs. State of Maharashtra A.I.R 1973, Supreme Court 157, in Ram Singh and others Vs. Col. Ram Singh 1985 (Supp.) S.C.C 616*** and the State (N.C.T) of Delhi (Supra) it has been held that relevant conversation recorded in the tap recorder is admissible in evidence.

16. In ***Vikram Singh (Supra)***, original tape record was considered as primary evidence and it was held that therefore the certificate under Section 65-B of the Indian Evidence Act was not required for its admissibility.

17. In ***Arjun Pandit Rao Kholkar Vs. Kailash Kushan Rao Gorantyal and others, A.I.R 2020 (S.C) 4908*** (Three Judges Bench), it has been held that if the electronic document is secondary evidence, the certificate required under Section 65-B (4) is condition precedence to the admissibility of the evidence. The requisite certificate is unnecessary, if the original document itself is produced. This can be done by the owner of the laptop, computer, a computer tablet or even a mobile phone by stepping into the witness box and proving that the concerned evidence on which the original information is first stored, is owned and /or operated by him.

18. In cases, where the ***"computer",*** as defined ***"happens to be a part of the computer system"*** or "***computer network***" and it becomes impossible to physically bring such network or system to the court, then the only means of proving information contained in such electronic record can be in accordance with Section 65-B (1), together with the requisite certificate under Section 65-B (4).

19. In this case it appears that the learned trial court has rejected the application without being confirmed as to whether the proposed electronic document is primary evidence or the secondary evidence.

20. Therefore, this Court is of the considered view that the impugned order is bad in law and it requires reconsideration by the concerned court.

O R D E R

(21) The Application U/s 482 Cr.P.C is **allowed.**

(22) The impugned order dated 02.08.2022 is hereby **set aside.**

(23) The learned Trial Court is directed to decide the application of the accused-applicant afresh in view of the judgment passed by this Court after affording sufficient opportunity.

(2023) 4 ILRA 783
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.03.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Application U/S 482. No. 28317 of 2022

Uday Yadav ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Abhishek Kumar Yadav

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 311-Contradiction in the St.ment of P.W.-2 in his examination in chief in Trial of Applicant and his St.ment in the Trial of co-accused-Applicant moved an Application u/s 311Cr.P.C.-for permitting to further cross-examine P.W.2-rejected-section 311 Cr.P.C. –mandatory to take any steps as mentioned in the section if new evidence appears to be essential to the just decision of the case.

Application allowed. (E-9)

List of Cases cited:

1. V. N Patil Vs Niranjan Kumar & ors., reported in (2021) 3 SCC 661

2. Varsha Garg Vs St. of M.P. & ors. reported in2022 SCC OnLine SC 986

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

1. This application under Section 482 Cr.P.C. has been filed by the applicant with a prayer to quash the order dated 29th August, 2022 passed by the Additional Sessions, Judge, Court No.15, Allahabad in Sessions Trial No. 196 of 2015 (State of U.P. Vs. Uday Yadav), arising out of Case Crime NO. 609 of 2014 under Section 302 I.P.C., Police Station Dhoomanganj, District-Prayagraj, whereby his application dated 25th August, 2022 under Section 311 Cr.P.C. praying for further cross-examination of P.W.-2 has been rejected.

2. I have heard Mr. Abhishek Kumar Yadav, learned counsel for the applicant and the learned A.G.A. for the State as well as perused the entire material available on record.

3. The relevant facts as born out from the records of the present application is as follows:

For the alleged incident occurred on 04.10.2014, first information report has been lodged by opposite party no.2 which came to be registered as Case Crime No. 609 of 2014 under section 147, 148, 149, 302 and 120-B I.P.C. Police Station-Dhoomanganj, District Prayagraj on 14.10.2021. After completion of statutory investigation under Chapter XII Cr.P.C. the Police submitted charge-sheet under Section 302 I.P.C. against the applicant and co-accused Harish Chandra. On submission of the charge-sheet, the concerned Magistrate took cognizance and committed the case to the Court of Sessions, where the case was registered as Sessions Trial No. 196 of 2015 (State Vs. Harish Chandra and Another). The charges against the applicant and co- accused Harish Chandra were framed by the learned additional Sessions Judge/Special Judge (S.C./S.T.) Act, Allahabad on 10.07.2019. The charge under section 25 of Arms Act was also framed against the applicant on 10.07.2019 in S.T. No. 196 of 2015 (State Vs. Harish Chandra and Others), arising out of Case Crime No. 609 of 2014 under section 3/25 Arms Act. The Additional and District Judge Court No.2 Allahabad passed the order dated 18.10.2019 in the Session Trial No. 196 of 2015 (State of U.P. Vs. Harish Chandra and Another) to separate the file of accused Harish Chandra from the Session Trial No. 196 of 2015 and the original paper of the case was directed to be kept in the trial of the applicant Uday Yadav and considering the facts and circumstances, a direction was issued by the trial court to expedite the trial of the applicant vide orders dated 16.10.2019 and 19.08.2019. The aforesaid case was taken

up on 21.10.2019 before the trial court, which passed the order dated 21.10.2019 fixing 22.10.2019 for recording the statement of prosecution witness Smt. Uma. The statement of P.W. 2 Pramod Kumar Sonkar was recorded in the case bearing S.T. No. 196 of 2015 (State Vs. Uday Yadav), on 24.10.2019 and he was cross-examined on 24.10.2019, 31.10.2019, 04.11.2019, 05.11.2019. In the examination- in-chief, in the trial of the applicant P.W.-2 has stated that the applicant and co-accused Harish Chandra fired upon the deceased by their country-made pistols, whereas in the trial of co-accused Harish Chandra being Sessions Trial No. 696 of 2019 (State vs. Harish Chandra), on 24th May, 2022, P.W.-2 has stated that he has not seen the person who fired upon the deceased Roop Chandra. When this very fact came to the knowledge of the applicant that totally contradictory statement has been given by P.W.-2 Pramod Kumar on 24.05.2022 in the S.T. No. 696 of 2019, State vs. Harish Chandra, the applicant moved an application under Section 311 Cr.P.C. on 24.08.2022 in S.T. No. 196 of 2015 (State Vs. Uday Yadav), for permitting to further cross-examine P.W. 2 Pramod Kumar with a view to elicit the truth. The said application has been rejected by the trial court under the order impugned.

4. Learned counsel for the applicant submits that the court below without considering the materials available on the record and ignoring the facts and circumstances of the case passed the impugned order dated 29.08.2022 by which the application bearing Paper No. 23-Kha moved by the applicant under section 311 Cr.P.C. has been rejected without application of mind causing serious injustice to the applicant- accused. Learned counsel for the applicant further submits that the factum of hostility of the witness P.W. 2 Pramod Kumar Sonkar was not available when he was examined in S.T. No. 196 of 2015 (State Vs. Uday Yadav) hence the observation of the learned Court below that the witness had already been crossed-examined three times could not have been ground to reject the application for further cross examination on the basis of his statement being recorded on 24.05.2022 in the S.T. No. 696 of 2019 (State vs. Harish Chandra). The applicant could not have asked the questions relating to the statement given after the conclusion of his evidence in S.T. No. 196 of 2015 (State vs. Uday Yadav), since the evidence of P.W. 2 Pramod Kumar Sonkar recorded in S.T. No. 696 of 2019 (State vs. Harish Chandra), was material for the fair decision of the trial of S.T. No. No. 196 of 2015 and unless the opportunity to bring the real facts was not afforded to the applicant by his cross-examination there are chances of failure of justice.

5. Learned counsel for the applicant further submits that the discretionary power vested in the court was not exercised in judicious manner and the application of the applicant was rejected solely on the ground that the cross- examination of the witness has sufficiently been done which could not have been the ground to reject the application in the fact and circumstances of the present case. Unless the witness is contradicted in respect of the statements recorded in a judicial proceeding, his evidence may not be given importance unless his attention is drawn to the statements made in the judicial proceeding and as such his further cross examination was important and necessary for the fair and just decision of this case.

6. Learned counsel for the applicant further submits that trial Court assumed that the witness was being recalled to get him declared hostile which could not be proper and feasible, this reasoning is uncalled for and based on assumption and presumption only because the Court has ample power to take action against the witness if deposes totally against the evidence earlier recorded and takes summersault. For the ends of justice and to unearth the truth his further cross examination was necessary.

On the cumulative strength of the aforesaid,learned counsel for the applicant submits that by the impugned order the application under section 311 Cr.P.C. moved by the applicant has been rejected and 02.09.2022 has been fixed for argument and in the facts and circumstances of the case it is in the interest of justice that this Hon'ble Court may set aside the order impugned and direct the court below to permit the applicant to cross-examine P.W.-2 again under Section 311 Cr.P.C.

7. On the other-hand, learned A.G.A. submits that there is no illegality or infirmity in the order passed by the court below so as to warrant any interference by this Court under Section 482 Cr.P.C.

8. I have considered the submissions made by the learned counsel for the parties and have examined the records of the present application specifically the order impugned rejecting the application of the applicant to cross-examine P.W.-2 once again.

9. The court below while passing the impugned order has recorded its finding that the argument advanced by the learned counsel for the accused-appellant/applicant that in the case in hand, charges against the two accused Uday Yadav and Harishchandra were framed together earlier, but after some time the file of co-accused Harishchandra was separated and the statement of P.W.-2 Pramod Kumar Sonkar has been recorded separately in both the trial cases, in which there are many contradictions, therefore, in such a situation it is necessary to summon the same witness again has been found to be of no force. For the said opinion, the ground taken by the court below is that it is not proper to summon the witness Pramod Kumar Sonkar again in the present case, as in the present case the statement of witness Pramod Kumar Sonkar has been recorded on 24.10.2019 and the cross-examination of the said witness has been done on 31.10.2019, 04.11.2019 and 05.11.2019. The trial court has further recorded its finding that after the statement of all the other witnesses, the trial case is currently at the stage of argument. The trial court has opined that there is no ground for calling the same witness merely in anticipation of his turning hostile. In the light of the above discussion, the trial court has come to the conclusion that it is not just and expedient to summon the same witness again in the hope of turning hostile, as such the trial court has held that application under Section 311 of the Code of Criminal Procedure is not maintainable and therefore deserves to be quashed under the order impugned.

10. On deeper scrutiny of the impugned order as well as the submissions made by the learned counsel for the applicant, this Court is of the opinion that on one hand, the trial court seems to be correct that trial case of the applicant could be delayed for reaching its logical end due

to repeated summon of witnesses (cross-examination of P.W.-2 in the facts of the case) but this Court cannot loose sight of the fact that for the logical conclusion, the accused and the litigant should be given enough opportunity to plead their respective case. It is no doubt true that in the trial case of the applicant being Sessions Trial No. 196 of 2015, on three occasions, the cross-examination of P.W.-2 has been done and the applicant has been afforded ample opportunity to cross-examine the said witness. However, when the applicant came to know that same witness Pramod Kumar Sonkar has been declared hostile in the same case crime registered for the offence of murder of the same deceased but in different session case of co-accused being Session Trial No. 696 of 2019, the prayer of the applicant to permit him to cross-examine P.W.-2 again in his trial case under Section 311 Cr.P.C. cannot be ignored in the interest of substantial justice. It would be very strange that for the same offence in the same criminal case but in the different trial cases of two criminals, on the basis of different statements of the same person, different views will come for both the accused. It is well settled that justice should not only be done but also seen to be done.

11. This Court is conscious of the fact that the provisions contained in Section 311 Cr.P.C. confer the power of wide amplitude on the court concerned to summon, examine, recall and re-examine such person.

12. For ready reference, Section 311 Cr.P.C. is reproduced herein-under:-

"311. Power to summon material witness, or examine person present.

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

13. From perusal of Section 311 Cr.P.C., it is apparent that this section is divisible in two parts. In the first part discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the Code, (a) to summon any one as a witness, or (b) to examine any person in the Court, or (c) to recall and re-examine any person whose evidence has already been recorded; on the other hand, the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears to be essential to the just decision of the case.

14. The ambit and scope of Section 311 Cr.P.C. have been considered very recently by Supreme Court in **V. N Patil Vs. Niranjan Kumar and Others**, reported in (2021) 3 SCC 661, where in following has been observed in paragraphs 14, 15, 16 and 17:-

"14. The object underlying Section 311 CrPC is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor

is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage.....

....

15. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar Vs. State of Uttar Pradesh and Another: (SCCp. 141, para 17)

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. This principle has been further reiterated in Mannan Shaikh and Others Vs. State of West Bengal and Another and thereafter in Ratanlal Vs. Prahlad Jat and Others and Swapan Kumar Chatterjee Vs. Central Bureau of Investigation (Swapan Kumar Chatterjee case SCC p.331, paras 10-11. The relevant paras of Swapan Kumar Chatterjee(supra) are as under: "10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every Court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice."

15. In **Varsha Garg Vs. State of Madhya Pradesh & Others** reported in

2022 SCC OnLine SC 986 in paras 31 to 37 the Hon'ble Spreme Court has held as under:-

"31. Having clarified that the bar under Section 301 is inapplicable and that the appellant is well placed to pursue this appeal, we now examine Section 311 of CrPC. Section 311 provides that the Court "may":

(i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and

(ii) Recall and re-examine any person who has already been examined.

32. This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court "shall" summon and examine or recall and re-examine any such person "if his evidence appears to the Court to be essential to the just decision of the case". Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

33. The first part of the statutory provision which uses the expression "may" postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression "shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case". Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

34. A two judge Bench of this Court in Mohanlal Shamji Soni (supra) while dealing with pari materia provisions of Section 540 of the Criminal Code of Procedure 1898 observed:

"16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision -- either discretionary or mandatory -- depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice."

35. Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the "evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means." In that context the Court observed:

"18 ...Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining

proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties."

36. Summing up the position as it obtained from various decisions of this Court, namely Rameshwar Dayal v. State of U.P.19, State of W.B. v. Tulsidas Mundhra20, Jamatraj Kewalji Govani v. State of Maharashtra21, Masalti v. State of U.P.22, Rajeswar Prosad Misra v. State of W.B.23 and R.B. Mithani v. State of Maharashtra24, the Court held:

27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

37. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest."

13. The provisions contained in Section 311 Cr.P.C., being germane to the present controversy, are extracted herein below:-

"311. Power to summon material witness, or examine person present.-- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

(emphasis supplied)

16. In view of the above discussions and deliberations, this Court opines that to meet the ends of justice, the door cannot be shut against the accused persons without giving opportunity to cross-examine the witness only after he came to know that in another sessions trial the same witness has turned hostile.

17. Accordingly, the order impugned passed by the trial court dated 29th August, 2022 passed by the Additional Sessions Judge, Court No.15, Allahabad in Session Trial No. 196 of 2015 (State Vs. Uday Yadav), arising out of Case Crime No. 609 of 2014 under Section 302 I.P.C., Police Station-Dhoomanganj, District-Allahabad rejecting the application filed by the applicant under Section 311 Cr.P.C. for further cross-examination of P.W.-2 is set aside. The trial court is directed to fix a date for cross-examination of P.W.-2 again by the applicant in the changed circumstances.

18. With the aforesaid directions, the present application stands allowed.

19. It is made clear that this Court has not expressed any opinion on the merits of the sessions trial no. 196 of 2015.

(2023) 4 ILRA 791
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 28748 of 2022

Pawan Garg ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Shyam Shankar Mishra, Sri Vijay Kumar Mishra

Counsel for the Opposite Parties:
G.A.

Negotiable Instrument Act- Section 138- Cheque dishonor-issued by a firm through its proprietor Smt. Kajal Garg-no name of the Applicant in the e-way bill GST documents as Proprietor, Director or owner-arrayed in the complain to mount pressure upon the Applicant being husband of Smt. Kajal Garg-Applicant not guarantor, nor authorized signatory of agent of his wife-husband and wife are separate legal entity-summoning order is bad-**Application allowed.** (E-9)

List of Cases cited:

St. of Har. Vs Ch. Bhajan Lal AIR 1992 SC 604

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

1. Heard Sri Shyam Shankar Mishra, learned counsel for the applicant, Sri Pankaj Tripathi, learned A.G.A for the State and perused the record.

2. This application has been filed by the application to quash the entire criminal proceedings in Criminal Complaint Case No. 12120 of 2020 - R & S Air Conditioning Vs. M/s Aircon Gallery, under Section 138 N.I Act, pending in the Court of Civil Judge (Junior Division), F.T.C. / Judicial Magistrate, Ghaziabad.

3. In brief, facts of the case are that opposite party no. 2 instituted a complaint under Section 138 of the N.I. Act, against the applicant and his wife Smt. Kajal Garg and M/s Aircan Galary through it's Proprietor Smt. Kajal Garg (wife of the applicant), stating that opposite party no. 3 Smt. Kajal Garg is the proprietor of partnership firm of opposite party no. 1, and opposite party no. 2 is Manager / recognized person, main officer. Opposite Party Nos. 2 and 3 are regulating the firm together, which is involved in installation, fitting of ducting and fabrication work. There have been business relations between Sachin Sharma, the proprietor of the complainant firm and opposite party no. 2

Sri Pawan Garg. There has been mutual faith between both of them. Opposite party had given an oral work order in the month of August, 2019 to the complainant for the ducting site fabrication and A.C. Installation work along-with the dactable A.C. Machine for an amount of Rs. 10,03,189.00/- out of which Rs. 5,45,189.00- was an arrears upon the opposite party.

4. The complainant used to make regular demand of arrears amount/money, for which no attention was paid by the opposite party, but lastly they provided a Cheque No. 088797 dated 31.08.2020, for an amount of Rs.3,00,000/- getting its signed by opposite party no. 3, but when it was produced on 01.09.2020 in his P.N.B Branch Govind Puram, Ghaziabad, the same was dishonoured with the endorsement exceed arrangement. The opposite party had provided the cheque of an account from which no payment was possible, they had given the cheque intentionally to deceit the complainant.

5. On 16.09.2020 a notice dated 16.09.2020 was sent to the opposite party on 17.09.2020, which was received by them on 26.09.2020, but they did not pay the amount. Even after 15 days upto 10.10.2020, hence the act of the opposite party attracts Section 420 I.P.C and Section 138 of the N.I. Act. Hence, the opposite parties be summoned for the trial in aforesaid sections.

6. On 12.08.2021, the applicant Pawan Garg and Smt. Kajal Garg were summoned by the concerned court as proprietor under Section 138 of the N.I.Act.

7. In brief, the grounds of this application are that the cheque was issued by the firm namely M/s Aircon Gallery through its' proprietor Smt. Kajal Garg. In the Tax Invoice e-way Bill GST documents produced by the opposite party no. 2 shows that there is no whisper of the name of the applicant as a Proprietor, Director, Owner or otherwise of the firm Aircon - Gallery.

8. In fact, the applicant has no concern with the aforesaid firm. It is a proprietorship firm run by single proprietor Smt. Kajal Garg, which is evident from Annexure No. 5, the photocopy of the registration certificate issued by the Government of India. The applicant has no concern with the aforesaid firm and he has been arrayed in the complaint with mala-fide intention to mount pressure for recovery of money being husband of Smt. Kajal Garg, proprietor of the aforesaid firm. The applicant has no business concern with the aforesaid firm and works separately as Sales Agent in grain market.

9. The learned courts below was totally failed in considering material available on record and has mechanically summoned the applicant under Section 138 of the N.I. Act along with Smt. Kajal Garg.

10. The impugned order is arbitrarily, unjust, illegal and is not sustainable in the eye of law. The applicant has no concern with the aforesaid firm by legal and practical aspects. The courts below could not examine the material available on record and on the basis of relation no person can be prosecuted, hence the present application be allowed and the impugned order be quashed.

11. The opposite party no. 2 has been sufficiently served, but none appeared and no counter affidavit has been filed against this application.

12. The papers available on record established that only Smt. Kajal Garg, is the sole proprietor of M/s Aircon Gallery and the applicant - Pawan Garg is neither the Proprietor, Co-proprietor or the Authorised Officer or Signatory Owner or the principal officer of the aforesaid firm.

13. The impugned cheque had been issued by Kajal Garg, opposite party no. 3, the sole proprietor of opposite party no. 1 of the complaint. There is no paper to establish that the applicant is authorized signatory, agent or co-proprietor of the Firm. In the eye of law, wife and husband have separate entity. It is also not a case that the wife, sole proprietor of the Firm had provided the cheque signed by or on behalf of the applicant.

14. In ***M. Seethalakshmi v. Suresh Bafna, 2005 SCC OnLine Mad 26:*** it was held by the Madras High Court that for the cheque issued by the husband for the loan obtained by him just for the reason that in the borrowing of the loan a guarantee has been given by the wife the accused which could only be enforced in a civil forum for the liability and since the wife is not party to the issuance of the cheque, she can not be made a party or an accused for the prosecution of the bounced cheque under Section 138 of the Act.

15. The similar position is in this case where the sole proprietor Kajal Garg wife of the applicant has issued the cheque and the applicant is neither the guarantor nor has acted in the capacity of authorized signatory or the agent of his wife.

16. The Apex Court in ***State of Haryana Vs. Ch. Bhajan Lal AIR 1992 SC 604:*** has laid down guide-lines where High Court can exercise inherent powers under **Section 482 Cr.P.C** to prevent the abuse of process of law. However, this should be done sparingly and in rarest to rare cases. The guidelines are as under:

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

2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R do not disclose a cognizable offence, justifying an investigation by police officers under S. 156(1) of the Code except under an order of a Magistrate within the purview of S. 155(2) of the Code.

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

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

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

6) Where there is an express legal bar engrafted in any of the provisions of

the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party."

17. In ***S.B. Shankar v. Amman Steel Corpn., 2001 SCC OnLine Mad 825***: it was held that if the accused did not function as Chairman and Director of the accused company during the period when cheques were drawn, no liability u/s 138 NI Act would arise.

18. In ***P. Dhamodharan v. Palani Andavar Mills Ltd., 2001 SCC OnLine Mad 944 :*** it was held that when the accused was neither signatory to the cheques nor was in charge of day-to-day affairs of the firm, he would not be liable u/s 138 NI Act.

19. In ***Gangadhar v. Shrenikmal, 2002 SCC OnLine MP 674:*** it was held that the accused was neither running a partnership firm nor was a partner nor signed the cheque hence, he would not be liable u/s 138 of the NI Act.

20. In ***G. Hubert Fenelon v. D. Sridharan, 2002 SCC OnLine Mad 547***: the accused was not Director of the company on the date of the commission of the offence hence, he was not held liable under section 138 NI Act.

21 All the above citations are in support of the defence taken by the applicant. Hence, the applicant cannot be summoned as accused under Section 138 of the NI Act and the summoning order in respect of the applicant is bad in law in light of the above facts and circumstances of the case.

O R D E R

This application under section 482 Cr.P.C is **allowed** and the impugned order dated 12.08.2021, so far as it relates to the applicant, is hereby **quashed.**

(2023) 4 ILRA 794
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 32791 of 2022

Deepak Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Mukesh Kumar, Sri R.K. Saxena

Counsel for the Opposite Parties:
G.A., Sri Shailendra Kumar Sharma, Sri Surendra Kumar

Criminal Law - Code of Criminal Procedure, 1973 - Section 197-FIR lodged-Final report rejected-prior sanction not taken-Applicant was officer on duty-no nexus between the official discharge of duty by the Applicant and alleged commission of crime-no prior sanction needed.

Application dismissed. (E-9)

List of Cases cited:

1. Mahendra Pal Singh Lekhpal & anr. Vs St. of U.P. & anr., 2022 0 Supreme (All) 15

2. Anil Kumar Yadav Vs St. of U.P. & anr., 2022 (4) JIC 223 (SC)

3. Ajit Shukla & ors. Vs St. of UP through Principal Secretary Home Civil Sectt. & ors.,Application U/S 482 No.5776 of 2017, decided on 10.08.2022

4. D. Devaraja Vs Owais Sabeer Hussain, 2020 0 Supreme (SC) 413

5. St. through CBI Vs BL Verma & ors., (1997) 10 SCC 772

6. Shantaben Bhurabhai Bhuriya Vs Anand Athabhai Chaudhari & ors., 2021 SCC OnLine 974

7. Fertico Marketing Vs Central Bureau of Investigation CBI (2021) 2SCC 525

8. Inspector of Police & ors. Vs Battenaptala Venkata Ratnam, AIR 2015 (SC) 2403

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

1. Heard Sri R.K. Saxena, advocate holding brief of Sri Mukesh Kumar, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned AGA for the State and Sri Surendra Kumar, learned counsel for opposite party no.2.

2. This application has been filed to quash the entire proceedings of Misc. Case No.817 of 2020 (State Vs. Mahesh Kumar) arising out of Case Crime No.595 of 2018, under Sections 147, 323, 504, 452, 342, 420, 467, 468, 471 IPC, Police Station Fatehgarh Kotwali, District Farrukhabad pending in the Court of Chief Judicial Magistrate, Farrukhabad as well as the impugned summoning order dated 07.08.2022.

3. In brief, facts of the case are that Constable 1107 CP Mahesh Kumar posted at the residence of District Judge, Fatehgarh, Farrukhabad lodged an FIR on 23.07.2018 at 10:10 a.m. about the offence committed on 22/23.07.2018 between 10:00 p.m. and 02:00 a.m. in the night at Crime No.595 of 2018, under Sections 147, 323, 504, 452, 342 IPC that he was deputed duty as guard in the night of 22.07.2018 from 10:00 p.m. to 02:00 a.m. Chaukidar Sudhis Kumar and Pankaj Yadav were also on duty. At about 11:15 p.m. a person in simple dress came with 6-7 persons in police uniform crossing the main gate of the residence of District Judge as it was locked. He ran towards the gate and saw that two constables were cutting the sandal wood already lying on the earth and some constables and SSI Deepak Kumar was keeping the chaukidars in police jeep in drunken condition. When he forbidden, leaving the wood, carried the guards, abused them and ran away. Guard and commander informed R.I. at once at about 01:00 am. Both the chaukidars returned and informed that SSI Deepak Kumar and other constables had abused and beaten them by sticks in which they have received injuries. During the course of investigation informant Mahesh Kumar filed an affidavit to S.P. Fatehgarh denying the contents of his FIR. Chaukidars Sudhis Kumar and Pankaj Yadav stated in support of the prosecution in their statement under Section 161 CrPC.

4. After investigation, the investigating officer submitted final report to the effect that no independent and corroborative piece of evidence was available. Injured opposite party no.2, Pankaj Yadav filed protest petition which was accepted and the final report was rejected on 07.08.2022 and cognizance has been taken against the applicant under Sections 147, 323, 504, 452, 342, 420, 467, 468, 471 IPC. It has also been

directed that the case would run as State case.

5. The injury report of opposite party no.2, Pankaj Yadav is on record which discloses four injuries, two as contusion and two injuries as complaint of pain.

6. Before the aforesaid FIR, an FIR under Section 379 IPC had been lodged by Sri Mohammad Ibrahim, Central Nazir, Civil Court, Farrukhabad regarding cutting of two sandal trees against the unknown thieves.

7. The applicant has taken ground that as per affidavit of Constable Mahesh Kumar (informant), the applicant was not seen at the place of occurrence. Though the injured Pankaj Yadav has supported the prosecution version. The investigating officer has submitted the final report as he found no offence against the applicant and he exonerated him from the aforesaid offence. The applicant is a government servant and police officer. Hence, prior sanction for initiating the prosecution against him was required under Section 197 CrPC which has not been taken from the concerned department. Opposite party no.2, Pankaj Yadav himself managed the injury report in his favour which are simple in nature. The applicant never made any forged signature of opposite party no.2 and his companion Shudhis Kumar but without calling a report from expert, the Magistrate summoned the applicant under Sections 420. 467. 468, 471 IPC in summary manner which is not permissible in law.

8. After submission of the final report, a right to defend his case was accrued to the applicant but without issuing any notice and without giving opportunity of hearing to him the impugned order has been passed which is not permissible in law. The impugned order is illegal. arbitrary and contrary to the evidence and is liable to be quashed. The applicant never beaten opposite party no.2 and his companion at any point of time as he was not present at the place of occurrence and only to hide the illegal theft of sandal wood, opposite party no.2 had falsely implicated him. Learned Magistrate had taken cognizance without applying his judicial mind which is not sustainable in the eye of law. The applicant has no criminal history. If he is put behind the bar, he will suffer irreparable loss. Hence, the application be allowed and the entire proceedings of the aforesaid case be quashed.

9. The applicant has filed supplementary affidavit by which the applicant has annexed the copy of G.D. as annexure-SA-2 and supplementary medical report of the injured Pankaj Yadav, Opposite party no.2.

10. Since the applicant claims protection under Section 197 CrPC, hence it is produced as under:-

***"197. Prosecution of Judges and public servants.**--(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-*

(a) in the case of a person who is employed or as the case may be, was at the

time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government: I Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression" State Government" occurring therein, the expression" Central Government" were substituted.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub- section will apply as if for the expression" Central Government" occurring therein, the expression" State Government" were substituted.

(3A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.

(4) The Central Government or the State Government, as the case may be, may determine the person by whom the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

11. There are difference of opinions between the parties about the applicability of Section 197 CrPC. According to the learned counsel for the applicant before proceeding against the applicant, a prior sanction under Section 197 CrPC was required whereas learned AGA and learned counsel for opposite party no.2 are of the view that the alleged commission of crime

is a separate act from the act of discharge of official duty. In this regard both the parties have relied on some judgments which are as under:-

(i) **Mahendra Pal Singh Lekhpal and another Vs. State of UP and another, 2022 0 Supreme (All) 15**. In this case applicant nos.1 and 2 were the public servant in consolidation department. During consolidation proceeding a joint plot was allotted to them. Opposite party no.2 filed an application before the SOC for making measurement of plot no.372. SOC directed consolidation officer for measurement. The question arose as to whether Section 197 CrPC is available here to protect the public servant discharging official duties and functions from harassment by initiation of frivolous criminal proceedings. The Court observed that if on the face of complaint, act alleged appears to have a reasonable relationship with official duty, power under Section 482 CrPC would have to be exercised to quash proceedings to prevent the abuse of process of Court. The Court further observed that the Magistrate has illegally taken cognizance of the offence summoning the applicants under Section 427 IPC which is ex facie bad for want of sanction.

(ii) **Anil Kumar Yadav Vs. State of UP and another, 2022 (4) JIC 223 (SC)**. In this case appellants were working in railway department. They removed illegal constructions of respondent no.2 under the judicial order passed under Section 133 CrPC. The complainant/respondent no.2 filed an application under Section 156(3) CrPC against the appellant for registration of FIR. Police submitted report that accused/appellant had removed the illegal constructions acting in his official capacity as a public servant. Ignoring the police report, the Magistrate summoned the appellant under Section 204 CrPC. The High Court refused to quash the criminal proceedings as well as the summoning order. The Apex Court held that issuance of process under Section 204 CrPC in ignorance of police report was unjust. The appellant had taken bona fide action in discharging his duty. Hence, no offence is made out. Accordingly, the complaint was quashed and the order of the High Court was set aside.

(iii) **Ajit Shukla and others Vs. State of UP through Principal Secretary Home Civil Sectt. and others, Application U/S 482 No.5776 of 2017, decided on 10.08.2022.** The relevant portion of the judgment is reproduced as under:-

"9. On behalf of the applicants, it has been submitted that the applicants were discharging official/public duty when the alleged incident took place for which two complaints came to be filed and the applicants had been summoned as accused; mandatory provision of sanction by the competent authority under Section 197 Criminal Procedure Code, 1973 (for short 'CrPC) could not have been ignored by the learned Chief Judicial Magistrate before taking cognizance and summoning the applicants as accused; the information received on Dial-100 through Mr. Anvar Khan, Advocate was recorded in the G.D. dated 21.05.2014. In the G.D. dated 22.05.2014 the extract of incident was also recorded. The police personnel, after receiving information. which got recorded in the G.D., reached to the District Court to control the situation in discharge of their official/public duty.

14. Section 197 in The Code of Criminal Procedure, 1973 is extracted herein below for convenience:-

"197 Prosecution of Judges and public servants.-(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government,"

Notification No. 1841 (3)/V1-538-71 dated 30th January 1975 reads as under:-

"Grth Vibhag (Police), Anubhag-9, Notification No. 1841 (3)/N1-538-71, dated January 30, 1975-

In exercise of the powers conferred by sub-section (3) of Section 197 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974), the Governor is pleased to direct that the provisions of sub-section (2) of the aforesaid section shall apply to all members of the following forces of the State, charged with the maintenance of public order wherever they may be serving, namely:

(i) UP Police Force

(ii) U.P Pradeshik Armed Constabulary"

(iv) In **D. Devaraja Vs. Owais Sabeer Hussain, 2020 0 Supreme (SC) 413**, the matter was in respect of the Karnataka Police Act, 1963 and Section 197 CrPC. It was held that Section 170 of the Karnataka Police Act read with Section 197 CrPC has its limitations. Protection is available only when alleged act done by the public servant is reasonably connected with discharge of his official duty and is not merely a cloak for objectionable act. An offence committed entirely outside scope of duty of police officer, would certainly not require sanction. If there is a reasonable connection between the act and the performance of official duty, fact that the alleged act is in excess of duty will not be ground enough to deprive policeman of protection of government sanction for initiation of criminal action against him. It is further held that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority. The act of a policeman or any other public servant unconnected with official duty, there can be no question of sanction. For ready reference relevant parts of the aforesaid judgment are reproduced herein below:-

"59. In the context of aforesaid, this Court held that an act is not "under" a provision of law merely because the point of time at which it is done coincides with the point of time when some act in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done "under" a provision of law, one must discover the existence of a reasonable

relationship between the provisions and the act. In the absence of such a relation, the act cannot be said to be done under the particular provision of law. It cannot be said that beating a person suspected of a crime or confining him or sending him away in an injured condition, at a time when the police were engaged in investigation, were acts done or intended to be done under the provisions of the Madras District Police Act or the Code of Criminal Procedure or any other law conferring powers on the police. It could not be said that the provisions of Section 161 of the Code of Criminal Procedure authorised the police officer examining a person to beat him or to confine him for the purpose of inducing him to make a particular statement.

64. In Pukhraj Vs. State of Rajasthan and another, (1973) 2 SCC 701 the Accused Post Master General, Rajasthan had allegedly kicked and abused a union leader who had come to him when he was on tour, to submit a representation. This Court held that Section 197 of the Code of Criminal Procedure, which is intended to prevent a public servant from being harassed does not apply to acts done by a public servant in his private capacity. This Court however left it open to the Accused public servant to place materials on record during the trial to show that the acts complained of were so interrelated with his official duty as to attract the protection of Section 197 of the Code of Criminal Procedure.

68. Sanction of the Government, to prosecute a police officer, for any act related to the discharge of an official duty, is imperative to protect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. The requirement of sanction from the government, to prosecute would give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, from which he would be protected Under Section 197 of the Code of Criminal Procedure, read with Section 170 of the Karnataka Police Act. At the same time, if the policeman has committed a wrong, which constitutes a criminal offence and renders him liable for prosecution, he can be prosecuted with sanction from the appropriate government.

69. Every offence committed by a police officer does not attract Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act. The protection given Under Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act has its limitations. The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and official duty is not merely a cloak for the objectionable act.

70. An offence committed entirely outside the scope of the duty of the police officer, would certainly not require sanction. To cite an example, a police man assaulting a domestic help or indulging in domestic violence would certainly not be entitled to protection. However if an act is connected to the discharge of official duty of investigation of a recorded criminal case, the act is certainly under colour of duty, no matter how illegal the act may be.

71. If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official

duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of the protection of government sanction for initiation of criminal action against him.

72. The language and tenor of Section 197 of the Code of Criminal Procedure and Section 170 of the Karnataka Police Act makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority.

73. To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction. However, if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if the policeman has exceeded the scope of his powers and/or acted beyond the four corners of law.

74. If the act alleged in a complaint purported to be filed against the policeman is reasonably connected to discharge of some official duty, cognizance thereof cannot be taken unless requisite sanction of the appropriate government is obtained Under Section 197 of the Code of Criminal Procedure and/or Section 170 of the Karnataka Police Act.

76. While this Court has, in D.T. Virupakshappa Vs. C. Subash, (2015) 12 SCC 231 held that the High Court had erred in not setting aside an order of the Trial Court taking cognizance of a complaint, in exercise of the power Under Section 482 of Code of Criminal Procedure, in Matajog Dobey Vs. H.C. Bhari, AIR 1956 SC 44 this Court held it is not always necessary that the need for sanction Under Section 197 is to be considered as soon as the complaint is lodged and on the allegations contained therein. The complainant may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty and/or under colour of duty. However the facts subsequently coming to light in course of the trial or upon police or judicial enquiry may establish the necessity for sanction. Thus, whether sanction is necessary or not may have to be determined at any stage of the proceedings."

12. In the cited case, the appellant was the police officer of rank of S.P. It was held that on face of complaint, if act alleged appears to have a reasonable relationship with official duty, where criminal proceeding is apparently prompted by mala fides and instituted with ulterior motive, power under Section 482 CrPC would have to be exercised to quash proceedings, to prevent abuse of process of Court.

13. Records of the instant case clearly reveal that that complainant alleged that the police exceeded while respondent was in custody, in course of investigation In connection.

14. Learned counsel for opposite party no.2 and learned AGA have argued that the applicant is denying his presence at the time and place of occurrence, hence he cannot claim protection under Section 197 CrPC. The applicant's counsel has argued

necessity of previous sanction before initiation of the impugned criminal proceeding without accepting the presence of the applicant as officer on duty on the alleged date, time and place of occurrence. It has also been argued by the learned counsel for opposite party no.2 that there is no GD entry that the applicant had visited the place of occurrence that time to record the evidence in connection of investigation of the prior case. The applicant has also not admitted that he had visited the District Judge, residence for inspection in connection of the FIR dated 21.07.2018, under Section 379 IPC lodged earlier with regard to theft of sandal tree.

15. Thus it is concluded that since there is complete denial by the applicant from the commission of the alleged crime, therefore, the present case is a separate and distinct crime from the previously lodged FIR under Section 379 IPC and also from the official discharge of duty of the applicant for which no prior sanction was required.

16. In the above judicial precedents it has been held that if the accused was discharging official duty when the alleged incident took place or the alleged incident was reasonably connected with the discharge of official duty, the previous sanction for prosecution of a public servant under Section 197 CrPC would be mandatory but if the offence ought to have been committed by the accused is entirely outside of the scope of the duty of a police official, there would not be any requirement of prior sanction. Here the applicant is denying the commission of the alleged crime in which opposite party no.2 has received injuries and FIR had also been lodged in due course and only on the basis of submission of two affidavits, one of Mahesh Kumar and another by Chaukidar, Sudhish Kumar, final report was produced ignoring the statement and injuries sustained by Pankaj Yadav, opposite party no.2. Whether the alleged offence had been committed by the applicant or not, can be decided only after taking evidence and during the trial. Only on the basis of status of the applicant that he is a police officer, he can not claim exemption under Section 197 CrPC. The protection under Section 197 CrPC is available only when the alleged offence had been committed in connection of discharge of official duty in due course. If such alleged offence has no connection with the discharge of official duty there would not be any need of prior sanction under Section 197 CrPC. It is not the case of the applicant that acting as I.O. he exceeded his duty and that is why the alleged occurrence has been committed. This Court is of the view that there is no nexus or connection between the official discharge of duty by the applicant and the alleged commission of crime, hence, there was no need for taking prior sanction under Section 197 CrPC.

17. I n some of the judgments, it has been held that no cognizance can be taken if prior sanction is pending consideration but contrary to that in **State through CBI Vs. BL Verma and others, (1997) 10 SCC 772; Shantaben Bhurabhai Bhuriya Vs. Anand Athabhai Chaudhari and others, 2021 SCC OnLine 974,** it has been held that the order of the High Court to drop the proceeding for want of sanction under Section 197(1) CrPC is bad. It will be perfectly valid and open to the petitioner to activate the prosecution against the respondent.

18. In **Shantaben Bhurabhai Bhuriya** (supra) it was held that absence of

sanction can not be a ground to quash the criminal proceeding in exercise of power under Section 482 CrPC is rather impermissible and if there is need of sanction under Section 197 CrPC, the Court may direct the authority to take sanction and then proceed in stead of quashing the entire proceeding. The same view has been taken in Fertico Marketing Vs. Central Bureau of Investigation CBI (2021) 2SCC 525.

19. In para 11 of **Inspector of Police and others Vs. Battenaptala Venkata Ratnam, AIR 2015 (SC) 2403**, it has been held that *the alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. Their official duty is not to fabricate records or permit evasion of payment of duty and cause loss to the Revenue. Unfortunately, the High Court missed these crucial aspects. The learned Magistrate has correctly taken the view that if at all the said view of sanction is to be considered, it could be done at the stage of trial only.*

20. Here the learned Trial Court has not opined that the alleged commission of crime by the applicant is in connection or nexus with his official discharge of duty, hence, he proceeded with the case in absence of prior sanction under Section 197 CrPC.

21. This Court is also in conformity with the conclusion of the learned Trial Court. This Court does not find the alleged occurrence having any connection with the discharge of official duty entrusted to the applicant. Hence, there would be no need of prior sanction before taking cognizance and passing the impugned summoning order.

22. On the basis of above discussion, this Court is of the considered view that this application under Section 482 CrPC is not maintainable and is liable to be dismissed.

23. This application under Section 482 CrPC is dismissed accordingly.

(2023) 4 ILRA 803
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 35136 of 2022

Smt. Sonia Srivastava & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ashwani Kumar Sachan, Sri Saurabh Sachan

Counsel for the Opposite Parties:
G.A., Sri Anil Kumar Mishra

Criminal Law - Code of Criminal Procedure, 1973 - Section 125 - Application u/s 125(6) Cr.P.C. rejected-Applicant defrauded by opposite party stating himself to be widower-applicant no.2 was born out of their wedlock-opposite party was ready to give sample for D.N.A. test but did not appeared for it-nor paid the fees- and has recalled the order for D.N.A. test-Trial Court without adjudicating opposite party as biological father under legal presumption u/s 14 of Evidence Act-without D.N.A. test-bad- one more opportunity granted for giving D.N.A. sample and depositing the fees-if fails Family Court would be free to draw the inference-if D.N.A. test found positive – Applications u/s 125 & 125 (6) Cr.P.C. shll be decided.

Application allowed. (E-9)

List of Cases cited:

1. Sharda Vs Dharmpal (2003) 4 SCC 493

2. Bhabani Prasad Jena Vs Convenor Secretary, Orissa St. Comission for Women AIR 2010 SC 2851

3. Y.B. Patil Vs Y.L. Patil (1976) 4 SCC 66

4. Badshah Vs Urmila Badshah Godse & anr., (2014) SCC 188

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

1. This application has been filed by the applicants to quash the order dated 20.07.2022 passed by Principal Judge Family Court, Kanpur Nagar, in Case No. 555 of 2015 under Section 125(6) Cr.P.C. and direct the opposite party no. 2 to pay the interim maintenance to the tune of Rs. 30,000/- per month (Rs. 20,000/- to the applicant no.1-wife and Rs. 10,000/- to applicant no.2-daughter) and also direct the Trial Court to take all necessary steps immediately to enforce the orders dated 27.3.2018 and 24.9.2019 for conducting the D.N.A. test of opposite party no.2 for ascertaining his biological paternity of the applicant no. 2.

2. In brief, facts of the case are that the opposite party no.2 by creating a deception that he was widower whose wife expired 8 years ago had solemnized a second marriage with applicant no. 1 through Arya Samaj rituals on 19.2.2006 and from their cohabitation applicant no.2 was born on 14.1.2007. Later on, when it revealed that wife of opposite party no.2 namely Smt. Mamta Sharma was alive, he stated that he will convince his wife and children born from first wife then he will introduce the applicant in his home. Resultantly, an F.I.R. dated 15.9.2007 under Section 494 I.P.C. has been lodged by the applicant against her husband in which charges have been framed. But due to scarcity of basic resources causing difficulty in survival and living with comfort with her new daughter and due to complete dependence on her brothers, the applicant wife had moved application under Section 125 Cr.P.C. On 22.7.2015 for seeking maintenance but due to dilatory tactics of the husband in deciding the aforesaid application and refusal from giving not even a penny, the wife was constrained to move an application under Section 125(3) Cr.P.C. for getting interim maintenance for salvage and survival of her daughter and herself.

3. The opposite party no.2 in reply to the aforesaid applications, had flagrantly claimed that he was neither a biological father nor has adopted the applicant no.2 and there was no marriage ever solemnized with the applicant no. 1. Hence, he is not bound to maintain an stranger. Surprisingly, simultaneously he is also baldly emphasizing that he is a pauper person with no source of income. Opposite party no. 2 is mentioned as father of applicant no. 2 in her every document from birth certificate to school admission form and I-card. There are genuine photographs from which it is tangible that opposite party no.2 is a husband of the applicant no.1 and father of applicant no.2. Due to flagrant denial by opposite party no.2 as husband of applicant no.1 and biological father of applicant no.2, the applicant no. 1 moved an application dated 27.3.2018 for conducting D.N.A. test profiling and identification test to establish the paternity of her daughter as opposite party no. 2 is the biological father of her daughter, applicant no.2. Initially the opposite party no.2 had given consent to give her blood

sample for D.N.A. identification. On 5.8.2019 the opposite party no.2 was directed to deposit the requisite amount fee for D.N.A. testing but he filed recall application which was rejected by the Trial Court on 24.2.2019.

4. Against the order dated 24.2.2019, a highly belated application U/S 482 Cr.P.C. No. 5983 of 2020 was filed by opposite party no.2 wherein till date no final order has been passed. Thereafter, from the conduct of husband, the Trial Court came to conclusion that he was not interested for D.N.A. test and on 2.11.2019 recorded in the order-sheet that husband is procrastinating the proceedings and actually he is not ready for D.N.A. test, he was lingering on the proceedings. Hence, the Trial Court proceeded and observed that it will take legal presumption u/s 114 of The Evidence Act against opposite party no. 2. Surprisingly, the Trial Court without adjudicating the aspect that opposite party no. 2 is biological father of applicant no. 2 under legal presumption under Section 114 of the Evidence Act and is bound to maintain his daughter and wife as he had solemnized second marriage after defrauding the applicant no. 1 and that he is bound to undergo D.N.A. test, in a cursory & hasty manner dismissed the application under Section 125 (6) Cr.P.C. Vide impunged order dated 20.7.2022. The applicant no. 1 declares that her daughter Km. Tanishka is the natural and biological daughter of the opposite party no.2-Ramesh Chandra Sharma, born from their wedlock and she declares on behalf of applicant no. 2 that she is ready to undergo any D.N.A. test for the purpose of establishing and proving the fact that she is not the child of any unknown paternal identity and opposite party no. 2 is her natural & biological father and she is entitled to get maintenance from him. The applicant no. 2 is an unemployed abandoned married women, she is absolutely financially dependent on her brothers. Indeed she is qualified as Masters but after birth of applicant no. 2 she is completely engrossed in bringing and rearing her up.

In support of his submission, learned counsel for the applicants has placed reliance on the following judgments:

(a) Sharda Vs. Dharmpal (2003) 4 SCC 493

(b) Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Comission for Women AIR 2010 SC 2851

(c) Y.B. Patil Vs. Y.L. Patil (1976) 4 SCC 66

(d) Badshah Vs. Urmila Badshah Godse & Anr., (2014) SCC 188.

It has been contended that on the basis of above cited case-laws the impugned orders be quashed and the relief claimed by the applicants be granted.

5. Opposite party no. 2 appeared and filed counter affidavit and stated that neither the applicant no. 1 is legally weded wife nor the applicant no. 2 is his biological daughter, he is already married to Smt. Mamta Sharma and has children with her. The application under Section 125 Cr.P.C. is misconceived and not maintainable at all. The allegations are false and fabricated only to harass him for making money from him. The application under Section 125 Cr.P.C. was filed in the year 2015 and the application 125 (6) Cr.P.C. has been moved

in the year 2020 after lapse of 5 years which itself shows sanctity of the bogus applicants. The opposite party no. 2 was ready to give sample for D.N.A. Test but the applicant herself moved application on 9.9.2019 for recalling the order dated 5.8.2019 and upon such application the Trial Court has recalled the order dated 5.8.2019 vide order dated 3.11.2019. Though the order dated 5.8.2019 has been challenged by him in Application u/S 482 No. 5893 of 2020 but the same has become infructuous after recall of the order dated 5.8.2019. The trial Court has wrongly drawn the presumption under Section 114 of the Evidence Act. The opposite party no. 2 is neither biological father of the applicant no. 2 nor adopted father of the applicant no. 1 and no marriage has been solemnized and proved with the applicant no. 1, therefore, he is not bound to pay maintenance to the strangers in any way and as such the Trial Court has rightly rejected the application of the applicant under Section 125 (6) Cr.P.C. Hence, this application be also rejected.

6. No rejoinder affidavit has been filed by the applicants.

7. Heard Sri Saurabh Sachan, learned counsel for the applicants, Sri Anil Kumar Mishra learned counsel for opposite party no.2 as well as Sri Pankaj Tripathi, learned A.G.A. and perused the record.

8. It is admitted to both the parties that opposite party no. 2 is already legally married person with one Smt. Mamta Sharma. According to the applicant no. 1 she was defrauded by opposite party no. 2 saying himself to be widower therefore she solemnized marriage with opposite party no.2 and out of their cohabitation, applicant no. 2 has born. Certainly, in all the papers opposite party no.2 is mentioned as father of the applicant no.2. There are some photographs which show primafacie that once upon a time the applicants and opposite party no. 2 remained together and spent pleasure time with each other and they have also visited some tourist places where they got their photographs clicked together.

9. Opposite party no.2 could not deny such photographs. It has also not been contended that such photographs are the result of trick photography. The opposite party no. 2 has been shown as father of opposite party no. 2 in Nagar Nigam records and also in school records of applicant no.2, however, there is no proof that any application for quashment of the same has been moved/filed by the opposite party no.2. It is obvious from the order-sheet that initially the opposite party no.2 had consented to give blood sample but when the Court ordered to pay him the requisite fee for conducting the D.N.A. test, he did not come forward and did not pay fee to comply with the order of the Court. Therefore, the Court was bound to draw adverse inference against him in this regard. There is no need to discuss the law regarding question of D.N.A. testing as it has been propounded in several decisions by the Apex Court that taking sample for D.N.A. is not in violation of Article 20 (3) of the Constitution of India.

10. Neither the applicants nor the opposite party no.2 have filed the copy of the Application U/S 482 Cr.P.C. No. 5893 of 2020 to know as to what grounds have been taken by opposite party no.2 therein. However, from evidence on record it is crystal clear that though the opposite party no.2 was ready to undergo the D.N.A. test but he neither deposited the requisite fee

nor attended the hospital on the date fixed by the Trial Court rather he filed the petition under Section 482 Cr.P.C. for which he did not take pain to get it decided at the earliest. The demeanor and attitude of opposite party no2 has been considered by the Trial Court and an order has been passed that when opposite party no.2 is not undergoing D.N.A. test, in such a circumstance an adverse legal presumption would be drawn against him. Though till now no such adverse presumption/inference has been drawn by the Trial Court. This Court is of the view that it is a matter of discussion and serious scrutiny as to whether a person who is denying to undergo the D.N.A. test, his sample can be taken forcefully or not. Even in the citation cited by the applicants' counsel, the Apex Court has held that if a person is denying to undergo with D.N.A. testing, an adverse inference would be drawn against him and the case would be proceeded on that basis and such adverse inference would be considered at the time of final disposal of the case.

11. An application under Section 125(6) Cr.P.C. had been moved by the applicant no. 1 for interim maintenance which was declined on the ground that till now it has not been proved that the applicant no. 1 is the legally wedded wife of opposite party no.2 and applicant no.2 is the biological daughter of him.

12. This Court is of the opinion that an application under Section 125 Cr.P.C. could be decided positively on the basis of documents supplied by the applicants. There is school document in which opposite party no.2 has been recorded as father of the applicant no.2, there is a document of Nagar Nigam Kanpur that a female child was born on 14th January, 2007 in Navyug Nurshing Home, whose mother is applicant no. 1, Smt. Sonia Srivastava and whose father is opposite party no. 2, Ramesh Chandra Sharma. Both these documents have not been legally challenged by the opposite party no. 2. The photographs in which the applicants and opposite party no.2 are shown together, are also primafacie evidence to establish the relations between the applicants and opposite party no.2. According to this Court, on the basis of these documents and the adverse inference drawn against the opposite party no.2 the Trial Court was competent to decide the application under Section 125 Cr.P.C. and also the application under Section 125 (6) Cr.P.C.

13. Though in some cases it has been held that legally married Hindu male or Hindu and Muslim women already married, can not claim that he or she is in live-in-relationship but the instant case is different as the contention of applicant no. 1 is this that opposite party no.2 who was already married concealing his marital status contacted her and solemnized marriage with her and cohabited with her that led to the birth of applicant no. 2. In such a situation in addition to above evidence a ground of live-in-relationship may also be considered by the Trial Court, if the same is being proved. It has also to be borne in mind that according to Section 16 of The Hindu Marriage Act, any child born out of void and voidable marriages, shall be treated to be legitimate child

14. This Court is of the view that with regard to drawing adverse inference against opposite party no. 2, an exhaustive and comprehensive order was required to be passed but no such order has been passed by the Trial Court. According to this Court, one more opportunity may be provided to

the opposite party no.2 for depositing the fee and for giving sample for D.N.A. test and if he fails to do so, the Family Court shall be free to draw the adverse inference against opposite party no.2 regarding paternity of applicant no.2. This fact would be kept in mind that generally a woman and a girl child would not made such claim which may diminish their character, career, honour, respect etc. for any false claim forever.

15. When the case of applicant no. 1 is that opposite party no.2 solemnized marriage with her concealing his martital status with his wife Smt. Mamta Sharma, it has to be seen whether the alleged second wife is entitled for maintenance or not. Certainly, a woman living in live-in-relationship is entitled to maintenance. It is the Trial Court who will ascertain on the basis of evidence that applicant no.1 had lived in live-in-relationship with opposite party no. 2 for some time or not. It appears contradictory that on one hand the Trial Court has concluded that on the basis of non compliance for participation in D.N.A. test, an adverse inference shall be drawn against the opposite party no.2 and on the other hand it has dismissed the interim maintenance application.

16. On the basis of above discussion, the application under Section 482 Cr.P.C. is liable to be allowed.

Order

The application is allowed in the following terms:

(a) One month more time is provided to opposite party no.2 for giving D.N.A. sample and depositing the requisite fee, if he fails to do so within the above stipulated period, the Family Court would be free to draw the adverse inference against the opposite party no.2 and thereafter opposite party no.2 would not be compelled to give the sample for D.N.A. test.

(b) If result of the D.N.A. test is found positive and in favour of the applicants, the applications under Section 125 and Section 125 (6) Cr.P.C. shall be decided taking help of such report. If D.N.A. test report is not obtained due to non-cooperation of the opposite party no.2, the Court shall proceed with the case on the basis of adverse inference drawn by it alongwith oral and documentary evidence filed by the parties.

(2023) 4 ILRA 808
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 35595 of 2022

Rashmi Devi ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Akash Chandra Maurya

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure,1973 - Section 173 (2)- Impugned order allowed the final report-accepted without assigning any reason-applicant claim self posted signature of the Applicant upon the notice was produced-but no handwriting expert was sought-on submission of police report u/s 173(2) Cr.P.C.-Magistrate

decides to accept it and to not take cognizance-informant was served notice which was not availed by he.

Application dismissed. (E-9)

List of Cases cited:

1. K.P. Ramasamy & ors. Vs R. Dharmalingam & ors., decided on 24.01.2020

2. Gangadhar Janardan Mhatre Vs St. of Mah., 2004 CrLJ 4632

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

1. Heard Sri Akash Chandra Maurya, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned Additional Government Advocate for the State and perused the record.

2. This application under Section 482 CrPC has been moved to quash the order dated 12.08.2021 passed by the Additional Chief Judicial Magistrate-I, Kanpur Dehat in Misc. Case No.1319 of 2019 by which the final report in Crime No.476 of 2018, under Sections 504, 506 and 427 of IPC and under Section 4/10 of Indian Forest Act, 1927 sent by Police Station Mangalpur, Kanpur Dehat was allowed and the Criminal Revision No.41 of 2021 (Rashmi Devi Vs. State of U.P. and others) was also dismissed by Additional Sessions Judge/Special Judge (NDPS Act), Court No.7, Kanpur Dehat vide order dated 26.09.2022.

3. The facts of the case and ground of the application under Section 311 CrPC in brief are that the applicant lodged an FIR on 18.12.2018 against opposite party nos.2 to 5 under the aforesaid sections in which after investigation, the investigating officer (I.O.) submitted the final report No.45 of 2019 on 14.04.2019 before the concerned Magistrate. According to the applicant the Additional Chief Judicial Magistrate-I, Kanpur Dehat accepted the said final report on 12.08.2021 without assigning any reason. At that time, there were holidays on account of COVID-19, hence the concerned police had not taken any receiving from the applicant with regard to the said final report and self posted signature of the applicant upon the notice was produced before the Court on 30.08.2021. When the applicant enquired, she came to know that the final report had been accepted on 12.8.2021, hence she filed the aforesaid criminal revision which has also been dismissed.

4. It is a settled law that service of notice before filing the final report is must, hence both the impugned orders be quashed and concerned Magistrate be directed to hear the matter on protest petition.

5. A supplementary affidavit has been filed by the brother-in-law of the applicant along with the certified copy of the order sheets. Notices were sent to the opposite party nos.2 to 5 which are served personally and through their family members but neither they appeared nor they filed any counter affidavit, hence heard Sri Akash Chandra Maurya, learned counsel for the applicant and Sri Pankaj Kumar Tripathi, learned Additional Government Advocate and perused the record.

6. From perusal of the record, it transpires that on 12.08.2021 the final report was accepted after service of notice upon the complainant but when the complainant did not appear on the date of hearing, the trial court heard the counsel for the State and perusing the record,

concluded that on the basis of statement, inspection and other collected material, no commission of offence by the accused persons have been proved and therefore, accepted the final report. The order of Additional Chief Judicial Magistrate-I was challenged through Criminal Revision No.41 of 2021 in which proper opportunity of hearing was provided to the applicant. The learned Revisional Judge found that the informant had appropriately been served through notices on 01.11.2019 and 11.08.2021 and her signatures were found thereon. It has also been noticed that on 04.10.2019, the final report had been submitted in the Court and thereafter notices were issued to her when there was no COVID-19 pandemic, hence the revision was dismissed.

7. Being aggrieved, the informant has filed this application under Section 482 CrPC.

8. According to this Court, if the applicant was of the view that her forged and fictitious signature had been obtained by the police, an occasion was available to her to get the expert opinion that the signatures present on the notices were not put by her but this remedy has not been availed by her.

9. Since the proper opportunity had been provided to the applicant and the notices were also served before accepting the final report, hence the case of **K.P. Ramasamy and others Vs. R. Dharmalingam and others**, **decided on 24.01.2020** by the Apex Court could not be applied in favour of the applicant.

10. In **Gangadhar Janardan Mhatre Vs. State of Maharastra, 2004 CrLJ 4632**, it has been held that when on submission of police report under Section 173(2) Cr.P.C., the Magistrate decides to accept it and not to take cognizance and to drop the proceeding against the all or some of the accused, the informant is entitled to a notice and opportunity to be heard at the time of consideration of such final report. In this case before accepting the final report, the Magistrate had served notice upon the applicant which was not availed by her.

11. In view of the above, the present application lacks merit and is liable to be dismissed.

12. This application under Section 482 CrPC is accordingly **dismissed.**

(2023) 4 ILRA 810
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2022

BEFORE

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

Application U/S 482. No. 35719 of 2022

Jijo C. George ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Arun Kumar Tripathi, Sri V.P, Srivastava (Sr. Adv.)

Counsel for the Opposite Parties:
G.A., Sri Amit Tiwari, Sri Shakti Shanker Tiwari, Sri Subash Chandra Tiwari

Criminal Law- Code of Criminal Procedure, 1973-Sections 157,173 & 482 Constitution of India, 1950-Article 21, 227-Applicant blackmailed the prosecutrix and committed rape upon her due to which she became pregnant which resulted in

birth of the second child of the victim-F.I.R. lodged by the victim u/s 376, 328, 323, 504 and 506 IPC-Applicant directed to undergo DNA test during investigation - Alleged commission of the rape upon the victim is, in fact, in issue and point of birth of the second child is subsidiary reference due to the commission of rape which (act) is imputed to the applicant-Inherent powers u/s 482 Cr.P.C. cannot be exercised at this stage of investigation-In order to ensure justice application under Section 482 Cr.P.C. though not maintainable at this stage is taken to be a petition under Article 227 of the Constitution of India-Once the investigation commenced u/s 157 Cr.P.C., it should reach to its logical conclusion as provided u/s 173 Cr.P.C-Applicant being an accused of the offence of rape can be directed for DNA testing for collecting material during investigation-DNA testing would not be treated to be in violation of the right to privacy. (Para 26 to 40)

Petition dismissed. (E-15)

List of Cases cited:

1. King- Emperor Vs Khwaja Nazir Ahmad, 1944 0 ICLF (SC) 30, 1945 0 AIR (PC)18; 1943 71 Law Report Ind. App. 203

2. Goutam Kundu Vs St. of W. B. 1993 O ICLF (SC) 539

3. Zandu Pharmacutical Works Ltd. & ors. Vs Mohd. Sharaful Haque & anr. (2005) 1 SCC 122

4. Ram Lal Yadav Vs St. of U.P. 1989 Crl.LJ. 1013

5. Rohit Shekhar Vs Narayan Dutt Tiwari on 27 April, 2012 FAO (OS) No.547 of 2011, AIR 2012 Delhi 151

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

(1) Heard Sri V.P. Srivastava, learned Senior Counsel assisted by Sri Arun Kumar Tripathi, learned counsel for the applicant, Sri Subhash Chandra Tiwari, learned counsel for the respondent no.4, learned A.G.A. for the State and perused the material available on record.

(2) This application under Section 482 Cr.P.C. has been filed to quash the effect and operation of the impugned order dated 18.10.2022 passed by Additional Chief Judicial Magistrate- IX, Allahabad, in Case - State vs. Jijo C. George arising out of the First Information Report registered at Case Crime No.0070 of 2022, under Sections 376, 328, 323, 504 and 506 IPC, Police Station- Mutthiganj, District-Praygraj and the operation and effect of the order impugned dated 21.10.2022 passed by Sessions Judge / Special Judge (SC/ST Act), Allahabad, in C.N.R. No. UPAD01-013127-2022, whereby he allowed the application of the Investigating Officer cocnerned to proceed with blood test / DNA test of the applicant during investigation.

(3) The applicant- Jijo C. George-feeling aggrieved by the aforesaid direction/order of the Magistrate has approaced this Court invoking inherent powers of this Court in this matter wherein investigation is in progress and the applicant has been directed for undergoing DNA test.

(4) In this case, a peep into facts of the case proceeds on line that an F.I.R. was lodged by the victim (opposite party no.2) that on 21.05.2022 referring to some incident that allegedly occurred on 05.12.2019 and onwards. The description in the first information report proceeds on to claim that the informant/prosecutrix was engaged in teaching profession at Ewing Christian College, Prayagraj. She was in

contact with the present applicant- Jijo C. George and (also in teaching profession in ECC), he taking advantage of the situation invited her to a tea party at 11:00 a.m. on 05.12.2019 at his campus residence in the Ewing Christian College, where both the applicant and the respondent no.4 were working as Assistant Professors. It is a case of the prosecutrix that she went to the applicant's house and took tea but she felt giddy and became unconscious on account of some noxious substance mixed in the tea and administered upon her. When she became unconscious, the applicant forcibly committed rape upon her. Upon regaining consciousness, she found herself in critical position on bed and realized that her modesty was outraged, while she asked the applicant as to why he deceitfully invited her, he threatened and said to her that he has made a video clip of the incident and would inform about it to her husband and viral it in case any protest is raised. Due to which the prosecutrix became apprehensive and the applicant continued to blackmail her and continued to commit rape upon her at different places due to which she became pregnant.

(5) As the F.I.R. proceeds further it divulges various details of subsequent events that led to the lodging of this first information report.

(6) Background of the case may be looked into for proper appreciation of the case wherein offence of rape is allegedly committed by the applicant. In this case, the informant is 37 years of age, is presently posted as Assistant Professor in the department of English in Ewing Christian College, Prayagraj (hereinafter referred to as ECC), whereas the applicant presently 32 years of age, was stated to be 28 years of age at the time of the incident (05.12.2019), was also posted as Assistant Professor in the same department of ECC, Prayagraj. it is claimed that no medical examination of the prosecutrix was conducted in this case. It is case of the prosecutrix (opposite party no.4) that she was married to one Atul Stenali Harmit at Prayagraj according to the Christian Rites and Rituals. She is mother of the two children namely Anya Samara Harmit, aged about 5 years and Jeremi Allen Hermit, aged about 1- 1/2 years old.

(7) The applicant belongs to Kerala and he came over to Prayagraj for the first time in the year 2012 when he was appointed as Assistant Professor in ECC, Prayagraj where the opposite party no.4 was also posted as Assistant Professor. The opposite party no.4 was senior to the applicant in the department of English. After some time, both became acquainted with each other. The details of the incident proceed further with the theme that the opposite party no.4 had lodged the first information report against her husband (Atul Stenali Harmit) and mother-in-law with allegations at Case Crime No.0068 of 2021 under Sections 498A, 323, 504, 506, 355, 452 I.P.C., Police Station Mahila Thana, District Prayagraj, on 11.11.2021. The investigation ensued and charge sheet was filed by the police in the aforesaid case.

(8) Both opposite party no.4 and her husband sought mutual divorce. Before filing of the divorce petition, the opposite party no.4 and her husband Atul Stenali Harmit entered into compromise and signed the contents of the affidavit qua the terms and conditions on which they wanted to be separated from each other.

(9) After filing of the charge sheet (in aforesaid case pertaining to Crime No.0068 of 2021), the opposite party no.4 and her

husband Atul Stenali Harmit moved matrimonial petition no.118 of 2022 under Section 10 A of the Indian Divorce Act, 1869, seeking divorce on mutual consent. An affidavit was filed as paper no.9A in which they have stated for the first time that the second child namely 'Jeremi Allen' is son of the applicant. It is urged by the applicant that in the divorce petition itself they have not attributed anything about the parentage of aforesaid child being son of the applicant and a contraditory affidavit has been filed by the opposite party no.4 and her husband before the family court concerned.

(10) It has been claimed in the application that the husband of the opposite party no.4 had filed an application under Section 482 Cr.P.Cr. No.15985 of 2022 to quash the first information report bearing no.0068 of 2021 giving rise to the proceeding as the case no.40 of 2022 State Vs. Atul Stenali Harmit and others wherein the parties were directed by the High Court for filing compromise deed before the lower court. However, it is claimed that the matter is pending and the charge sheet has not been quashed by the High Court, as yet. The divorce petition (between the opposite party no.4 and her husband) has been decreed on 25.07.2022. In the intant case in hand (case crime no.0070 of 2022), the applicant has been arrested and bailed out. Relevant to mention as the petition proceeds on to add certain details as to how the situation flared up while the investigation is in progress in this case in hand. In the meanwhile, the opposite party no.4 moved an application before the Additional Chief Judicial Magistrate, Court No.9, Prayagraj, regarding conduction of DNA testing of the minor child and the applicant, which was rejected on 14.07.2022 on the ground that the opposite party no.4 had no locus to move the application and in case the Investigating Officer finds it proper, he can move appropriate application. It was observed, inter-alia, that there is no issue/dispute regarding determination of paternity of the child, however substantial evidence may be collected in regard to alleged offence of rape.

(11) Subsequently, an application was moved by the opposite party no.4 before the Senior Superintendent of Police, Prayagraj along with the affidavit regarding DNA testing of the minor child and the applicant. Now it so happened that the Investigating Officer moved an application on 11.10.2022 before the Additional Chief Judicial Magistrate, Court No.9, Allahabad for conduction of DNA testing of the minor child and the applicant.

(12) In the wake of the aforesaid background and averments in the application/petition, claim of the applicant is that he has not given his consent for the conduction of blood / DNA testing. However, the Additional Chief Judicial Magistrate, Court No.9, Allahabad has ordered on 18.10.2022 for conduction of DNA testing in accordance with law. The petition proceeds on to claim that the order of the Magistrate dated 18.10.2022 in allowing DNA testing is basically in violation of the right to privacy of the applicant. Feeling aggrieved by the aforesaid order dated 18.10.2022, the applicant preferred a criminal revision bearing CNR No. UPADO1 - 013127 of 2022 before the Incharge Sessions Judge / Special Judge (SC/ST Act), Allahabad but the criminal revision was dismissed on 21.10.2022 holding that the order dated 18.10.2022 passed by the Magistrate is interlocutory order as such revision is not maintainable.

(13) The petition continues to proceed on the same line and asserts that fundamental right of the applicant is being

violated inasmuch as the right of privacy being integral part of the personal liberty enshrined in Article 21 of the Constitution of India is being violated, whereas, in a catena of cases the Hon'ble Apex Court has categorically held that the right to privacy being integral part of right to liberty cannot be violated and this mandate is applicable to all cases including the one where the investigation is going on and the charge sheet has not been filed. Consequently, the order dated 18.10.2022 passed by the Additional Chief Judicial Magistrate, Court No.9, Allahabad, directing the DNA testing / blood test of the minor child and the applicant, as affirmed by the revisional court on 21.10.2022 are not sustainable in the eye of law. Both the orders have been impunged by way of this application.

(14) At the very outset, relevant to mention that preliminary objection has been raised by the counsel for informant (opposite party no.4) questioning the maintainability of this application to the ambit that this application under Section 482 Cr.P.C. is not maintainable as the investigation of this case is underway wherein apart from other Sections of I.P.C., offence under Section 376 I.P.C. is also involved and during course of the investigation, this Court has no powers to exercise jurisdiction so as to interfere with the investigation under Section 482 Cr.P.C. at this juncture.

(15) I n reply to the preliminary objection, learned counsel for the applicant has claimed that insofar as exercise of jurisdiction under Section 482 Cr.P.C. is concerned, the law is specific that in cases of urgency and in order to secure ends of justice, the inherent powers can be exercised by this Court so as to do complete justice.

(16) In support of his claim, learned counsel for the applicant has placed reliance on the decision of the Privy Council **King- Emperor Vs. Khwaja Nazir Ahmad, 1944 0 ICLF (SC) 30, 1945 0 AIR (PC)18; 1943 71 Law Report Ind. App. 203** and stressed on the last three paragraphs of the judgment by submitting that the Privy Council has expressed view that inherent jurisdiction can be exercised to secure the ends of justice.

(17) At this stage, learned counsel for the opposite party no.4 interrupted and submitted that the view expressed by the Privy Council itself was to the purport and meaning that in normal course, "functions of the Courts begin when charge is preferred". It means only after charge sheet is preferred only then Court's interference is justified.

(18) Learned counsel for the applicant has continued with his reply and claimed that the functions of the judiciary and the police are supplementary and not overlapping. Both are required to act in its respective sphere. Learned counsel again placed reliance on some parts of the aforesaid citation.

(19) Apart from that, on the point of maintainability for exercise of inherent jurisdiction of this Court in relation to this application under Section 482 Cr.P.C., learned counsel for the applicant has placed reliance on the decision of the Hon'ble Apex Court in the case of **Goutam Kundu vs. State of West Bengal 1993 O ICLF (SC) 539** wherein under facts and cirucmstances of the case, the matter was contested between the husband and the wife wherein fact of the paternity of the child was in issue and the Hon'ble Apex Court held that there were other methods to

disapprove paternity and medical test cannot be conclusive of the paternity.

(20) Lastly, learned counsel for the applicant has placed reliance on the decision of the Hon'ble Apex Court in the case of **Zandu Pharmacutical Works Ltd. and others Vs. Mohd. Sharaful Haque and another (2005) 1 SCC 122** wherein Hon'ble Apex Court held, inter-alia, that no hard and fast rule can be laid down for exercise of the jurisdiction under Section 482 Cr.P.C.

(21) On the basis of above decision of the Privy Council and the Hon'ble Apex Court, contention is that there is no bar to the exercise of power vested in this Court by virtue of Section 482 Cr.P.C. during investigation. Learned counsel for the applicant proceeds on to assert that exercise of powers under Section 482 Cr.P.C. is meant to be exericsed for doing complete justice and securing ends of justice and the other ingredients described in this Section (482 Cr.P.C.) and power to do complete justice is vested in the Court exercising powers under Section 482 Cr.P.C. Therefore, DNA testing as directed by the Additional Chief Judicial Magistrate, Court No.9, Allahabad, cannot be done in the absence of consent of the applicant. Learned counsel claimed that it is a fit case for interference for securing the ends of justice and to protect right of privacy of the applicant. Therefore, the inherent jurisdiction may be exercised by this Court under Section 482 Cr.P.C. even during continuance of the investigation.

(22) While retorting to the aforesaid arguments, learned counsel for the opposite party no.4 has persuaded to the substance of point of issue involved in the case of King Emperor by clarifying that insofar as point of exercise of jurisdiction under Section 482 Cr.P.C. is concerned, in the of case King Emperor (supra), the Privy Council was itself of the view and laid parameters as to when inherent powers can be exercised in matters of investigation and in abscence of these parameters, learned counsel proceeds on to state that exercise of jurisdiction under Section 482 Cr.P.C. cannot be done in the way sought by the applicant at this juncture. Further insofar as the right to privacy of the applicant is concerned, no doubt it is, inalienable, and integral part of Article 21 of the Constitution of India, but that does not give absolute liberty to a person, but the liberty can be curtailed by just and fair procedure by following the procedure established by law in this regard. In this case, nothing of the sort is involved as has been claimed by the applicant. The liberty is subject to reasonable restrictions.

(23) In support of his claim, learned counsel for the opposite party no.4 has placed reliance on the Full Bench (seven Judges) of this High Court in the case of **Ram Lal Yadav Vs. State of U.P. 1989 Crl.LJ. 1013** has claimed that the Full Bench has settled the law on the point of interference being caused by excercise of powers under Section 482 Cr.P.C. during investigation of a case - as not permissible. The Full Bench has concluded that the High Court has no inherent powers under Section 482 Cr.P.C. to interfere with the investigation that is being done by the police. The High Court has no inherent power to stay arrest of the accused during the investigation.

(24) Apart from that, learned counsel for the opposite party no.4 has persuaded to the point that it is only in those particular cases where arbitrariness results in

violation of privacy only then there would arise ground for interference in order to ensure protection of the fundamental rights of a person/citizen in appropriate cases. But in cases where procedure prescribed by law is just, fair and reasonable and after following it right to privacy is restricted and restraint is applied on a person then there is no violation of right of privacy of a person.

(25) In this regard, learned counsel for the opposite party no.4 has also placed reliance on the decision of the Delhi High Court in the case of **Rohit Shekhar vs. Narayan Dutt Tiwari on 27 April, 2012 FAO (OS) No.547 of 2011, AIR 2012 Delhi 151** wherein also under prevailing facts and circumstances of the case, Delhi High Court had directed for blood / DNA testing of Narayan Dutt Tiwari.

Discussion and Conclusion

(26) No doubt, insofar as the submission raised regarding maintainability of this application for exercise of jurisdiction under Section 482 Cr.P.C. during course of investigation is concerned, it can be observed that as per dictum of aforecited case of **King- Emperor Vs. Khwaja Nazir Ahmad, 1944 0 ICLF (SC) 30, 1945 0 AIR (PC)18; 1943 71 Law Report Ind. App. 203**, inherent jurisdiction can be exercised in rarest of rare and exceptional cases and circumstances which may of its own justify such exercise; but insofar as this rare and exceptional apsect is concerned, the Privy Council was of the view that in case bare perusal of the report does not make out commission of any offence or cognizable offence then the investigation pertaining to that first information report may be interfered with. The Privy Council did not mandate in a way that in all cases, inherent jurisdiction can be exercised, while the case is one at the investigation level, the Privy Council categorically held that the "domain of the Court begins when charge is preferred".

(27) The point in issue that arises for determination pertains to fact whether inherent jurisdiction of this Court (under Section 482 Cr.P.C.), can be invoked during investigation of a case. Can it be said that no offence is made out from perusal of the report? Can it be said that no cognizable offence is made out from perusal of the report?

(28) Now this Court would have to consider the very language and import of allegations contained in the first information report and to contemplate on the point whether bare description contained in the first information report makes out, inter-alia, alleged offence of rape and commission of cognizable offence or not?

(29) In that regard, as this Court proceeds with the description contained in the FIR it is reflected that the allegations are expressive of solitary view that "taking advantage of the opposite party no.4 on 05.12.2019", the applicant allegedly "invited" the opposite party no.4 "at his residence in ECC campus served tea and admixed some noxious substance in tea due to which she became unconcious". Consequently, rape was committed upon her. When she regained her consciousness, she asked the applicant as to why he deceived her when he threatened her and told that he has made a video clip of the incident and he would viral it to the public at large and "inform about it to her husband". Thus, he allegedly kept her

under constant fear, blackmailed her and taking advantage of this situation, the applicant continued to commit rape upon her as a result of which she conceived and developed pregnancy which resulted in birth of the second child (Jeremi Allen Harmit born to her). The alleged rape and birth of the child thus becomes point in issue directly involved in this case. Here point of peternity of the child is neither in issue nor is it raised as such. But the allegations of rape, if unrebutted, would be penal. At this stage, all evidence that sheds light on the alleged commission of rape become relevant in issue.

(30) It is no denying fact that under facts and circumstances of the case in hand, allegations prima-facie make out a cognizable offence. It can be said that the allegations made in the first information report, inter-alia, make out commission of a cognizable offence. Simlicitor alleged commission of the rape upon the opposite party no.4 is, in fact, in issue and point of birth of the second child to the opposite party no.4 is subsidiary reference due to the commission of rape which (act) is imputed to the applicant. That being the case, the investigation on these aspects may go on uninterruptedly. Therefore, inherent powers under Section 482 Cr.P.C. cannot be exercised at this stage of investigation and the case cannot be said to be falling within circumference - rare and exceptional.

(31) Similarly, insofar as point of violation of the right to privacy and fundamental right of the applicant is concerned, it can be observed that the right to privacy is not an absolute right but subject to reasonable and fair restriction. In the decision of the Delhi High Court in the case of Rohit Shekhar (supra) wherein the Delhi High Court dealt with the entire matter and DNA testing was forced upon Narayan Dutt Tiwari. In this case in hand, the determination of factum of rape is to be done for which material / evidence is being collected by the Investigating Officer. The process of collection of material during investigation in that regard may go on uninterruptedly. It would not be convenient to express any opinion about the merit or demerit of the material sought to be collected by the Investigating Officer at this juncture. It is exclusive prerogative of the Investigating Officer to carry out investigation in all fairness and transparency, as such no interference in investigation is warranted in exercise of inherent jurisdiction as vested in this Court by virtue of Section 482 Cr.P.C.

(32) Insofar as the point of impingement of fundamental right and personal liberty as enshrined under Article 21 of the Constitution of India, of the applicant is concerned, it cannot be said to have been violated by the order dated 18.10.2022 passed by the Additional Chief Judicial Magistrate, Court No.9, Allahabad, for specific reason that collection of evidence / material relevant during course of investigation is going on which is a procedure to be adopted while investigating a case by virtue of provisions contained under Section 157 of the Criminal Procedure Code. This mandate cannot be termed to be unfair, unreasonable and unjust, conversely it is just and fair. It is noticeable that the learned Magistrate has passed order in his supervisory capacity enabling the Investigating Officer to collect material and evidence having nexus with the offence alleged. At the cost of repetition, it can be observed that this Court should refrain from observing anything, on the quality of the evidence sought to be collected during investigation, and its on

merits. It being so, the applicant cannot insist on for exercise of inherent jurisdiction of this Court.

(33) In normal circumstances, this Court would have directed the applicant to approach the appropriate Court exercising jurisdiction either under Article 226 or 227 of the Constitution of India, for redressal of his grievances. But in order to ensure justice on merit of the case, this application under Section 482 Cr.P.C. though not maintainable at this stage in its present form (under Section 482 Cr.P.C.) calling for interference in the ongoing investigation of this case is taken to be a petition under Article 227 of the Constitution of India. But considering the case from that angle as has been brought by way of this application / petition before this Court wherein both the sides have stuck to their guns by their respective pleadings which they have exchanged, inter-se, obviously it can be observed with utmost caution that the case in hand is not the one falling in the category of rarest of rare cases and exceptional circumstance which alone would justify indulgence of this Court in the ongoing investigation at this stage, as the law in this regard is well settled that there shall be no interference with the investigation of an offence by the Courts. The allegations in the report make out a cognizable offence on the face, to be specific - offence of rape - as such.

(34) It is exclusive domain of the Investigating Officer to collect all the relevant material and evidence which are reflective and have direct or indirect nexus to the offence alleged. Once the investigation commenced under Section 157 Cr.P.C., it should reach to its logical conclusion as provided under Section 173 Cr.P.C. If some vital and important material / evidence is available then it is required to be collected and every effort should be made to bring it on record so as to ensure logical end of the legal process.

(35) Insofar as the order dated 18.10.2022 passed by the Additional Chief Judicial Magistrate, Court No.9, Allahabad, directing for DNA testing is concerned, the same cannot be ignored merely on the ground that the applicant has not consented for it. The applicant being an accused of the offence of rape, he can be directed for DNA testing for collecting material during investigation. Thus DNA testing would not be treated to be in violation of the right to privacy as such it cannot be said to be either arbitrary or unreasonable. In the case of Rohit Shekhar (supra), Narayan Dutt Tiwari was forced to undergo DNA testing despite his stiff resistance to the order of DNA testing.

(36) In such cases like the present one where fact in issue primarily and solely is aligned to the alleged commission of rape upon the opposite party no.4 by the applicant, truth can be divulged by conduction of DNA testing of the applicant. Under the prevailing facts and cirucmstances of this case, DNA testing cannot be halted merely on the ground that the person, whose DNA testing is required to be done has not consented to such testing. Similarly the lower revisional court was justified when it refused (vide order dated 21.10.2022) to interfere with the aforesaid order dated 18.10.2022 passed by Additional Chief Judicial Magistrate- IX, Allahabad, on the ground of it being interlocutory order. No infirmity is thus discovered in the order impugned passed by the lower revisional court. Moreover this Court has heard, in extenso, the applicant on the point of relief sought by

way of challenge made to the order of DNA testing and considered the matter in entirety, therefore, no grievance in regard to rejection of criminal revisional by the lower revisional court on technical ground exist.

(37) Insofar as the guidelines in the case of **Goutam Kundu** (supra) is concerned, in that case question of paternity was primarily fact in issue to be adjudicated upon between the wife and the husband where birth of the child was disowned by the husband, whereas, in this case, the point of determination of paternity of the child has got no relevance nor claimed. Therefore, the petition though taken to be one under Article 227 of the Constitution of India also lacks merit and deserves dismissal.

(38) For the reasons aforesaid, this Court is of the considered view that at this stage, when the investigation is going on attention of the Investigating Officer would be on the allegations made in the first inforamtion report which aspect, per se, is based upon alleged commission of the offence of rape upon the opposite party no.4 by the applicant and consequent development of pregnancy and birth of a child. The Investigating Officer is free to collect material relevant by following due procedure of law. At the investigation stage, no interference is warranted by this Court and the investigation may go on uninterruptedly.

(39) Consequently, this petition is dismissed.

(40) It is made clear that nothing has been expressed on the merit of the case and authenticity of the material sought to be collected by the Investigating Officer during course of the investigation and the investigating agency shall not be prejudiced by the observation made hereinabove and the same is confined solely to the disposal of this petition and would in no case travel beyond it.

(41) Cost easy.

(2023) 4 ILRA 819
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2023

BEFORE

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

Application U/S 482. No. 38783 of 2022

Kanwarpal @ Lala & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Mayank Yadav, Sri Vivek Kumar Singh

Counsel for the Opposite Parties:
G.A., Sri Anil Kumar Dubey, Sri Chandra Bhan Dubey

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power ,Section 200 - Examination of complainant , Section 202 - Postponement of issue of process , Section 203 - Dismissal of complaint, Section 156(3) - direction for further investigation , Section 173 (2) - police report , Section 190(1)(b) - cognizance of offence by Magistrate upon police report, Indian Penal Code, 1860 - Sections 302, 363, 201, 120B - once a protest petition has been filed and after recording the statement u/s 200 and 202 Cr.P.C., the concerned Magistrate finds prima facie case is made out, he is not bound by the opinion of Investigating Officer which is found after recording the

statements of witnesses u/s 161 Cr.P.C.(Para - 15)
(B) Criminal Law - Code of Criminal Procedure, 1973 - power vested in the High Court u/s 482 Cr.P.C. for quashing the initiation of prosecution against the accused - at the stage of issuing process, or at the stage of committal, or at the stage of framing of charges, all stages before the commencement of the actual trial, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence - Such a determination must always be rendered with caution, care and circumspection.Para -15)

Present protest petition filed by informant - fulfill the requirements of the complaint - same was treated as complaint statements of complainant as well as witnesses recorded u/s 200 and 202 Cr.P.C. respectively - applicants have been summoned - application filed by applicant - to quash - entire criminal proceeding as well as impugned summoning order.**(Para - 12)**

HELD:-No illegality, impropriety and incorrectness in the impugned order or the proceedings under challenge.**(Para - 16)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:

1. Dudh Nath Mishra Vs St. of U.P., 2003 A.L.J. 55

2. Chhotey Lal s/o Parmanand Vs St. of U.P. & Smt. Rati Basor w/o Hasmukh Basoi, 2006 Cr.L.J. 2265

3. Abdul Hamidkhan Pathan & ors. Vs St. of Guj. & ors., 1989 Cr.L.J. 468 (Guj. DB)

4. Kishor Singh & Etc. Vs Sudama Prasad & ors., 2002 Cr.L.J. 802 (MP)

5. Rosy & anr. Vs St. of Kerala & ors. 2000(1) SCR 107

6. Rajiv Thapar & ors. Vs Madan Lal Kapoor (Criminal Appeal No.. of 2013, SLP(Crl) no. 4883 of 2008

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

1. Heard Mr. Vivek Kumar Singh, learned counsel for the applicants, Mr. Chandra Bhan Dubey, learned counsel for the opposite party, and Mr. Amit Singh Chauhan, learned A.G.A. for the State and perused the record.

2. This application under Section 482 Cr.P.C. has been filed by the applicant to quash the entire criminal proceeding of Complaint Case No. 13682 of 2021 (Smt. Sarla Vs. Kanwarpal @ Lala and others), under section 302 IPC, Police Station Chapprauli, District Baghpat as well as impugned summoning order dated 26.08.2022 passed by learned Chief Judicial Magistrate, Baghpat.

3. Brief facts of the case is that an FIR was lodged by Trishpal, son of Bishambhar on 11.03.2019 at 13:18 hours which was registered as Crime No. 60 of 2019, under section 302 IPC at Police Station Chhaprauli, District Baghpat against unknown persons with the allegation regarding missing of his nephew Samrat whose dead body was found on 11.03.2019 at 10:30 am on road side near a pulia.

4. On 11.03.2019, the postmortem of the aforesaid dead body was conducted wherein some injuries were noted and cause of death was due to throttling and shock.

5. The matter was investigated by Investigating Officer and statement of the informant namely Trishpal was recorded

11.03.2019. In the aforesaid statement, the informant did not name anyone for involvement in murder of his nephew. On 14.03.2019, the Investigating Officer tried to record the evidence but nothing relevant was found by him. On 15.03.2019, the Investigating Officer while conducting the investigation reached the house of the deceased wherein Terahvin was being performed, during the conversation amongst the people present there, he came to know that sometime back there had been a quarrel between Pappu, Deshpal son Padam Singh and the deceased. During course of investigation, the Investigating Officer on 17.03.2019 came to know that the uncle of the deceased namely Kanwarpal @ Lal was also been suspected for involvement in murder of the deceased. On 20.03.2019, the statements of Ashok son of Padam Singh, Deshpal @ Kala, Pappu son of Padam and Bindar were recorded, from where it was found that the aforesaid persons had nothing to do with the alleged incident. On 25.03.2019 while investigating the matter, the Investigating Officer found that some dispute had taken place between the deceased and his uncle Kanwarpal but later on compromise was entered between the two. Likewise on 26.03.2019, 18.04.2019 and 22.04.2019 all efforts were made by Investigating Officer to find out the truth behind the alleged murder of deceased Samrat son of Shamsher. On 03.05.2019, statement of Shamsher (father of deceased), Smt. Sarla (mother of the deceased), Bharti and Shakshi (daughters of Shamsher) were recorded. The aforesaid persons in their statements clarified the position of Kanwarpal, uncle of the deceased for his non involvement in the alleged murder. On 07.05.2019, the statement of Shubham and Vicky were also recorded and the position of uncle namely Kanwarpal remained the same. On 10.05.2019, 21.05.2019 and 06.06.2019 statements of other persons were also recorded and the Investigating Officer could not gather any information about the murder of the deceased on the alleged dates. On 02.08.2019, the Investigating Officer recorded the statement of Kuldeep, Deepak, Harendra Singh and Ashok who stated that Manisha, aunt of the deceased is resident of village Soop from where relevant information may be gathered regarding the alleged incident. Statement of Deshpal Singh, Tejpal and Omveer Singh were also recorded on 16.08.2019 but the Investigating Officer could not gather any information about the culprit.

6. On 15.10.2019, the investigation was handed over to SHO, Chapprauli Sri Dinesh Kumar and he was the fourth Investigating Officer, who started the investigation on 28.10.2019 but could not find anything relevant about the murder of the deceased Samrat. Finally on 28.05.2020, the Investigating Officer concluded the investigation and submitted a final report as nothing could be found against anyone connecting him with the murder of deceased. It appears that an order for further investigation was passed by Circle Officer on 21.06.2020 and investigation again commenced on 25.06.2020. Thereafter, on 16.08.2020, the investigation was handed over to new SHO, Chapprauli, who perused the entire case diary, however nothing was done by him in respect of investigation. Thereafter on 18.09.2020, investigation was handed over to newly appointed SHO Chapprauli, who perused the entire case diary on 19.09.2020 and proceeded to record the statement of Sarla (mother of the deceased) on 04.11.2020 but no name was disclosed by her. Newly appointed SHO recorded the

statements of Shamsher Singh and Trishpal who also did not disclose any name. Thus on 12.11.2020, after visiting the nearby place and recording the statements of other persons, the investigation was concluded and final report was submitted.

7. During pendency of the investigation of the aforesaid case, opposite party no. 2 filed a complaint case on 21.01.2020 being complaint case no. 249 of 2020 against the applicants under sections 302, 363, 201, 120B IPC with regard to murder of deceased Samrat. The aforesaid complaint was dismissed u/s 203 Cr.P.C. vide order dated 03.12.2021 as the complainant did not produce any evidence u/s 200 and 202 Cr.P.C.

8. After submission of final report before the court concerned by the Investigating Officer notices were issued to opposite no. 2 to file protest petition against the applicants which was treated as complaint case by the learned Magistrate vide order dated 27.10.2021 and opposite party no. 2 was directed to produce her witnesses. The learned Magistrate recorded the statement of witnesses u/s 200 and 202 Cr.P.C. and finally summoned the applicants to face trial, hence the present petition has been filed.

9. Learned counsel for the applicants submits that at no point of time during the ongoing investigation for a period of one and a half year, the name of the applicants were placed before the Investigating Officer and during this period statement of opposite party no. 2 was recorded on several occasions. He further submits that the witness Anil Kumar is uncle of the deceased who claims to be eye witness of the incident has not disclosed as to why this fact was not disclosed by him to the Investigating Officer and other official. The other witnesses have stated about the information of the incident to the parents of the deceased but none of them made it clear as to why no application with regard to the alleged incident was given to any senior police officer in respect of alleged biased investigation. The court below without going through the records of the case diary of the present case summoned the applicants to face trial ignoring the fact that the incident had taken place on 10.03.2019 and after proper report was submitted on several occasions, the witnesses claiming themselves to be eye witness, after about three years of the incident, have come out with a story and named the applicants and the applicants have been summoned.

10. Learned counsel for the applicant submits that on 03.12.2021, the opposite party no. 2 namely Sarla mother of the deceased was examined u/s 200 Cr.P.C. and her witnesses Anil Kumar, Ashok Kumar and Shamsher were examined u/s 202 Cr.P.C. from where for the first time a new story was introduced stating that the opposite party no. 2 and the witnesses saw the applicants taking dead body of the deceased who was murdered on account of previous dispute between them. The counsel for the applicant further submits that the protest petition filed by the opposite party no. 2 has been treated as complaint case and without complying the provisions of section 202(2) Cr.P.C. all the witnesses of the complaint have not been examined, therefore, the summoning order suffers from illegality and the continuance of proceedings amounts to abuse of process of law hence is liable to be quashed.

11. Learned AGA as well as learned counsel for the opposite party on the other hand submits that there is no illegality or

infirmity in the aforesaid order as after filing a protest petition the same has been treated as complaint and after recording the statement u/s 200 and 202 Cr.P.C., the applicants have been summoned, therefore, the relief as prayed cannot be granted. Learned AGA further submits that once a final report has been submitted by the police, the Magistrate can take cognizance on that as congnizance taken is of an offence and not an offender. It is settled position of law that when a report forwarded by the police to the Magistrate is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either accept the report and take cognizance of the offence and issue process, or may disagree with the report and drop the proceeding, or may direct further investigation under section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again an option of adopting one of the three courses open i.e. he may accept the report and drop the proceeding; or he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or he may direct further investigation to be made by the police under section 156(3). The position is, therefore, now well settled that upon receipt of a police report under section 173(2) a Magistrate is entitled to take cognizance of an offence under section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Section 200 and 202 the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the first information report lodged becomes wholly or partially ineffective. Therefore, where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, notice to the informant and grant of an opportunity of being heard in the matter becomes mandatory.

12. The other situation is where the protest has been filed which and the

Magistrate treats the same as complaint, he would have to follow the procedure of section 200 and 202 of the Code. Thus, the complainant and his witnesses have to be examined. The present protest petition filed by the informant fulfill the requirements of the complaint, therefore, the same was treated as complaint and after recording the statements of complainant as well as the witnesses u/s 200 and 202 Cr.P.C. respectively, the applicants have been summoned.

13. Learned counsel for the applicants submits that as requirement u/s 202(2) all the witnesses of the complainant associated or connected with his interest and those witnesses who are material and relevant to prove prosecution case were not examined especially in a case exclusively triable by the court of session, that as per the provisions contained in Section 202(2), it is provided that if it appears to the Magistrate that the offence complained of, is triable exclusively by the Court of Sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath.

14. The counsel for the opposite party submits that it is not mandatory for the complainant to examine all the witnesses named in the complaint and he has a choice in the matter, and therefore, there is no illegality or infirmity in the aforesaid order and the continuance of proceedings. In support of his argument he has placed reliance in the Case of ***Dudh Nath Mishra vs. State of U.P., 2003 Allahabad Law Journal 55*** so also in case of ***Chhotey Lal s/o Parmanand vs. State of U.P. & Smt. Rati Basor w/o Hasmukh Basoi, 2006 Cr.L.J. 2265,*** in cae of ***Abdul Hamidkhan Pathan & Others vs. State of Gujarat & Others, 1989 Cr.L.J. 468 (Guj. DB),*** and in case of ***Kishor Singh & Etc. vs. Sudama Prasad & Others, 2002 Cr.L.J. 802 (MP).*** He further submits that if Magistrate does not comply the provisions of Section 202(2) Cr.P.C. to examine all the witnesses on oath, it would not by itself vitiate the proceedings, the aforesaid has been held in the judgment of Hon'ble Apex Court in case of ***Rosy and another Vs. State of Kerala and others 2000(1) SCR 107.***

15. Lastly learned AGA submits that once a protest petition has been filed and after recording the statement u/s 200 and 202 Cr.P.C., the concerned Magistrate finds prima facie case is made out, he is not bound by the opinion of Investigating Officer which is found after recording the statements of witnesses u/s 161 Cr.P.C. Learned AGA further submits that the power vested in the High Court u/s 482 Cr.P.C. for quashing the initiation of prosecution against the accused, at the stage of issuing process, or at the stage of committal, or at the stage of framing of charges, all stages before the commencement of the actual trial, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. Placing reliance upon the judgement of Hon'ble Apex Court, passed in ***Rajiv Thapar & Ors Vs. Madan Lal Kapoor (Criminal Appeal No..... of 2013, arising out of SLP(Crl) no. 4883 of 2008, decided on 23.01.2013)*** learned AGA submits that the aforesaid powers for quashing the proceedings should be invoked with care and caution as has been held as under:-

"22. The issue being examined in the instant case is the jurisdiction of the

High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section -

482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice."

16. In view of the aforesaid facts, the prayer for quashing or setting aside the entire proceeding as well as impugned order dated 26.08.2022 passed by learned Chief Judicial Magistrate, Baghpat, is refused as I do not see any illegality, impropriety and incorrectness in the impugned order or the proceedings un der challenge, hence, the application u/s 482 Cr.P.C. is **dismissed.**

(2023) 4 ILRA 825
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Application U/S 482. No. 41406 of 2022

Pooja Sharma @ Pinkey Giri ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Rajnish Dubey

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 376D & 506 - Power of Magistrate to direct further investigation is a significant power which has to be

exercised sparingly, in exceptional cases and to achieve the ends of justice - Magistrate if not satisfied with charge-sheet may direct further investigation but before taking cognizance - After taking cognizance the Magistrate will have no power to suomoto direct further investigation, it can be directed if the investigating agency seeks such direction. (Para - 15)

(B) Criminal Law - Code of Criminal Procedure, 1973 - Section 173(8) - Magistrate can exercise power of further investigation on the application of the investigating officer even if the cognizance has been taken by the court - Magistrate cannot suo moto exercise its power to order further investigation.(Para - 16)

Application moved by applicant under Section 156 (3) Cr.P.C. - FIR registered - statements of victim under Sections 161 and 164 Cr.P.C. - charge sheet - cognizance - applicant moved an application under Section 173 (8) Cr.P.C. - for further investigation by police - application of applicant was rejected - ground - on charge sheet cognizance has been taken - complainant/alleged victim moved application for further investigation alleging the facts.**(Para -1 to 12)**

HELD:-Magistrate has no power to order for further investigation suo motu after taking cognizance on charge sheet. Order for further investigation in exceptional circumstances and that too on the prayer of the Investigating Officer. Magistrate can always take recourse to the provision of section 319 cr.p.c. if any material is disclosed during examination of the witnesses during trial.**(Para - 17,18,19)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:

1. Luckose Zachariah @ Zak Appellants Nedumchira Luke & ors. Vs Joseph Joseph & ors., 2022 LiveLaw (SC) 230

2. Vinay Tyagi Vs Irshad Ali @ Deepak & ors., 2013 0 AIR (SCW) 220

3. Bikash Ranjan Rout Vs St. through the Secy. (Home), Govt. of NCT of Delhi in Criminal Appeal No. 687 of 2019, SLP (Criminal) No. 297 of 2015

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard learned counsel for the applicant, learned A.G.A. and perused the record.

2. By moving this application prayer is made to quash the order dated 30.09.2022 passed by the Judicial Magistrate, Mathura arising out of Case Crime No. 1538 of 2018, under Sections 376D, 506 IPC Police Station Highway, District Mathura in Case No. 6936 of 2020 (State Vs. Satendra Bhati and others and to allow the application dated 19.07.2022 filed by the applicant before the trial court for further investigation in the case filed under Section 173 Cr.P.C.

3. Vide order dated 30.09.2022 the Judicial Magistrate, Mathura rejected the application of the applicant filed under Section 173 (8) Cr.P.C.

4. As per the facts of the case, an application was moved by the applicant under Section 156 (3) Cr.P.C. on 16.08.2018 whereby an FIR, Case Crime No. 1538 of 2018 regarding incident dated 30.07.2018 was registered against Satyendra Bhati, Gaurav and one unknown person under Sections 506 and 376D IPC.

5. It was the allegation of the applicant that she was from a very poor family. On the basis of a telephonic call of Satyendra Bhati that he would arrange a job for her, on 30.07.2018 at 2.00 p.m. the applicant, who was a 23 years old married lady, came at Mandi Chauraha, Saukh

Road, from where Satyendra took her to an electronic shop at Saunkh Road, Mathura by his motorcycle. In the shop computers were fixed, two persons were already present there. Satyendra disclosed himself to be a financer. One person went out of the shop and when she was busy in talking with Satyendra, the person who went out, closed the shutter of the shop and Satyendra on the point of pistol and other person Gaurav holding her hair gave her threat of life, laid her down on the floor and committed rape on her one by one. After giving threat of life she was directed to leave the place. She was also followed by the accused persons. When she went to lodge her FIR, neither her First Information Report was lodged nor she was medically examined. On 09.08.2018 she sent the applications to the SSP, Mathura, Chief Minister, U.P. and I.G. Agra by registered post but nothing could be done. The enquiry from Satyendra regarding that unknown person is must and pistol is also to be recovered.

6. On this application under Section 156 (3) Cr.P.C. of the applicant FIR was registered and after recording the statements of the victim under Sections 161 and 164 Cr.P.C. on 09.10.2018 and 27.10.2018 respectively and after due investigation charge sheet was submitted against accused Satyendra and Gaurav under Sections 376D and 506 IPC on 05.04.2019, and the cognizance was taken by the court on 01.05.2019.

7. On 19.07.2022 the applicant moved an application under Section 173 (8) Cr.P.C. before the trial court with the version that prior to 30.07.2018 she met a person in Aligarh, who lured her of providing job and because of this enticement on 30.07.2018 at 2.00 p.m. she reached at the fixed place Mandi Chauraha, Mathura and met a person, who was tall and dark and about 50 years old. He took her in a shop. He and his companion misbehaved her there. The other person was also about 45 years of age, dark complexioned having dark spots on his face with a cut mark on his forehead. She was asked to come again after eight days. When on 09.08.2018 she reached there again, she could not locate the shop and that time she met two persons whom she disclosed her plight. They disclosed her the names of Satyendra Bhati and Gaurav as the persons who committed wrong with her and assured her of every help. On the basis of information provided by them only, she sent her complaint to the SSP and other officers and these persons started proceedings on her behest on 16.08.2018 in the court. These persons suggested her the age of Satyendra Bhati to be 32 years and age of Gaurav as 23 years. Though initially she resisted the same but due to sympathy of those persons she could not resist much and at the time of statement also, they compelled her to give statement as per their version. After that, they eloped and the applicant could not met them again. Now through police she came to know that Satyendra Bhati is not of 50 years of age or tall or dark complexioned person nor Gaurav is 45 years old dark, complexioned person, nor they have any shop of their own. Satyendra Bhati and Gaurav are innocent. She gave the affidavit to the SSP Mathura on 05.01.2019 mentioning the correct facts but even then the charge sheet has been filed against Satyendra Bhati and Gaurav after wrong investigation. Hence, prayer was made for further investigation by the police concerned.

8. This application of the applicant was rejected vide order dated 30.09.2022

by the Judicial Magistrate, Mathura on the ground that on the charge sheet against Satyendra Bhati and Gaurav cognizance has been taken on 01.05.2019 and the case is fixed for the appearance of the accused persons. The charge sheet has been filed on the basis of evidence collected by the investigating officer. Hence, the court did not find any ground for allowing the application of the applicant and finally rejected the same.

9. If we go through the concerned law, it is Section 173 (8) Cr.P.C. which may be extracted as below:-

Section 173(8) Cr.P.C.

"Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2)."

10. Thus, from perusal of this section it is clear that the Magistrate has a right to order for further investigation.

The same view has been expressed by the Apex Court in ***Luckose Zachariah @ Zak Appellants Nedumchira Luke and Others Versus Joseph Joseph and Others, 2022 LiveLaw (SC) 230,*** wherein the Apex Court opined that "it would also be in the interest of justice that this power (power of further investigation) be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law."

11. In para-31 of the judgement ***Vinay Tyagi Vs. Irshad Ali @ Deepak & others, 2013 0 AIR (SCW) 220*** the Apex Court observed as under:-

"Having discussed the scope of power of the Magistrate under Section 173 of the Code, now we have to examine the kind of reports that are contemplated under the provisions of the Code and/or as per the judgments of this Court. The first and the foremost document that reaches the jurisdiction of the Magistrate is the First Information Report. Then, upon completion of the investigation, the police are required to file a report in terms of Section 173(2) of the Code. It will be appropriate to term this report as a primary report, as it is the very foundation of the case of the prosecution before the Court. It is the record of the case and the documents annexed thereto, which are considered by the Court and then the Court of the Magistrate is expected to exercise any of the three options afore-noticed. Out of the stated options with the Court, the jurisdiction it would exercise has to be in strict consonance with the settled principles of law. The power of the magistrate to direct 'further investigation' is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the Court in its supervisory capacity is required to ensure

the same. Further investigation conducted under the orders of the Court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code."

12. Thus, the power of Magistrate to direct further investigation is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the court in its supervisory capacity is required to ensure the same.

13. In the present case, learned counsel for the applicant made his argument by putting the fact before the court as if the applicant is an accused in the case but from the perusal of the record, it is clear that it was the complainant/alleged victim only, who had moved this application for further investigation alleging the facts.

14. Learned counsel for the applicant placed before the court the judgement in ***Bikash Ranjan Rout Vs. State through the Secretary (Home), Government of NCT of Delhi*** in Criminal Appeal No. 687 of 2019, SLP (Criminal) No. 297 of 2015 decided on 16th April, 2019, wherein it has been clearly laid down by the Apex Court that if the cognizance has been taken by the Magistrate he will have no power to direct further investigation suo motu. He can direct the further investigation only if the investigating agency seeks such directions. Thus, both the arguments and the judgement placed by the learned counsel for the applicant before the court are against his case, wherein not the accused but the complainant himself had moved for further investigation. Again the applicant in the present case is not an accused as argued by the learned counsel for the applicant rather she is the complainant in the case, who had moved the application before the Magistrate concerned mentioning the facts that on the telephonic call of a person she came at Mathura at the indicated place where she met with a person of 50 years of age, who was tall and dark. He took in a shop where he and his companion, who was about 45 years of age having black spots on the face and cut mark on the forehead and dark complexioned misbehaved with her and she was called after eight days. Again when she reached she could not locate the place and she met two other persons, who disclosed the names of the persons, who misbehaved her, as Satyendra Bhati and Gaurav. On the basis of their suggestion, she named Satyendra Bhati and Gaurav in the First Information Report, later on she came to know that on the basis of appearance and age, suggested by two unknown persons, the named persons in the FIR were different persons and she prayed for further investigation as he did not want to implicate innocent persons. The Magistrate finding the facts and circumstances not acceptable, opined that after taking cognizance it would not be proper for the Magistrate to order for further investigation.

15. Whether this power of further investigation could be exercised by the Magistrate after taking the cognizance of the offence also? judgments ***Vinay Tyagi Vs. Irshad Ali @ Deepak & others (supra) and Luckose Zachariah @ Zak Appellants***

Nedumchira Luke and Others Versus Joseph Joseph and Others (supra) are silent about this point. However, in judgment ***Bikash Ranjan Rout Versus State through the Secretary (Home), Government of NCT of Delhi (supra)***, the Apex Court specifically held that Magistrate if not satisfied with charge-sheet may direct further investigation but before taking cognizance. After taking cognizance the Magistrate will have no power to suomoto direct further investigation, it can be directed if the investigating agency seeks such direction.

16. Section 173(8) Cr.P.C. also speaks of the same that nothing in this section "shall be deemed to preclude further investigation in respect of an offence after a report sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of police station obtains further evidence, oral or documentary, he shall further forward to the Magistrate a further report." Thus, it is clear that the Magistrate can exercise this power of further investigation on the application of the investigating officer even if the cognizance has been taken by the court. The Magistrate cannot suo moto exercise its power to order further investigation.

17. In the opinion of the court, in the case in hand the view taken by the Magistrate cannot be interfered with, because as per Section 173 (8) Cr.P.C. and the rule laid down in ***Bikash Ranjan Rout (supra)*** the Magistrate has no power to order for further investigation suo motu after taking cognizance on charge sheet. He could order for further investigation in exceptional circumstances and that too on the prayer of the Investigating Officer which is not the position in the present case.

18. However, it will always be available to the Magistrate to take recourse to the provision of Section 319 Cr.P.C. if any material is disclosed during examination of the witnesses during trial.

19. Hence, in the opinion of the court, there is no ground to interfere with the order passed by the Magistrate concerned. The application having no merits is liable to b

20. The application under Section 482 Cr.P.C. is hereby **dismissed.**

(2023) 4 ILRA 830
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.04.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 43085 of 2022

Nanhe & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ram Shiromani Yadav

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections -364, 302, 201, Power conferred under Section 311 Cr.P.C. - should be invoked by the court only to meet the ends of justice - power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection - power under this provision shall not be exercised if the court is of the view that the application

has been filed as an abuse of the process of law.(Para -22)

(B) Criminal Law - Code of Criminal Procedure, 1973 - Section 311 - Power to summon material witness, or examine person present - Any Court *may*, at any stage of any inquiry, trial or other proceeding under this Code - summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. Recall and re-examine any person already examined - and the Court *shall* summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case - two parts of the Section 311 - user of "*May*" in first part "*Shall*" in second - first part is discretionary, second part is obligatory.(Para - 8, 21)

Applications filed under Section 311 Cr.P.C. of the applicants/accused – rejected – quashing of. **HELD:-** Trial court made error in evidence recording, violating natural justice and fair trial principles. Accused-appellants have right to cross-examine material witnesses (P.W. 6 & 7) and trial court must provide full opportunity. Impugned order passed by trial court quashed.**(Para - 10)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:

1. Raja Ram Prasad Yadav Vs St. of Bihar & anr. A.I.R 2013 (SC) 3081

2. R.B. Mithani Vs St. of Mah. , A.I.R. 1971, Supreme Court 1630

3. St. of Haryana Vs Ram Prasad 2006 Cr.L.J. 1001

4. Nira Vs St. of Orissa, 2008 Crl. L.R. 1315

5. St. of Sikkim Vs Thukchuk Lachungpa 2005, Crl. L.R 201

6. Rama Paswan Vs St. of Jhhark, 2007 Crl. L.J. 2750

7. Ismail Baba Saheb Vs A.A. Hulagen, 1997 Crl.L.J. 1804

8. Raju Vs St. of M.P., 2002, Crl.L.J. 2367

9. Raj Deo Sharma Vs St. of Bihar, A.I.R 1999 Supreme Court 3524

10. Mohan Lal Sham Ji Soni Vs U.O.I., 1991 Cr.L.J. 1521

11. Rajendra Prasad Vs Narcotic Cell Delhi, A.I.R 1999, Supreme Court 2292

12. Jamat Raj Vs St. of Maha., A.I.R 1968, Supreme Court 178

13. V.N Patil Vs Niranjan Kumar & ors., (2021) 3 SCC 661

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

1. Heard learned counsel for the applicants, Sri Pankaj Kumar Tripathi, learned A.G.A for the State and perused the record.

2. This application under Section 482 Cr.P.C has been instituted by the applicants for quashing the order dated 17.10.2022 passed by Special Judge (E.C. Act) / Additional Sessions Judge, Court No. 4, Moradabad passed in Special Sessions Trial No. 336 of 2018 - State Vs. Nanhe & Anr., arising out of Case Crime No. 48 of 2018, under Sections 364, 302, 201 I.P.C, Police Station Katghar, District Moradabad, whereby the applications filed under Section 311 Cr.P.C. of the applicants/accused have been rejected.

3. In brief, the facts of the case are that after submission of the charge-sheet in the aforesaid crime number, the trial is going on. On 18.08.2022 and 15.09.2022 examination-on-chief of P.W 6 and P.W 7 had been recorded. On 18.08.2022 when

the applicants' counsel was out of station, an adjournment application was moved and on 15.09.2022, the applicants' counsel was busy in another Court, the opportunity of cross-examination from the witnesses had been closed and when the application under Section 311 Cr.P.C was moved by the applicants on 17.10.2022, it was rejected same day by the impugned order stating therein that examination-in-chief of P.W. 6 had been recorded on 18.08.2022 and allowing the adjournment application on 22.08.2022 had been fixed for cross-examination. On 22.08.2022 P.W 6 was present since morning, but none appeared to cross-examine him hence at 3:20 cross examination had been closed.

4. On 15.09.2022 the examination-in-chief of P.W. 7 S.I. Mukesh had been recorded at 11:00 a.m. and the applicants were directed to call for their counsels but the counsels did not appear, therefore opportunity to cross examining P.W. 7 had been closed at 4:45 p.m.

5. The learned trial court concluded that since sufficient opportunity had been provided, but the witnesses had not been cross-examined, hence, there was no sufficient ground to allow the application 45-B under Section 311 Cr.P.C and accordingly rejected the application and fixed 07.11.2022 for examination of rest of the witnesses. Being aggrieved, this application has been moved on behalf of the applicants. Neither the State nor opposite party no. 2 have filed any objection/counter affidavit.

6. The application had been moved during the course of examination of the witnesses. It is crystal clear that the trial court has not provided proper opportunity and equal protection of law to the defence side while several dates have been given to the prosecution for examination of the witnesses without any adjournment, the learned trial court closed the cross-examination same day, rejecting the adjournment application of the defence.

7. Learned trial judge could not understand the abstracts behind the section in which the accused persons had moved application to recall the witnesses for cross examination.

8. It would be proper to quote Section 311 Cr.P.C, which is as under :

"Section 311 in The Code Of Criminal Procedure, 1973.

311. *Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."*

9. In ***Raja Ram Prasad Yadav Vs. State of Bihar and Anr. A.I.R 2013 (SC) 3081,*** it has been held that it is, therefore imperative that invocation of Section 311 Cr.P.C and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provisions, namely, for achieving a just decision of the case. The power vested under the said provisions is made available to any court at any stage in any inquiry or trial or other proceedings initiated under

the code for the purpose of summoning any person as a witness or for examining any persons in attendance, even though not summoned as witnesses or to re-call or re-examine any person in attendance. In so far as recalling and re-examining of any person already examined, the court must necessarily consider and ensure that such re-call and re-examination of any person, appears in the view of the court to be essential for the just decision of the case.

10. On the above discussion, this Court comes to the conclusion that the learned trial court had committed manifest error during the course of trial in recording the evidence and has proceeded with the case in harried manner in violation of the principles of natural justice and fair trial. The impugned order is not sustainable in the eye of law and deserves to be quashed.

11. In ***R.B. Mithani Vs. State of Maharashtra, A.I.R. 1971, Supreme Court 1630,*** the Hon'ble Supreme Court has held that additional evidence summoned must be necessary not because, it would be impossible to pronounce judgement but also because there would be failure of justice without it. Though the power must be exercised sparingly and only in suitable case but once such action is justified, there is no restriction on the kinds of evidence, which may be received. It may be formal or substantial in nature.

12. In ***State of Haryana Vs. Ram Prasad 2006 Cr.L.J. 1001, the Punjab & Haryana*** High Court held that where the examination and re-examination of the witness is essential for the just decision of the case, it is obligatory of the Court to summon such a witness.

13. The ***Orissa High Court in Nira Vs. State of Orissa, 2008 Crl. L.R. 1315,*** held that this power can be exercised by the Court even at the stage of preparation of the judgment.

14. In ***State of Sikkim Vs. Thukchuk Lachungpa 2005, Crl. L.R 201,*** the Sikkim High Court has held that this power can be exercised even though at the earlier stage of the trial, the Court has rejected such application.

15. In ***Rama Paswan Vs. State of Jhharkhand, 2007 Crl. L.J. 2750***, the Hon'ble Supreme Court has held that it would not be improper, the exercise of the power of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The Section is a general Section, which applies to all proceedings, inquiries and trials under the Court and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or inquiry.

16. In ***Ismail Baba Saheb Vs. A.A. Hulagen, 1997 Crl.L.J. 1804,*** the Karnataka High Court, has held that where the production of the document and the summoning of the witness is necessary for the just decision of the case, the rejection of the application on the ground that document has not been produced from proper custody is not proper.

17. In ***Raju Vs. State of Madhya Pradesh, 2002, Crl.L.J. 2367***, the Madhya Pradesh High Court has held that where the documents filed with the Charge-sheet have not been proved, important documents relevant for the just decision of the trial have not been filed, the Court would direct

their production exercising of power under Section 311 Cr.P.C. and Section 165 of Evidence Act.

18. In ***Raj Deo Sharma Vs. State of Bihar, A.I.R 1999 Supreme Court 3524***, the Hon'ble Supreme Court has held that once it is found that the evidence is essential for the just decision of the case, the witness can be recalled at any time before pronouncement of the judgment, the time factor would not come in the way.

19. In ***Mohan Lal Sham Ji Soni Vs. Union of India, 1991 Cr.L.J. 1521,*** Supreme Court, the Hon'ble Supreme Court has held that an inquiry or trial in a criminal proceedings comes to an end or reaches its finality when the order or judgment is pronounced and until then the Court has power to use this Section.

20. In ***Rajendra Prasad Vs. Narcotic Cell Delhi, A.I.R 1999, Supreme Court 2292,*** the Hon'ble Supreme Court has held that it can not be laid down as legal preposition that the Court can not exercise the power of re-summoning any witness, if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered latches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even re-call any witness at any stage of the case, if the Court considers it necessary for a just decision.

21. As already said that there are two parts of the Section 311, in this context, the Hon'ble Supreme Court in ***Jamat Raj Vs. State of Maharashtra, A.I.R 1968, Supreme Court 178*** has held that the user of "May" in first part "Shall" in second shows, that when the first part is discretionary, second part is obligatory.

In the Case of Mohan Lal (Supra) the Hon'ble Supreme Court has also held that the power to summon and examine any witness may be exercised at the stage, opportunity however is to be given to the parties to rebut the evidence.

22. Para 14 to 17 of ***V.N Patil Vs. Niranjan Kumar and others, (2021) 3 SCC 661;*** are relevant hence they are reproduced as under :-

"14. The object underlying Section 311 CrPC is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".

15. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar v. State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240 : (SCC p. 141, para 17)

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The

discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. This principle has been further reiterated in Mannan Shaikh v. State of W.B., (2014) 13 SCC 59 : (2014) 5 SCC (Cri) 547 and thereafter in Ratanlal v. Prahlad Jat, (2017) 9 SCC 340 : (2017) 3 SCC (Cri) 729 and Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839 . The relevant paragraphs of Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839 are as under: Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839, SCC p. 331, paras 10-11)

"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine, or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

23. In this case, the accused-appellants have right to cross-examine the witnesses. Since P.W. 6 & 7 were the material witnesses, therefore to provide full opportunity to cross-examine such witnesses was the duty of the trial court.

O R D E R

24. (a) This Application U/s 482 CrPC is **allowed.**

(b) The impugned order dated 17.10.2022, passed by the trial court is hereby **quashed.**

(c) The learned trial court is directed to re-call PW 6 & 7 for their cross-

examination on behalf of all the accused persons.

(d) Let a certified copy of this order be sent to the concerned court for its compliance immediately.

(2023) 4 ILRA 836
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Application U/S 482. No. 46541 of 2018

Sanjeev Sahu & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rajiv Lochan Shukla

Counsel for the Opposite Parties:
G.A., Meera Verma, Sri Ranjan Upadhyaya, Sri Ramesh Upadhyaya, Sri Ronak Chaturvedi, Sri Shailesh Pandey, Sri Shailesh Upadjyay, Sri Arun Pandey

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 354, 354B, 452, 504 & 506 - Code of Criminal Procedure, 1973 - Sections 156 (3),200 & 202 , The Protection of Children From Sexual Offences Act, 2012 - Section 7/8 , The Schedule Castes And The Schedule Tribes (Prevention of Atrocities) Act , 1989 - Section 3 - High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court - authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse.)Para - 27,28)

Quashing of - summoning order & entire proceedings of Complaint Case - complaint filed by a minor under Section 156 (3) Cr.P.C. was registered as a complaint - minor's representation was not proper - complaint was not filed by a proper person - No medical examination/injury report prepared regarding incident with victim - Complaint filed against applicants with connivance - to take revenge of removal of encroachment done by father of opposite party no. 2 - continuance of process issued by applicants - removal of illegal encroachment done by parents of opposite party no. 2 - accused persons being related to media started covering on media and India news - harassment done by powerful persons.**(Para -18,24,25)**

HELD:-Complaint is nothing but a sheer misuse of the process of law, made for the protection of the children. To prevent abuse of the process of law or otherwise to secure the ends of justice, summoning order, the entire proceeding of Complaint Case quashed. POCSO Court has jurisdiction to hear the case against summoning order under Section of SC/ST Act, as per the judgement of the coordinate bench of this court in Rinku (supra). Section 14A of SC/ST Act provides a provision of appeal from any judgement, sentence or order of a Special Court.(Para -25,28,30)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:

1. M/s Neeharika Infrastructure Pvt. Ltd. Vs St. of Maha. & ors. (SC), A.G.I. ; N.C.W. ; St. of Maha., Criminal Appeal No. 330 of 2021

2. Satish Vs Satish & anr., St. of Maha. & anr., Libnus, 2021 LawSuit (SC) 739

3. Phool Singh Vs The St. of M.P. , 2021 0 Supreme (SC) 760,

4. Jagmohan Singh Vs Vimlesh Kumar & ors., Criminal Appeal No. 741 of 2022

5. St. of U.P. & anr. Vs Akhil Sharda & ors., 2022 0 Supreme (SC) 598

6. Jahur Khan & 4 ors. Vs St. of U.P. & anr. , Application U/S 482 No. 5690 of 2021

7. St. of Haryana & ors. Vs Bhajan Lal & ors., 1992 Suppl (1) SCC 335

8. Karnataka Vs L. Muniswamy, (1977) 2 SCC 699

9. St. of Karnataka Vs M. Devendrappa, (2002) 3 SCC 89

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard Sri Rajiv Lochan Shukla, learned counsel for the applicants and Sri Arun Pandey, learned counsel for the opposite party no. 2 and perused the record.

2. By moving this application under Section 482 Cr.P.C. the applicants seek to invoke the inherent jurisdiction of this court to quash the summoning order dated 29.11.2018 passed by the Special Judge, POCSO Act/Additional Sessions Judge, Court No. 6, Ghaziabad and the entire proceedings of Complaint Case No. 77 of 2018 (X Kumari Vs,. Sanjeev Sahu and others) whereby the applicants have been summoned to face the trial under Sections 354, 354B, 452, 504, 506 IPC, Section 7/8 POCSO Act and Section 3 of SC/ST Act, Police Station Indrapuram, District Ghaziabad.

3. As per facts of the case, an application under Section 156 (3) Cr.P.C. was filed by the minor X Kumari on 01.10.2018 with the allegation that her parents do the work of ironing the clothes since last 17 years in Vartalok Apartment. They also do the work of washing the vehicles in the society. All the opposite parties (present applicants) have an evil eye on the applicant and her mother. The applicant and her mother have been misbehaved and molested many times at the hands of these persons, but because of the intervention of other people of the society, no complaint was made against them. They also used to eve tease them and on their protest they are given threat to turn out from the society. On 23.09.2018 (Sunday) at about 5.00 p.m. when her mother was doing iron on the clothes and she was studying sitting near her mother, all the five persons namely, Sanjeev Sahu, Dushyant Singh, Harish Chand Joshi, Mohan Lal and Uday Narayan, Dushyant using caste based words made sexual connotations, Harish Chand Joshi also made the same remarks against her, Uday Narayan caught hold of her, took her in the adjacent tin shed and torn her shirt. All the rest persons (opposite parties/the applicants) also came. Sanjeev Sahu caught hold of her hands and Mohan Lal caught hold of her legs. She was disrobed. She was crying but they were not ready to hear anything. As soon as Harish Chand Joshi entered his penis into her vagina, immediately on the hue and cry of the applicant and her mother, Shilpi Gupta and Sandeep Gupta, the residents of the same society and many other persons came, seeing them opposite parties made good their escape. After some time they again came, abused the applicant and her parents, destroyed the tin shed and other articles kept there. The police also came on the spot, but forcibly got written a different application from her. One policeman, Sachin Malik gave her threat also. On 25.09.2018, she sent a complaint to the S.S.P., but no case could be registered, hence, the prayer was made to issue a direction for lodging the FIR.

4. After summoning a police report on this application, the trial court registered this application as a complaint and after recording the statements of the victim

under Section 200 Cr.P.C. and witness Shilpi Gupta under Section 202 Cr.P.C., by passing the impugned order dated 29.11.2018 summoned all the above five applicants to face the trial under Sections 354, 354B, 452, 504, 506 IPC, Section 7/8 POCSO Act and Section 3 of SC/ST Act.

5. With the prayer of quashing this summoning order and the entire proceedings of the complaint above, the present application has been moved by the applicants and in the supporting affidavit it is alleged that though the case is sessions triable, even then the whole witness list of the complainant was not exhausted by the trial court. The statement of the complainant was noted by the reader of the court, while as per the circular letters issued by this court time to time, it must be noted down by the Presiding Officer himself. There is overwriting on the date of incident in the statement of the witness Shilpi Gupta. The whole premises including the spot in question is covered with CCTV cameras. No CCTV footage was placed before the trial court. Neither any medical of the alleged victim was done nor the torn clothes were produced before the court. The mother of the alleged victim, who is said to be present on the spot from the very beginning of the alleged incident, has not been examined and the applicants have been summoned by the trial court ignoring the above facts.

6. It is further said that the complaint has been lodged on false grounds. In fact, the father of the alleged victim had illegally occupied land and constructed a '*jhuggi*' inside the Vartalok Apartment. The Residents Welfare Association of Vartalok Apartment sought to remove the same and in a bid to create pressure on the Residents Welfare Association this complaint has been filed. The truth is that on the same day i.e. on 23.09.2018 the officers of the Residents Welfare Association in the presence of the officers of Vartalok Sahkari Awas Samiti had called on No. 100 for police force and in the presence of police force, the illegal constructions made by the father of the alleged victim inside the society was removed. This illegal encroachment was protested by the alleged victim, opposite party no. 2 and her family members and a pressure was made by them on the Residents Welfare Association to reconstruct the illegal 'jhuggi'. The video recording of the said operation was also made. On the application under Section 156 (3) Cr.P.C. of opposite party no. 2, the police also submitted the report that the officials of Residents Welfare Association of Vartalok Apartment in the presence of Vartalok Sahkari Awas Samiti officials called the police on number 100 and in the presence of police force, the encroachment was removed on 23.09.2018 under the video recording. In this regard, with a view to create pressure upon Residents Welfare Association of Vartalok Apartment, the applicant has made totally false allegation.

7. The applicant no. 1 - Sanjeev Sahu is aged about 47 years and is ex-President of Vartalok Residents Welfare Association and also the Chief Manager, Times of India, New Delhi, applicant no. 2 - Dushyant Singh is 32 years old practicing Advocate in New Delhi and the resident of the same society, he is the legal adviser of the society, applicant no. 3 - Harish Chand Joshi, aged 51 years, is the present Vice President of the society and also the Deputy General Manager, Jindal Saw Ltd., applicant no. 4 -Uday Narayan Singh, aged 66 years, is Secretary of Vartalok Samiti, retired from the post of Dy. Manager, Times of India, New Delhi, applicant no. 5

- Mohan Lal, aged 51 years, is a resident of Vartalok Society and a close associate of the Secretary, Uday Narayan Singh and is a class-I officer in Central Government.

8. The opposite party no. 2 and her family members were the illegal occupiers of a piece of land on which the hut had been constructed by them, with active help of Yashwant Rana, Managing Editor, India News, his wife Anjana Singh, Shilpi Gupta, the alleged witness of the present case, her husband - Sandeep Gupta, Suresh Dobriyal and Damodar Das Upadhyay. All these persons are the residents of the same society, who at some point of time had been interferring with the functioning of the society and had also encroached over the land belonging to the residents of the society. The notices were issued to them to remove the encroachments. In the year 2013, Rajiv Kumar, the then President of Vartalok Sahkari Awas Samiti, made a complaint to the Superintendent of Police also, about illegal stay of the father of the opposite party no. 2 in the society and that the society and its members were being harassed by Sonu @ Pappu, father of the opposite party no. 2. The threat was given by him to implicate them in false cases.

9. Sandeep Gupta, who has been helping Pappu, the father of opposite party no. 2, constantly instigated Pappu to give threat to the members and officiating members of the society. Against the bye laws of the society he had given illegal electricity connection to Pappu. He had also encroached upon the land of the society. He was given notice by the society to remove the encroachment but he replied wrongly, claiming the construction to be justified and that the constructions were purely temporary in nature, for securing the privacy of his family. It was made clear by the society that unless he complies with the instructions of the society, the proceeding of the registry of his flat would not be processed and at last a proposal was passed in the general body meeting of Residents Welfare Association of Vatalok Apartment that the steps be taken for cancellation of the allotment of the flat of Sandeep Kumar Gupta. This Sandeep Kumar Gupta is the main person behind Pappu, initiating and pressing the illegal activities on behalf of Pappu, as Pappu having no knowledge of English, he is continuously pressing the proceedings all prepared in English language on the initiation of Sandeep Kumar Gupta. Though Sandeep Kumar Gupta in a bid to misuse the process of law filed a Civil Suit bearing No. 859 of 2018, wherein the society put its appearance and filed its written statement. Sandeep Kumar Gupta also instituted a suit No. 181 of 2019 against applicant no. 5 and father of applicant no. 2 Omendra Pal. It was decided exparte against Sandeep Kumar Gupta. Thus, Sandeep Kumar Gupta and Shilpi Gupta are clearly inimical to the applicants and the opposite party no. 2 is the puppet of these two. Because of illegal connection given to Pappu by Sandeep Kumar Gupta the society had to approach electricity department regarding this illegal activity. The illegal encroachment made by Pappu was being tried to remove since long.

10. Since the year 2013 and 2014 and till now the applicant no. 4 Uday Narayan Singh, who was the Secretary of the society, was challenging this encroachment and in 2017 it was resolved unanimously by the members of the Vartalok Sahkari Awas Samiti in the general body meeting to get removed the illegal encroachment done by the father of opposite party no. 2, which was given effect on 23.09.2018, which is

the date on which this fake incident has been concocted by the opposite party no. 2 to create pressure upon the applicants. As per the resolution of the society, on 09.06.2018 the then District Magistrate, Ghaziabad directed the Circle Officer and S.H.O. to take proper action in the matter as per law and consequently under the video recording, in the presence of the officers of Vartalok Sahkari Awas Samiti and the officers of Residents Welfare Association Vartalok Apartment the encroachment made by the father of the alleged victim was removed by the police after due process. This incident led opposite party no. 2 to start the present malafide proceeding under the guardianship of her mother, who herself had filed the complaint no. 94 of 2018 against Rajiv Kumar, the then President of Vartalok Sahkari Awas Samiti and others, which was dismissed by the court concerned on 18.12.2019, though the order is said to be challenged by the mother of opposite party no. 2.

11. Thus, it was argued that no such incident as shown in the complaint took place on 23.09.2018. The law made for protection of children has been misused by the guardian of opposite party no. 2 by propping opposite party no. 2 as victim of having suffered indignities at the hands of applicants. The incident is completely false, which has been concocted with a view to create pressure on the officials of the society. Such proceeding cannot be permitted to continue and the court under its extraordinary jurisdiction with a view to impart justice to the applicants may quash the summoning order and the entire proceedings of the complaint.

12. In support of their version the applicants placed before the court the report of police sent on the application under Section 156 (3) Cr.P.C. of opposite party no. 2, the statement of vicitim and Shilpi Gupta and the list of witnesses supplied by the complainant in the impugned complaint, carbon copy of complaint made by Rajiv Kumar (the then President of the Samiti) to the S.S.P. Ghaziabad on 15.04.2013, various notices issued to Sandeep Kumar Gupta and the replies given by him, photographs of illegal encroachment done by Sandeep Kumar Gupta in the society, copy of plaint of Civil Suit O.S. No. 859 of 2018 (Sandeep Kumar Gupta Vs. Vartalok Sahkari Awas Samiti Limited and others through its President, Rajiv Kumar), orders passed by the court in this suit, order sheet of Civil Suit No. 181 of 2009 (Sandeep Kumar Gupta Vs. Mohan Lal and others, applicant no. 5 in this case), copies of the letters sent to the Executive Engineer, EEEUDD,Vasundhara, Ghaziabad by Vartalok Sahkari Awas Samiti Limited, resolution of general body of the society dated 05.09.2017, copy of the letter to District Magistrate, Ghaziabad dated 09.06.2018 sent by Rajiv Kumar, President of the Samiti regarding encroachment by the father of opposite party no. 2, copy of complaint dated 09.07.2018 made by mother of opposite party no. 2 against applicant no. 4 Uday Narayan Singh, Harish Chand Joshi, applicant no. 3, naming four other persons under Sections 323, 384, 354, 504, 506, 120B IPC and sections of SC/ST Act, CCTV footage and video clip prepared by the mobile regarding the proceedings of the removal of encroachment both dated 23.09.2018, copy of complaint dated 04.02.2017 by Pappu @ Sonu, father of opposite party no. 2 to SHO, Indrapuram, order of Special Judge, SC/ST Act dated 18.12.2019 dismissing the complaint of Rajni, the mother of opposite party no. 2,

photocopy of caste certificate of the applicant Mohan Lal, a report from SIFS India Forensic Lab. dated 29.12.2020 to prove that the video clipping filed by the applicants are not tempered.

13. In reply, the counter affidavit has been filed by Pappu, father of opposite party no. 2 that he was living in a hut at gate no. 2 in Vartalok Apartment, Sector-4C for the last more than 17 years. Some of the applicants along with some other residents of the society misbehaved with his wife and demanded Rs. 1,00,000/- per year to permit him to reside in the hut for doing the ironing work in the apartments and when this demand of their was not fulfilled he and his family members were abused and given threat. On number of occasions his FIR could not be lodged, though, complaint no. 94 of 2018 was lodged by his wife against 06 persons including some of the applicants on 09.07.2018. The applicants are highly influential persons. They were infuriated coming to know about this complaint, which resulted in the incident dated 23.09.2018 and with intervention of some residents of the apartment including Shilpi Gupta and her husband, his (Pappu) life was saved from the applicants. His FIR was not lodged by the police officer Sachin Malik. Even if his construction was unauthorised the same could be removed through legal procedure only and not by the force. As admitted in the present case, his house was demolished in connivance of the police. He had been residing in the hut for the last 17-18 years. He served as a labourer for the constructions of Vartalok Apartment, thereafter, he is ironing clothes of the residents of the apartment since long. There was no occasion to file false complaint against the applicants. When the incident of 23.09.2018 was committed with his daughter then the complaint was filed in that matter. As he was residing in the apartment since last 17-18 years, Sandeep Kumar Gupta gave him electricity connection, who lives on the ground floor of the apartments, so that his daughter, opposite party no. 2 could study during night. He never charged any money from him and pays electricity bills from his own pocket. He is a washerman and does the job of ironing clothes. He has nothing to do with the dispute of Samiti and Sandeep Kumar Gupta. As the applicants are highly placed persons, having their own flats in the apartment, this does not justify the incident dated 23.09.2018. The applicants in connivance of local police demolished his entire house and also damaged the house hold property just to take revenge with his wife who filed complaint no. 94 of 2018 against illegal demand of Rs. 1,00,000/- by the applicants. The District Magistrate is not the competent authority to get his house removed. The only recourse available to the applicants was to file an ejectment suit. The pendrives have not been supplied to him, therefore, he is not in a position to comment regarding the same.

14. Along with his reply, copy of the complaint made by the wife of Pappu dated 09.07.2018, certified copy of the order sheet of that court and letter of Chief Secretary, U.P. State, that government orders do not authorise any authority to enter into any private dispute of two persons, have been filed. From the State side also, counter affidavit has been filed. It is stated therein that under Section 14A of SC/ST Act only an appeal is maintainable, hence, the present proceedings are said to be not maintainable.

15. Rejoinder affidavit reiterating the previous version has been filed by the applicants.

16. Thus, on the basis of the pleadings, it is argued by the learned counsel for the applicants that the complaint has been filed against the applicants with the connivance of Sandeep Kumar Gupta and his wife just to take revenge of removal of encroachment done by the father of the opposite party no. 2. By placing judgement of this court in Criminal Misc. Bail Application No. 33075 of 2018 - Rinku Vs. State of U.P., it is argued by the learned counsel for the applicants that when apart from sections of IPC, the proceedings were also under POCSO Act and SC/ST Act, only POCSO court would have the jurisdiction to entertain such proceeding, as is done in the present case and it is argued that as the impugned summoning order was passed by the POCSO court itself, so Section 14A of SC/ST Act would not apply.

17. While learned counsel for the opposite party no. 2 placed before the court the judgements in ***Criminal Appeal No. 330 of 2021 - M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others (SC), Attorney General for India; National Commission for Women; State of Maharashtra; Satish Vs. Satish and another, State of Maharashtra and another, Libnus, 2021 LawSuit (SC) 739, Phool Singh Vs. The State of Madhya Pradesh, 2021 0 Supreme (SC) 760, Order dated 05.05.2022 passed by the Supreme Court in Criminal Appeal No. 741 of 2022 - Jagmohan Singh Vs. Vimlesh Kumar and others, State of Uttar Pradesh and another Vs. Akhil Sharda and others, 2022 0 Supreme (SC) 598,*** and judgement dated 30.06.2021 of this court passed in ***Application U/S 482 No. 5690 of 2021 - Jahur Khan and 4 others Vs. State of U.P. and another***, and submitted that at this stage of 482 Cr.P.C. the court has not to look into the correctness of the allegations made in the complaint nor the court has to look into the defence of the applicants. As the complaint discloses commission of a cognizable offence, there is no irregularity or illegality in the order summoning the applicants. It is argued that the court should not embark upon an enquiry about the facts whether there is reliable evidence or not. The jurisdiction under Section 482 Cr.P.C. is to be exercised sparingly, carefully and with caution, when the criminal proceeding can be said to be an abuse of the process of the court, to warrant intervention under Section 482 Cr.P.C. From the FIR a cognizable offence is clearly made out and the charge sheet has also been filed under the cognizable sections, the court has no ground to interfere in the criminal proceeding in exercise of its power under Section 482 Cr.P.C.

18. If we go through the above pleadings, it is found that the application under Section 156 (3) Cr.P.C. was filed by minor aged about 15 years against five applicants and after receiving the report of the police station that the incident is false this application was registered as a complaint. The complainant being minor has not been represented in the court by her guardian rather she has been represented by pairokar Smt. Rajni w/o Pappu. Smt. Rajni may be the mother of the minor but the representation of the minor must be proper. The minor had to appear in the court through her legal guardian and not through a pairokar, hence, the complaint cannot be said to be filed by a proper person.

19. Again, the counter affidavit in the present proceedings has not been filed by the mother of the victim, who is mentioned as legal guardian of the minor in the

counter affidavit, but the counter affidavit has been filed by Pappu, the father of opposite party no. 2 and under what capacity the counter affidavit has been filed by Pappu is not made clear. The third witness, in the list, mother of the minor, who is said to be witness of the incident from the initial stage, has not been produced before the trial court. The overwriting on the date of incident, in the statement of Shilpi Gupta has also been ignored by the trial court.

20. In the whole complaint, it is nowhere mentioned that the complainant, the present opposite party no. 2, belongs to SC/ST and the opposite parties (present applicants) belong to general category. From the caste certificate produced by the applicants counsel, Mohan Lal, applicant no. 5 appears to belong to the scheduled caste. No explanation has been tendered by the learned counsel of opposite party no. 2 in this regard.

21. It is true that the power under Section 482 Cr.P.C. be used sparingly in rare and exceptional cases but in the case law, ***State of Haryana and others Vs. Bhajan Lal and others, (1992 Suppl (1) SCC 335),*** the Apex Court held that in the case where the allegations made in the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion, that there is sufficient ground for proceeding against the accused and whether a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wrea***State of Haryana and others Vs. Bhajan Lal and others, (1992 Suppl (1) SCC 335),***king vengeance on the accused and with a view to spite him due to personal grudge, the court can exercise its power.

22. From perusal of the record, it is found that it is the version of the opposite party no. 2 that since last 17 years the father of the opposite party no. 2 was residing in the society by making a hut, the legal right of the father of opposite party no. 2 regarding making hut has not been specified. It is also an admitted fact that on the date of incident itself i.e. on 23.09.2018 in the evening his hut and the alleged encroachment done by him was removed with the help of police in supervision of the applicants and in the presence of the officers of Vartalok Sahkari Awas Samiti. When the hut was removed on the very same day of the alleged incident and video and mobile clippings of the hut (tin shed), which is said to be the place of incident, from 2 p.m. to 6.30 p.m. are placed before the court and at that time there could be no occasion for the applicants to commit the said offence with the minor girl - opposite party no. 2

23. Admittedly an illegal electric connection was given to the father of the opposite party no. 2 by one Sandeep Kumar Gupta that was being used by the family of opposite party no. 2 for the last 10 years without any lawful authority. The illegal electric connection taken by the father of opposite party no. 2 and the hut made by him in the society without any allotment in his name have been admitted by the father of the opposite party no. 2. The two pendrives of the whole incident from 2.00 p.m. to 6.30 p.m. have been filed by the applicants showing the whole incident of the removal of the illegal encroachment made by Pappu, the father of opposite party no. 2. As the tin shed where the incident

took place, is said to have been covered with the view of CCTV camera, the applicants have filed three clippings of the CCTV footage and two clippings made by mobile of that area of the time including the period of alleged incident shown in the complaint, wherein no such incident has been shown. If it was so, the opposite party no. 2/her parents were free to file the CCTV footage of that area of the time of incident, but it has not been done by them. Rather at the time of the incident at about 6 to 8 p.m. many times the alleged victim and her parents are seen resisting and arguing with the police and other persons. If any incident as alleged in the complaint had taken place at 5 p.m. that day, the victim and her family members could have made a complaint to the police at that time but no such complaint was made to the police rather the victim is seem opposing the incident with full enthusiasm and strength.

24. No medical examination/injury report is said to have been prepared regarding the incident with the victim. The documents filed by the applicants above are on record, which show that in support of the complaint filed by the opposite party no. 2, only Shilpi Gupta has come forward to give statement against the applicants in the court under Section 202 Cr.P.C., while long proceedings by the Residents Welfare Association of the society were running against her husband regarding the illegal encroachment and illegal electricity supplied by him (Sandeep Kumar Gupta) to the parents of opposite party no. 2. The documents on record show that whenever any proceeding was used to start against the parents of the opposite party no. 2, they used to give threat to the applicants/then officialsofficers of Residents Welfare Association of the society to indulge them in the false cases and specifically a case under Sections of SC/ST Act. On 09.07.2018 the mother of the opposite party no. 2 had filed a complaint under Sections 323, 384, 354, 504, 506, 120B IPC and sections of SC/ST Act against Uday Narayan Singh, Harish Chand Joshi and four others, which is said to have been dismissed vide order dated 18.12.2019 of the Court of Special Judge. Though, this order is said to have been challenged in this court.

25. It is also the version of the applicants that in continuance of process issued by the applicants for removal of illegal encroachment done by the parents of the opposite party no. 2, including opposite party no. 2, with connivance of Sandeep Kumar Gupta, his wife Shilpi Gupta, Yashwant Rana and his wife Anjana Singh entered in the house of the applicant Dushyant Singh on 16.09.2018 and gave threat to the mother of Dushyant that they would not spare her son. The pregnant wife of Dushyant Singh was pushed down with intention of aborting her child. FIR with regard to the incident was registered under Sections 316, 387, 389, 452, 500, 506, 507, 511, 120B IPC. The above named accused persons being related to media started covering on media and India news that it was an harassment done by the powerful persons. A demand of Rs. 60 lacs was made to withdraw the complaint against the applicant and various threats were given to him. All this clearly shows that the complaint is nothing but a sheer misuse of the process of law, made for the protection of the children.

26. In the judgements placed before the court by the learned counsel for the opposite party no. 2 itself, it has been held that the power under Section 482 Cr.P.C. can be exercised when it is justified and

when going through the material on record the court could reasonably arrive at a finding that the proceedings are the abuse of the process of the court. In the judgement Bhajan Lal (Supra) it has been held that when a criminal proceeding is manifestly attended with malafide and where the proceedings is maliciously instituted with an ulterior motive with a view to spite a person due to private and personal grudge, the power under Section 482 Cr.P.C. should be exercised.

27. In state of ***Karnataka Vs. L. Muniswamy, (1977) 2 SCC 699***, the three Judges Bench of the Apex Court held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court. Paragraph-'7' of the judgement can be quoted as under:-

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

28. A three Judges bench in ***State of Karnataka Vs. M. Devendrappa, (2002) 3 SCC 89,*** analysed the scope of Section 482 Cr.P.C. and laid down that the authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. Paragraph-'6' of the judgement can be quoted as under:-

"6.....All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice.....Inherent jurisdictin under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist."

29. Thus, from the above discussion, it reflects that to prevent abuse of the process of law or otherwise to secure the ends of justice, the entire proceeding of Complaint Case No. 77 of 2018 (X Kumari Vs. Sanjeev Sahu and others) needs to be quashed.

30. So far as the argument that this court has no jurisdiction to hear the case against summoning order under Section of

SC/ST Act is concerned, the impugned order has been passed by the POCSO court and not by the SC/ST Court. As per judgement of the coordinate bench of this court in Rinku (supra) the court found that when in a case the offences both under POCSO Act and SC/ST Act are arising out of same crime and may be tried at the same time, the Special Court of POCSO would have jurisdiction. Though, it is argued that this judgement is about the bail application but in the opinion of the court, Section 14A of SC/ST Act provides a provision of appeal from any judgement, sentence or order of a Special Court and with regard to SC/ST Act, the Special Court shall be the SC/ST Court and not the POCSO Court. The impugned order has been passed by the POCSO Court, so in my opinion the argument of the learned counsel for the opposite party no. 2 in this regard is not tenable.

31. In view of the above discussion, the summoning order dated 29.11.2018 passed by the Special Judge, POCSO Act/Additional Sessions Judge, Court No. 6, Ghaziabad and the entire proceedings of Complaint Case No. 77 of 2018 (X Kumari Vs. Sanjeev Sahu and others) under Sections 354, 354B, 452, 504, 506 IPC, Section 7/8 of the POCSO Act and Section 3 of the SC/ST Act, Police Station Indrapuram, District Ghaziabad pending before the 6th Additional District Judge/Sessions Judge, Ghaziabad, are quashed.

32. The application under Section 482 Cr.P.C. is, thus, **allowed**.

(2023) 4 ILRA 846
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.02.2023

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 52424 of 2022

Ram Singh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Upendra Kumar Singh

Counsel for the Opposite Parties:
Sri Rabindra Kumar Singh (AGA), Sri Shekhar Gangal, Sri Shamsher Singh

(A) Criminal Law - Code of Criminal Procedure, 1973 - Sections 161,164 & 439 - Special Powers of High court or Court of Session regarding bail , Indian Penal Code, 1860 - Sections 147, 148, 323, 452, 504, 506, 304 & 354(Ka) - The Protection of Children From Sexual Offences Act, 2012 - Sections 7/8 - It is a sound exercise of judicial discipline for an order granting or rejecting bail to record the reasons which have weighed with the court for the exercise of its discretionary power - If the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity.(Para - 18,38)

Applicant sneaked into house of the victim (aged about 15 years) - attached to his house - tried to outrage modesty of minor girl - deceased was beaten to death by applicant and other co-accused persons - witnesses including victim (daughter of deceased) and wife of deceased fully supported prosecution case - danda was used in commission of crime - recovered at the pointing out of the applicant - bail granted to co-accused.**(Para - 27,46)**

HELD:- Bail granted to Co-accuseds without consideration of facts or reason. Case of present applicant distinguishable from the case of other co-accused persons. No allegation against them with regard to outraging modesty of minor

victim which was only been assigned to present applicant. Further incident, which took place, was the outcome of the act committed by the applicant in the night.**(Para - 48)**

Bail application rejected. (E-7)

List of Cases cited:

1. Deepak Yadav Vs St. of U.P. & anr. , (2022) 8 SCC 559

2. Dataram Vs St. of U.P. & anr. , (2018) 3 SCC 22

3. Prahlad Singh Bhati Vs NCT of Delhi & ors. , (2001) 4 SCC 280

4. Ram Govind Upadhyay Vs Sudarshan Singh & ors. , (2002)3 SCC 598

5. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr. , (2004)7 SCC 528

6. Chaman Lal Vs St. of U.P. , (2004)7 SCC 525

7. Masroor Vs St. of U.P. , (2009) 12 SCC 286

8. Prashant Kumar Sarkar Vs Ashis Chatterjee & anr. , (2010)14 SCC 496

9. Anil Kumar Yadav Vs St. (NCT of Delhi), (2018)12 SCC 129

10. Mahipal Vs Rajesh Kumar @ Polia & anr. , (2020)2 SCC 118

11. Jagjeet Singh & ors. Vs Ashish Mishra @ Monu & anr. , (2022) 9 SCC 321

12. ''Y' Vs St. of Raj. & anr. , 2022 live Law (SC) 384

13. Indresh Kumar Vs St. of U.P. & anr. , Live Law (SC) 610

14. Ajwar Vs Niyaj Ahmad & anr., Criminal Appeal No. 1722 of 2022 (arising out of SLP (Crl.) No. 8139 of 2022)

15. Sunder Lal Vs St. of U.P., 1983 Cr.L.J. , (FB) (Alld High Court)

16. Chander @ Chandra Vs St. of U.P. , 1998 Cr.L.J., 2378

17. Brijmani Devi Vs Pappu Kumar, (2022) 4 SCC 497

18. Naresh Vs St. of Mah. AIR 1967 SC 1

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

1. Heard Shri Upendra Kumar Singh, learned counsel for the applicant, Shri Rabindra Kumar Singh, learned Additional Government Advocate and Mr. Shamsher Singh, learned counsel, who is appearing on behalf of Mr. Shekhar Gangal, learned counsel for the first informant.

2. By means of this application under Section 439 of Cr.P.C., applicant-Ram Singh, who is involved in Case Crime No. 332 of 2021, under Sections 147, 148, 323, 452, 504, 506, 304, 354(Ka) IPC and Sections 7/8 POCSO Act, Police Station Harduaganj, District Aligarh, seeks enlargement on bail during the pendency of trial.

Facts of the case

3. As per prosecution case, in brief, informant who is brother-in-law *(Jeeja)* of the victim, lodged a first information report on 30.08.2021 against Gulab Singh, Ram Singh (present applicant), Lekhraj, Vimlesh and Shanti Devi alleging *inter-alia* that on 27.08.2021, his sister-in-law *(Saali)* aged about 15 years was sleeping alone at the roof of her house. At about 10:00 in the night, the present applicant Ram Singh, who is her neighbour, sneaked into her house and with an intention to outrage her modesty, caught hold of her. On raising alarm by the victim, her mother Pushpa Devi and father Jai Narayan woke up and

when they rushed at the roof, applicant Ram Singh succeeded in fleeing away. Since it was late night, therefore, victim's father did not go to the police station to lodge FIR. On the next day i.e. 28.08.2021 when Jai Narayan was going to lodge FIR along with victim, at that time, the accused persons namely Gulab Singh, Ram Singh (present applicant), Lekhraj, Vimlesh and Shanti Devi armed with lathi, danda, farsa and iron rod barged into his house and started mounting pressure upon them for compromise. When Jai Narayan refused for the same, they started beating him. The FIR further alleges that when his wife Pushpa Devi and victim tried to intervene, they were also belaboured by them. Thereafter the accused persons ran away giving threat to them. The people of the locality collected there gave information about the said incident to the police by dialling 112, on which the police reached the spot and took Jai Narayan to Deen Dayal Hospital. Considering his condition as serious, he was referred to Medical Hospital, but since, there was no facility of ventilator at Medical Hospital, he was referred to Safdarjung Hospital, Delhi, where he succumbed to the injuries.

Submissions on behalf of the applicant.

4. It is argued by learned counsel for the applicant that general role of assault has been assigned to all the accused persons named in the FIR and no specific role has been attributed to the present applicant. It is also submitted that co-accused Smt. Shanti Devi and Smt. Vimlesh have been granted bail by the co-ordinate Bench of this Court vide order dated 01.04.2022 in Criminal Misc. Bail Application No. 54440 of 2021 and thereafter other co-accused persons namely Gulab Singh and Lekhraj have been granted bail vide order dated 09.09.2022 passed in Criminal Misc. Bail Application No. 25969 of 2022 only on the ground of parity of bail order of Smt. Shanti Devi and Smt. Vimlesh, as noted above, therefore, the applicant on the Principle of parity is also entitled to be released on bail. It is argued that if the applicant is not granted bail on the ground of parity, it would be violative of his fundamental right. Applicant has no criminal history to his credit and is languishing in jail since 22.09.2021.

Submissions on behalf of the State

5. Per contra, Shri Rabindra Kumar Singh, learned Additional Government Advocate for the State as well as learned counsel for the informant vehemently opposed the prayer for bail of the applicant in the light of prosecution case as mentioned in the FIR. It is also pointed out that the facts of this case, the injuries found on the body of the deceased, statement under Section 164 Cr.P.C. of the victim as well as statement under Section 161 Cr.P.C. of other prosecution witnesses, recorded during investigation, have not been taken into consideration by the Co-ordinate Bench of this Court while granting bail to co-accused persons as indicated herein above.

6. Placing reliance upon the decision of Hon'ble Supreme Court in **Deepak Yadav Vs. State of U.P. and another, (2022) 8 SCC 559,** learned Additional Government Advocate submits that it is the duty of the Court to record some reason while granting or rejecting the bail, whereas in the bail order dated 01.04.2022 of co-accused Smt. Shanti Devi and Smt. Vimlesh, no reason has been given for

granting bail. Further co-accused Gulab Singh and Lekhraj have been granted bail by the Coordinate Bench of this Court vide order dated 09.9.2022 only on the ground of parity. Learned Additional Government Advocate further submits that parity cannot be the sole criteria to grant bail and if the bail granted to similarly placed co-accused persons without assigning any reasons, then on the basis of such bail orders merely on the ground of parity, the bail application should not be allowed. It is also submitted that the victim in her statement under Section 164 Cr.P.C. has reiterated the prosecution version with regard to outraging her modesty and assault on her father by all the five accused persons, named in the FIR. Learned Additional Government Advocate also submitted that judgment in the case of **Dataram vs. State of U.P. and another, (2018) 3 SCC 22** is not applicable to the fact of the present case.

Settled principles for consideration of prayer for bail

7. Time and again, the Hon'ble Apex Court in plethora of judgements cautioned that while granting bail, the Courts should exercise discretion judiciously and framed guidelines for granting bail to an accused. Now, it would be useful to refer to some of the judgements of Hon'ble Apex Court in the matter of grant of bail to the accused.

8. In **Prahlad Singh Bhati Vs. NCT of Delhi and Others (2001) 4 SCC 280,** Hon'ble Apex Court laid down following principles for granting bail to the accused:

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

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

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

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

9. In **Ram Govind Upadhyay Vs. Sudarshan Singh and others, (2002)3 SCC 598,** Hon'ble Apex Court laid down the factors that must guide the exercise of the power to grant bail in the following terms:

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

the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.

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

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

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

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

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

10. In **Kalyan Chandra Sarkar Vs. Rajesh Ranjan alias Pappu Yadav and another (2004)7 SCC 528**, Hon'ble Supreme Court held thus:

"The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly, where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind."

11. In **Chaman Lal Vs. State of U.P. (2004)7 SCC 525,** Hon'ble Supreme Court while dealing with an application for bail, has stated that certain factors are to be considered for grant of bail, they are:

".....(i) nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, (ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant, and (iii) prima faice satisfaction of the court in support of the charge.

12. In **Masroor Vs. State of U.P. (2009) 12 SCC 286,** Hon'ble Supreme Court while giving emphasis to ascribe reasons for grant of bail, however, brief it may be, the Court observed:

" There is no denying the fact that the liberty of an individual is precious and is to to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a persons accused of

an offence would depend upon the exigencies of the case."

13. In the case of **Prashant Kumar Sarkar Vs. Ashis Chatterjee and another, (2010)14 SCC 496**, the accused therein was facing trial for the offence under Section 302 IPC. After being unsuccessful to obtain bail from the Sessions Court, the accused preferred a bail application before the High Court. The High Court allowed the bail to the accused by a short order, by observing thus:

"Having regard to the nature of the alleged crime, we do not think that interest of investigation requires or justifies further detention of the present petitioner (accused) at this stage."

14. Being aggrieved by the order of High Court granting bail to the accused, the first informant approached the Supreme Court by filing appeal. Hon'ble Supreme Court set aside the order of the High Court and allowed the appeal filed by the informant by holding thus"

"We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

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

(ii) nature and gravity of the accusation;

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

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

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

(vi) likelihood of the offence being repeated;

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

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

15. The Court in **Prasanta Kumar Sarkar (Supra)** went on to note that it is manifest that if the High Court does not advert to these relevant considerations and mechanically grants bail, the said order would suffer from the vice of non-application of mind rendering it to be illegal.

16. In **Anil Kumar Yadav Vs. State (NCT of Delhi), (2018)12 SCC 129**, Hon'ble Supreme Court spelt out some of the significant considerations which must be placed in the balance in deciding the bail application, which reads as under:

"While granting bail, the relevant considerations are:- (i) nature of seriousness of the offence; (ii) character of the evidence and circumstances which are

peculiar to the accused; and (iii) likelihood of the accused fleeing from justice; (iv) the impact that his release may make on the prosecution witnesses, its impact on the society; and (v) likelihood of his tampering. No doubt, this list is not exhaustive. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court."

17. Hon'ble Supreme Court in **Mahipal Vs. Rajesh Kumar alias Polia and another, (2020)2 SCC 118**, while setting aside the order of the High Court granting bail, observed thus"

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

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

18. Hon'ble Supreme Court in **Mahipal (Supra)** went on to observe that there is another reason why the judgment of the learned Single Judge has fallen into error. It is a sound exercise of judicial discipline for an order granting or rejecting bail to record the reasons which have weighed with the court for the exercise of its discretionary power. In the present case, the assessment by the High Court is essentially contained in a single paragraph which reads:

"4. Considering the contentions put-forth by the counsel for the petitioner and taking into account the facts and circumstances of the case and without expressing opinion on the merits of the case, this court deems it just and proper to enlarge the petitioner on bail."

19. Supreme Court further held:

"Merely recording —having perused the record and on the facts and circumstances of the case does not sub-serve the purpose of a reasoned judicial order. It is a fundamental premise of open

justice, to which our judicial system is committed, that factors which have weighed in the mind of the judge in the rejection or the grant of bail are recorded in the order passed. Open justice is premised on the notion that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The duty of judges to give reasoned decisions lies at the heart of this commitment. Questions of the grant of bail concern both liberty of individuals undergoing criminal prosecution as well as the interests of the criminal justice system in ensuring that those who commit crimes are not afforded the opportunity to obstruct justice. Judges are duty bound to explain the basis on which they have arrived at a conclusion."

20. Recently, a three Judges' Bench of Supreme Court in **Jagjeet Singh & Ors. V. Ashish Mishra @ Monu & another, (2022) 9 SCC 321**, has reiterated the factors that the Court must consider at the time of granting bail under Section 439 Cr.P.C. as well as highlighted the circumstances where Apex Court may interfere when bail has been granted in violation of the requirements under the abovementioned section. The Supreme Court observed:

" We may, at the outset, clarify that power to grant bail under Section 439 of CrPC, is one of wide amplitude. A High Court or a Sessions Court, as the case may be, are bestowed with considerable discretion while deciding an application for bail. But, as has been held by this Court on multiple occasions, this discretion is not unfettered. On the contrary, the High Court of the Sessions Court must grant bail after the application of a judicial mind, following well established principles, and not in a cryptic or mechanical manner."

21. In "**Y' Vs. State of Rajasthan and another, 2022 live Law (SC) 384,** the Apex Court observed:

"22. The impugned order passed by the High Court is cryptic, and does not suggest any application of mind. There is a recent trend of passing such orders granting or refusing to grant bail, where the Courts make a general observation that "the facts and the circumstances" have been considered. No specific reasons are indicated which precipitated the passing of the order by the Court.

23. ***Such a situation continues despite various judgments of this Court wherein this Court has disapproved of such a practice."***

22. This Court has granted bail to accused Mintu alias Jitendra , who in involved in Case Crime No. 08 of 2019, under Sections 302, 201, 376 read with 120B IPC and under Sections 5 and 6 of the POCSO Act for the alleged rape and murder of an eleven year old child. The High Court while granting bail held as under"

"Considering the overall acts and circumstances, the nature of allegations, the gravity of offence, the severity of the punishment, the evidence appearing against the accused, submission of learned counsel for the parties, considering the law laid down in the case of ***Data Ram Vs. State of U.P. and others, 2018(3), SCC, 2*** *and also the fact that aforesaid co-accused has been admitted to the concession of bail by this Court, but without expressing any opinion on merits, this Court finds it to be a fit case for bail.*

Accordingly, the bail application stands allowed."

23. Being dissatisfied with the order of this Court granting bail, the first informant Indresh Kumar, approached the Hon'ble Supreme Court in **Indresh Kumar Vs. State of U.P. And another, Live Law (SC) 610,** Hon'ble Supreme Court while allowing the appeal and setting aside the order of the High Court, Hon'ble Supreme Court held thus:

"The offence alleged against the respondent-accused of rape and cold blooded murder of an eleven year old child is heinous and dastardly. The conduct of killing a child to avoid getting caught of the offence, inter alia, of rape and then burial of the child as also her stained clothes and other articles under the soil to cause disappearance of evidence and evade apprehension for the offence of murder is indicative of a tendency to evade the process of law. It is possible that the respondent-accused might flee to evade the process of law.

The High Court has ignored the material on record including incriminating statements of witnesses under Section 164/161 of the Code of Criminal Procedure. Statements under Section 161 may not be admissible in evidence, but are relevant in considering the prima facie case against an accused in an application for grant of bail in case of grave offence.

The High Court has granted the respondent-accused bail, without considering the heinous nature of the allegations against him, the gravity of the offence alleged and severity of the punishment in the event of ultimate conviction, only because a co-accused had also been granted bail by the High Court.

*The impugned order of the High Court incorrectly states that bail is granted considering all the facts and circumstances, nature of allegations, gravity of the offence, severity of the punishment, the evidence appearing against the accused and the law laid down in **Dataram Singh Vs. State of U.P. and others, (2018)2 SCC 22**. This has not been done. "*

24. The Apex Court further went on to note that the observations and directions in **Dataram Singh (Supra)** were in the context of arrest and long custodial detention in a case under Section 138 of the Negotiable Instruments Act, 1881 for issuing cheque and then stopping payment of the cheque. Bail application had been rejected, first by the Trial Court and then by the High Court even after five months of detention of the accused in custody.

25. In A**jwar Vs. Niyaj Ahmad and another, Criminal Appeal No. 1722 of 2022 (arising out of SLP (Crl.) No. 8139 of 2022)**, Hon'ble Supreme Court while setting aside the order of Allahabad High Court held as under:

"However, the reasons in support of an order granting or refusing bail must emerges from the record and must show a due application of mind by the Judge to the facts of the case. An over-burdened docket is no justification for formulaic justice. We, therefore, disapprove of the manner in which the Single Judge of the High Court of Judicature at Allahabad has been dealing with applications for bail.

Factual analysis of the present case.

26. Now turning to the facts of the instance case. After the incident, the injured (deceased) was taken to Deen Dayal Hospital, but as his condition was precarious, he was referred to Medical College. Since the Ventilator was not available in the Medical College, he was referred to Safdarjung Hospital, Delhi, where he breathed his last. The post mortem on the cadaver was conducted by the Department of Forensic Medicine & Texicology Vardhman Mahavir Medical College & Safdarjung Hospital, New Delhi. Doctor found the following injuries:

(i) Lacerated wound of size 6.5cm x 0.5 cm x bone deep, present vertically over parietal region of head on right side, lower end of the wound situated 7.0cm away from midline and 9.0cm above right supra-orbital ridge.

(ii) Lacerated wound of size 3.1cm x 0.8cm x bone deep, present over parietal region of scalp on right side situated 10.1 cm above right supra-orbital ridge and 2.0cm away from midline on right side.

(iii) Lacerated wound of size 0.3cm x 0.1cm x 0.1cm present over inner aspect of lower lip in midline.

(iv) Bluish contusion of size 1.0cm x 1.0cm present over inner aspect of lower lip on right side.

(v) Reddish brown scabbed abrasion of size 5.1cm x 1.0cm present over back of right shoulder situated at the level of top of right shoulder and 17.1cm away from midline.

In respect of the position of the head of the deceased, following observations were made:

"Scalp: Extravasation of blood, present over right fronto-parietal region of scalp and diffusely present over left side of scalp.

Temporalis muscle: Right temporalis muscle contused.

Skull: A piece of skull bone missing underneath craniotomy wound from left fronto-tempo-parietal region over an area of 13.0cm x 10.0cm. Linear fracture of length 2.2cm present over floor of middle cranial fossa on left side. Sutural fracture of length 5.2cm present along coronal suture on right side. Linear fracture of length 5.1cm present over right temporal bone. Extravasation of blood present over fractured sites.

Membranes: Surgically cut underneath craniotomy site and replaced with artificial graft covered with blood clots.

Brain: Subdural and subarachnoid hemorrhages diffusely present over surface of bilateral cerebral hemispheres."

Cause of death: Death is due to cranio-cerebral damage as a result of ante mortem injuries sustained to head produced by blunt force impace. All injuries are ante mortem in nature and injury No. 1, injury No. 2 along with internal injuries, sustained to head are sufficient to cause death in ordinary course of nature.

27. There are two incidents in the matter. In the first incident, the applicant sneaked into the house of the victim, which is attached to his house and tried to outrage her modesty. The second incident is the

stem of the first incident, in which the deceased was beaten to death by the applicant and other co-accused persons.

28. Victim, who is aged about 15 years as per medical examination report, in her statement under Section 161 as well as 164 Cr.P.C. has given a vivid description of the offence by stating that on 27.8.2021 at about 10 PM, when she was sleeping on the roof of her house, accused-applicant Ram Singh, came to her roof, which is attached to his roof and in order to outrage her modesty, captured her. On her shrieks, when her parents came to the roof, accused-applicant jumped to his roof. Due to night, she could not get her report lodged. On 28.8.2021 when she along with her father were going to get her report lodged, accused Gulab Singh, Ram Singh (applicant), lekhraj, Smt. Vimlesh and Smt. Shanti Devi barged into her house and pressurized her father for not lodging the FIR. When her father did not surrender to their words, all the accused persons assaulted him with lathi, danda and iron rod and fled away from the scene extending threats. Smt. Pushpa Devi, wife of the deceased, who is the eyewitness of the incident have also supported the prosecution case. As indicated in the post-mortem report, a piece of skull bone was found missing underneath craniotomy wound from left fronto-tempo-parietal region over an area of 13.00 cm x 10.00 cm.

29. After the arrest of the present applicant Ram Singh, he confessed to his guilt and stated before the police that he used to molest the victim and a day prior to the instant incident, he also tried to outrage her modesty. He also stated that he along with the aforesaid accused persons assaulted the deceased with danda. Danda, which was used for assaulting the deceased was also recovered at the pointing out of the applicant. At present, there is nothing on record to disbelieve the statements of the victim and wife of the deceased.

Discussion about the issue of parity

30. The arguments advanced by the learned counsel for the applicant is that co-accused Smt. Shanti Devi and Smt. Vimlesh having been enlarged on bail by the Coordinate Bench of this Court vide order dated 01.4.2022 and other co-accused Gulab Singh and Lekhraj vide order dated 09.9.2022 as noted above, the applicant is also entitled to bail.

31 . I find that an issue of legal nodus of ubiquitous manifestation of law of parity and gravity of offence has arisen before this Court. In this regard, it would be apposite to discuss and consider the following decisions.

32. In **Sunder Lal Vs. State of U.P., 1983 Cr.L.J. (FB)** (Allahabd High Court), in addition to the other questions, a question has cropped up before the Full Bench of this Court that by reasons of fact that other co-accused having been granted bail, the applicant should also be granted bail only on the ground of parity. **The learned single Judge in order to avoid delay and expedite the disposal of the bail application referred the whole case for consideration by the Bench.**

33. The **Full Bench (Supra)** of this Court did not agree with the contention of the learned counsel for the applicant. Since the learned single Judge had referred the whole case for decision by the Full Bench, the Bench called upon the learned Counsel

for the applicant to argue the bail application on merits.

34. The learned counsel only pointed out that by reasons of fact that other co-accused has been admitted to bail the applicant should also be granted bail.

35. The Full Bench while rejecting the bail application of the application held thus"

"This argument alone that by reasons of fact that other co-accused has been admitted to bail the applicant should also be granted bail, would not be sufficient for admitting the applicant to bail who is involved in a triple murder case. Moreover, it appears that on merits this application had not been pressed before the learned single Judge but only on legal ground it was prayed that the applicant be admitted to bail."

36. The Division Bench of this Court in **Chander alias Chandra Vs. State of U.P., 1998 Cr.L.J., 2378,** after noticing the submission made on behalf of the applicant that an accused is entitled to bail if a co-accused similarly placed has been granted bail, the learned Judge of this Court has formulated the following question for decision by the larger Bench:

"Let the papers of this case be laid before Hon'ble the Chief Justice for constituting a larger Bench to lay down guidelines as to what should be done in a case like this where bail has been granted to a co-accused, and whether in the present case (1) the bail application of the applicant should be rejected although bail has been granted to a co-acused whose case is on the same footing." (2) whether bail granted to the co-accused should be cancelled."

37. Thereafter, Hon'ble the Chief Justice has referred the matter to the Division Bench of this Court. Before the Division Bench, it was argued that if an accused is granted bail, a similarly placed co-accused should also be granted bail on the principle of parity.

38. The Division Bench did not impress by the submission of learned counsel for the applicant therein and held as under:

"1. If the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity.

"2. A judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant factors essential for granting bail."

39. In **Deepak Yadav (Supra)** the first information report was lodged against Harjeet Yadav, Sushil Kumar Yadav and two unknown persons with the allegation that the accused persons fired at the deceased with common intention to kill him. The bullet shot hit his right cheek and made its exit through the other side leaving him severely injured. He was admitted to the hospital where he told his wife that he was shot by accused-Harjeet Yadav and one Sushil Yadav and that they were accompanied by two other persons as well. The statement given by the deceased was noted down by Shri Mahesh Kumar Chaurasia, SSP/ACP, Lucknow and Shri

Ashok Kumar Singh, SI/First Investigating Officer. Accused/Harjeet Yadav was arrested and one country made pistol with two live cartridges were recovered from him. After the death of the victim, the case was converted to one under Section 302 IPC. The Bail application moved by the accused-Harjeet Yadav was rejected by the Sessions Judge, Lucknow on the ground that he has been named on the basis of the information given by the deceased himself.

40. Being unsuccessful to obtain bail from the Sessions Court, the accused-Harjeet Yadav moved the High Court for grant of bail, where a plea has been taken that co-accused Sushil Kumar Yadav has been granted bail by the High Court on 18.10.2021 in Bail Application No. 8501 of 2021 and that the case of accused/Harjeet Yadav stands on identical footing making him entitled for bail on the ground of parity. The bail application was allowed vide order dated 22.10.2021. The operative portion of the judgement reads as under:

"Keeping in view the nature of the offence, arguments advanced on behalf of the parties, evidence on record regarding complicity of the accused, larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of ***Dataram Singh Vs. State of U.P. & Anr (2018) 3 SCC 22*** *and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.*

41. After considering pleuthera of judgements on the guiding principle for adjudicating a regular bail, Hon'ble Supreme Court in Deepak Yadav (Supra) held as under:

26. "The importance of assigning reasoning for grant or denial of bail can never be undermined. There is prima facie need to indicate reasons particularly in cases of grant or denial of bail where the accused is charged with a serious offence. The sound reasoning in a particular case is a reassurance that discretion has been exercised by the decision maker after considering all the relevant grounds and by disregarding extraneous considerations."

" xxxxxxxxxxxxxxxxxxx"

"39. ***Grant of bail to the Respondent No. 2/accused only on the basis of parity shows that the impugned order passed by the High Court suffers from the vice of non-application of mind rendering it unsustainable.*** *The High Court has not taken into consideration the criminal history of the respondent No. 2/accused, nature of crime, material evidences available , involvement of respondent No. 2/accused in the said crime and recovery of weapon from his possession."*

42. Hon'ble Supreme Court in **Brijmani Devi Vs. Pappu Kumar (2022) 4 SCC 497,** deprecated the practice to allow bail application without assigning any reason by observing as under:

"Thus, while elaborating reasons may not be assigned for grant of bail, at the same time an order de hors reasoning or bereft of the relevant reasons cannot result in grant of bail. It would be only a non speaking order which is an instance of violation of principles of natural justice. In such a case the prosecution or the informant has a right to assail the order before a higher forum."

43. Now the issue for consideration before this Court is whether the Coordinate Benches of this Court while granting bail to the co-accused have taken into consideration the gravity of the offence, guidelines laid down by Hon'ble Supreme Court referred to above and assigned any reason for granting bail.

44. In this case five persons namely Gulab Singh, Ram Singh (applicant), Lekhraj, Smt. Vimlesh and Smt. Shanti Devi have been nominated in the first information report. Out of the aforesaid five accused person, four accused namely Smt. Shanti Devi, Smt. Vimlesh, Gulab Singh and Lekhraj have been granted bail by the two different Coordinate Benches of this Court. In the order dated 01.4.20222, the Coordinate Bench of this Court while granting bail to Smt. Shanti Devi and Smt. Vimlesh after noting the submissions of the parties, held as under:

"Having heard the submissions of learned counsel of both the sides, nature of accusation and severity of punishment in case of conviction, nature of supporting evidence, prima facie satisfaction of the Court in support of the charge, reformative theory of punishment and considering the ***larger mandate of Article 21 of the Constitution of India*** *and the dictum of Apex Court in the case of* ***Dataram Singh Vs. State of U.P. and another, (2018)3 SCC 22,*** *without expressing any view on the merits of the case, I find it to be a case of bail."*

45. Co-accused Gulab Singh and Lekhraj have been granted bail by another Coordinate Bench of this Court vide order dated 09.9.2022 only on the ground of parity with the co-accused Smt. Shanti Devi and Smt. Vimlesh. The Court noted as under:

" Considering the facts and circumstances of the case as well as submissions advanced by learned counsel for the parties and enlargement of identically placed co-accused on bail, without expressing any opinion on the merits of the case, the applicants are entitled for bail."

46. In both the orders granting bail, no reason whatsoever has been assigned by the Coordinate Benches of this Court. It is a very serious matter. Firsty the applicant tried to outrage the modesty of a minor girl and when the father of the victim was going to lodge the first information report, he was beaten to death. The witnesses including the victim, who is the daughter of the deceased and Smt. Pushpa Devi, who is the wife of the deceased have fully supported the prosecution case. The danda, which was used in the commission of crime was also recovered at the pointing out of the applicant.

Analysis about Article 14

47. Now the other contention of learned counsel for the applicant is that not granting bail to a similarly placed co-accused on the ground of parity would amount to discrimination and would be violative of his fundamental right guaranteed under Article 14 of the Constitution. This issue has already been set at rest by the decision of nine judges Bench of Hon'ble Supreme Court in **Naresh Vs. State of Maharashtra, AIR 1967 SC 1,** wherein the Hon'ble Apex Court held as under:

"It is clear that the observations made by this Court in this case unambiguously indicate that it would be inappropriate to suggest that the decision rendered by a judicial tribunal can be described as offending Article 14 at all. It may be a right or wrong decision and if it is a wrong decision it can be corrected by appeal or revision as may be a permitted by law, but it cannot be said per se to contravene Article 14 of the Constitution."

48. Having heard learned counsel for the parties and examined the matter in its entirety, I find that as per post-mortem prepared by the Department of Forensic Medicine and Toxicology Vardhman Mahavir Medical College and Safdarjung Hospital, New Delhi as described above, the assault was so powerful that a piece of skull bone was found missing underneath cranlotomy wound from left fronti-temporo parietal region over an area of 13.0 cm x 10.0 cm. Linear fracture of length 2.2 cm present over floor of middle cranial fossa on left side. Sutural fracture of length 5.2 cm present along coronal suture on right side. Linear fracture of length 5.1 cm present over right temporal bone. Extravasation of blood present over fractured sites. I also find that the prosecution case is corroborated from the statement under Section 164 Cr.P.C. of the minor victim as well as from the injuries found on the body of the deceased as noted above. So far as the submission of learned counsel for the applicant that other co-accused have been granted bail, are concerned, I find substance in the submission of learned State Counsel that neither the facts of the case have been considered while granting bail order nor any reason has been assigned in granting bail to co-accused. I also find that case of present applicant is distinguishable from the case of other co-accused persons because there was no allegation against them with regard to outraging the modesty of the minor victim which has only been assigned to the present applicant and the further incident, which took place on 28.08.2021 was the outcome of the act committed by the applicant in the night of 27.08.2021. Further the Danda, which was used in the incident, was also recovered at the pointing out of the appellant.

49. In view of the verbose discussion, considering the overall facts and circumstances of the case as well as keeping in view the submissions advanced on behalf of parties, gravity of offence, role assigned to applicant, nature of injuries and severity of punishment, I do not find any good ground to release the applicant on bail.

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

51. However, It is made clear that the observations made herein above were only confined to the disposal of bail application and in no way be construed to have an expression on the merits of the case.

(2023) 4 ILRA 860
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SURENDRA SINGH-I, J.

Habeas Corpus Writ Petition No. 223 of 2023

Smt. Zainab Fatima @ Rubi & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Abhishek Kumar Mishra, Sri Khan Saulat Hanif, Sri Ravindra Sharma, Sri Shadab Ali, Sri Vijay Mishra, Sri D.S. Mishra (Senior Adv.)

Counsel for the Respondents:
G.A.

Civil Law-Constitution of India, 1950-Article 21 & 226-Habeas Corpus petition filed seeking direction to the respondents to produce the corpus before this Hon'ble Court and set them at liberty forthwith-Petitioners already invoked provisions of Section 151 CrPC and have been released on personal bonds which is a "procedure established by law"- No defect in the procedure adopted for releasing the petitioners on personal bond has ever been alleged-Petitioners are not controlled by any body or any authority or by any other person against whom a direction can be issued to produce him or her-Writ of Habeas Corpus would not be maintainable at the instance of a person, who has got himself released as per the procedure established by law i.e. Section 151 Cr.P.C. on his own promise, to claim that he shall be made free from his own promise made in the personal bond by issuing a writ of habeas corpus. (Para 18-26, 36-38)

Writ petition dismissed. (E-15)

List of Cases cited:

1. Rachna & anr. Vs St. of U.P. & others AIR 2021 (Allahabad) 109 (FB)

2. Markendey & ors. Vs St. & anr. 1976 (74) ALJ 88

3. Bal Mukund Jaiswal Vs Superintendent, District Jail, Varanasi & anr. 1998 A.L.J. 1428

4. Niranjan Singh & anr. Vs Prabhakar Rajaram Kharote & ors. (1980) 2 SCC 559

5. Chandra Dev Ram Yadav Vs St. of U.P. & anr. 2014 (1) ALJ 210

6. Udaybhan Shuki Vs St. of U.P. & ors. 1998 A.L.J. 2362

7. Sandal Singh Vs District Magistrate and Superintendent, Dehradun AIR 1934 Allahabad 148

8. Zahir Ahmad Vs Ganga Prasad, A.S.D.M., Ballia & anr. AIR 1963 Allahabad 4

9. Ram Manohar Lohia & ors. Vs St. of U.P. & ors. AIR 1968 Allahabad 100

10. Nirmal Jeet Kaur Vs St. of M. P. & anr. (2004) 7 SCC 558

11. Sunita Devi Vs St. of Bihar & anr. (2005) 81 SCC 608

12. Udaybhan Shuki Vs St. of U.P. & ors. 1998 A.L.J. 2362

13. In the matter of Madhu Limaye 1969 (1) SCC 292

14. Bhim Singh, MLA Vs St. of J & K & ors. AIR 1986 SC 494

15. Sunil Batra Vs Delhi Aministration (1980) 3 SCC 488

16. In the matter of Keshav Singh 1965 AIR (All) 148

17. Home Secretary (Prison) & ors. Vs H. Nilofer Nisha (2020) 14 SCC 161

18. Sapmawia Vs Deputy Commissioner, Aijal, 1970 (2) SCC 399

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri D.S. Mishra, learned Senior Counsel for the petitioners assisted by Abhishek Kumar Mishra, Sri Ravindra Sharma, Sri Sadab Ali, Sri Ravindra Sharma and Sri Vijay Mishra, learned counsels and Sri Manish Goyal, learned Additional Advocate General assisted by Sri A.K. Sand, learned AGA-I for the State-respondents.

2. We have heard learned counsel for the parties at length on preliminary objection that present petition is no longer maintainable as admittedly the petitioners have been released on personal bonds and they are not in illegal detention and in such case the petition has become infructuous.

3. Per contra, learned Senior Counsel for the petitioners disputed the same and submitted that even if petitioners are not in physical custody, the petition is still maintainable and has not been rendered infructuous as their movements are restricted due to personal bonds executed by them for their release.

4. Present petition has been filed seeking direction to the respondents to produce the corpus before this Hon'ble Court and set them at liberty forthwith.

5. Submission of learned Senior Counsel for the petitioners is that the petitioner nos. 2 and 3 are permanent resident of H.No. 52, Bhawani Nagar, Hapur Road, Meerut and being close relative of petitioner no. 1, who came at the house of the petitioner no. 1 from district Meerut and on 1.3.2023 petitioner nos. 2 and 3 were present at the house of the petitioner no. 1; petitioner nos. 1 and 2 are housewives and petitioner no. 3 is the minor daughter of the petitioner no. 2; at present, husband of the petitioner no. 1, namely, Khalid Azeem @ Ashraf (Ex-MLA) is in jail at District Jail-II, Bareilly and such the petitioner no. 1 is living at her Maika / parental house along with four minor children at Village Hatwa, Police Station Puramufti, District Prayagraj; on 1.3.2023 the petitioners were present at their house and on the said day at about 01:00 A.M. the police personnels of Police Station Puramufti and Dhoomanganj along with Special Task Force and Crime Branch Team raided the parental house of petitioner no. 1, where all the petitioners were residing breaking the front wall and the main door of the house even though no males were present in the house. The police personnel took rifle on forehead of petitioner no. 1 and also beaten the petitioners and other family members of the house with batons and sticks and also harassed the children at midnight. The petitioner no. 1 having four minor children who were all crying upon their mother being taken by the police; the police personnels of Police Station Puramufti and Dhoomanganj came at the parental house of the petitioner no. 1 without lady police and forcibly entered into the house of the petitioners after breaking wall and doors of the house and forcibly/illegally taking away the petitioners in their illegal custody in the night without showing any summon, warrant or any other documents; the police authorities arrested the petitioners being women in violation of Section 46(4) Cr.P.C.; the police personnels of the Police Station Puramufti and Dhoomanganj forcibly taking the petitioners into their illegal custody without disclosing the reason of their arrest/confinement; the petitioners are innocent lady and they are not involved in any case at any police station of district Prayagraj and district Meerut; the petitioners are not wanted in any criminal case; the police personnels of Police Station Puramufti and Dhoomanganj illegally detained the petitioners without any authority; the police illegally detained the petitioners since 1.3.2023 and till 3.3.2023 (i.e till the date of filing of the petition) the police did not produce the petitioners before any Magistrate; the family members are searching the petitioners from one police station to another but no one is telling anything about

the petitioners; on 2.3.2023 in all the newspapers news was published regarding arrest of the petitioners by the police and the police officers admitted that they have arrested the petitioners on 1.3.2023 and since then the petitioners are in their custody and the police officers also giving statement that they are interrogating the petitioners regarding the incident that had taken place on 24.2.2023 regarding which a first information report was registered on 25.2.2023 being Case Crime No. 114 of 2023, under Sections 147, 148, 149, 302, 307, 506, 34, 120B IPC, Section 3 of Explosive Act and Section 7 of Criminal Law Amendment Act, Police Station Dhoomanganj, District Prayagraj; the petitioners have no concern with the aforesaid FIR; the petitioners are not named in the aforesaid FIR, however, husband of the petitioner no. 1 and brother of the petitioner no. 2 have been made accused and the allegations levelled against the father of the petitioner is of criminal conspiracy; the intention of the police is not fair and any mishappening may be occurred at any point of time with the petitioners.

6. On the basis of supplementary affidavit it is submitted that on 2.3.2023 Mansoor Ahmad (father of the petitioner no. 1) filed an application before Chief Judicial Magistrate, Allahabad under Section 97 & 98 Cr.P.C. upon which report was sought from police station Dhoomanganj and on 3.3.2023 Head Moharrir, Police Station Dhoomanganj submitted his report mentioning therein that Smt. Zainab Fatima, Smt. Aaisha Noori and Km. Unzila Noori are not in the police station. Being not satisfied and upon the objection of the counsel of Smt. Zainab Fatima and others the learned CJM Allahabad again directed the Station House Officer, Dhoomanganj to submit parawise reply and thereafter on 4.3.2023 the Station House Officer, Dhoomanganj submitted his report mentioning therein that Smt. Zainab Fatima, Smt. Aisha Noori and Km. Unzila Noori have been challaned by the police of police station Puramufti under Section 151 Cr.P.C. and they have been released on personal bonds on 3.3.2023.

7. The admitted position thus, is that the corpus are not under physical detention as on date.

8. A preliminary objection has been raised by Sri Manish Goyal learned Additional Advocate General appearing for the State- respondents that the petitioners are admittedly not in detention/custody, therefore, present petition is no longer maintainable and/or has become infructuous. It is submitted that admittedly the provision of Section 151 Cr.P.C. was invoked and petitioners have been released on personal bonds on their own undertaking and no restrain has been put on them.

9. Learned counsel for the respondents has placed reliance on judgments in the cases of **Rachna and another vs. State of U.P. and others AIR 2021 (Allahabad) 109 (FB), Markendey and others vs. State and another 1976 (74) ALJ 88, Bal Mukund Jaiswal vs. Superintendent, District Jail, Varanasi and another 1998 A.L.J. 1428, Niranjan Singh and another vs. Prabhakar Rajaram Kharote and others (1980) 2 SCC 559, Chandra Dev Ram Yadav vs. State of U.P. and another 2014 (1) ALJ 210 and Udaybhan Shuki vs. State of U.P. and others 1998 A.L.J. 2362.**

10. Replying to the preliminary objection, Sri D.S. Mishra, learned Senior

Counsel for the petitioners submitted that even though the petitioners are not in physical custody but since they have been released on personal bonds, therefore, they are not at liberty to move freely, hence their personal liberty is still curtailed due to conditions imposed in the personal bonds. Submission, therefore, is that the present habeas corpus is still maintainable and has not become infructuous.

11. Learned counsel for the petitioners has placed reliance on judgments in the cases of **Sandal Singh vs. District Magistrate and Superintendent, Dehradun AIR 1934 Allahabad 148, Zahir Ahmad vs. Ganga Prasad, A.S.D.M., Ballia and another AIR 1963 Allahabad 4, Ram Manohar Lohia and others vs. State of U.P. and others AIR 1968 Allahabad 100, Nirmal Jeet Kaur vs. State of Madhya Pradesh and another (2004) 7 SCC 558, Sunita Devi vs. State of Bihar and another (2005) 81 SCC 608, Udaybhan Shuki vs. State of U.P. and others 1998 A.L.J. 2362, In the matter of Madhu Limaye 1969 (1) SCC 292, Bhim Singh, MLA vs. State of J & K and others AIR 1986 SC 494, Sunil Batra vs. Delhi Aministration (1980) 3 SCC 488 and In the matter of Keshav Singh 1965 AIR (All) 148.**

12. Sri D.S. Mishra, learned Senior Counsel appearing for the petitioners draws strength to his arguments mainly from **Zahir Ahmad (supra)** and **Udaybhan Shuki (supra).** Relevant paragraphs 4, 7 and 19 of **Zahir Ahmad (supra)** are quoted as under:-

"4. A preliminary objection has been 'taken on behalf of the State by Sri Tripathi, the learned Additional Government Advocate, that the petitioner having been bailed out and being out of jail 'custody, cannot maintain the present petition, it has been submitted on behalf of the State that before a writ for habeas corpus can issue, the person sought to be set at liberty must be in actual physical custody and inasmuch as bail has been granted to the petitioner and he has availed of the same, he is neither in custody nor his movements are restrained, with the result that no writ of habeas corpus can be issued. It is common ground that the petitioner has been bailed out and is in the custody of the bondsmen, if the expression, 'custody' can be used in respect of a 'bailee' and that he is no longer in jail custody. It cannot be denied that the question under consideration is a difficult one and not free from controversy. Even if the case were to be decided on first principles, we would have been inclined to hold that the fact that a person has been granted bail does not amount to his being set at liberty. It is true that after bail is granted, he is no longer in physical custody in the sense of being in a prison but it is difficult to say that he has liberty of action or even complete liberty of movement. In the surety bonds, the sureties definitely state that they will produce him on a date appointed by the Court. The failure to produce him on the appointed date entails not only the forfeiture of the surety bonds but also the consequence of the cancellation of "the bail and the person being lodged in jail. The movements of the person let out on bail are subject to the directions of the Court and the Court has always the power to cancel the bail at any time. Under these circumstances, we find it difficult either to believe or to hold that the mere fact of bail being granted leads to the result that the petitioner has been set at liberty and that the case is no longer amenable to the writ of habeas corpus. In Words and Phrases, Volume 19, at page, 6

the law on the point has been stated in the following words:

"The writ of 'habeas corpus' is the remedy which the law gives for the enforcement of the civil right of personal liberty..... The writ of habeas corpus is a writ of liberty, and its original purpose was for the release of persons illegally or forcibly imprisoned, but when it was made to appear that such detention was by virtue of the process of a Court, the writ was not granted, unless the proceeding or judgment supporting the process was absolutely void..... One under arrest, but at large on bail, is entitled to a writ of "habeas corpus" the same as if the arrest was accompanied by actual imprisonment; the purpose of the writ being to test the right of the Court or other body issuing the process to detain the person for any purpose by restraining him of his right to go without question."

This statement of law is based upon Mackenzie v Barrett, 141 F. 964 at p. 966. The report of the case has, however, not been produced before us.

7. It would appear from the statement of law as contained in Extraordinary Legal Remedies by Ferris that actual physical custody is not necessary and even if the person is subject to the orders of another to surrender at the time when he wants him to surrender, a writ of habeas corpus would lie.

19. We have already examined the various provisions occurring in the Code of Criminal Procedure relating to bail and release on bail and it is clear from them that whereas a person released on bail is not in physical confinement, he still remains under the control of the Court and notionally in the custody of the Court, and that persons, who are his sureties, are only the agents of the Court. For these reasons it appears to us that even a person who has been temporarily let out on bail but still on trial, can present an application for a writ of habeas corpus. We, therefore, overrule the preliminary objection made by the learned Additional Government Advocate."

(emphasis supplied)

13. For ready reference, paragraphs 8 to 12 of **Udhaybhan Shuki (supra)** are quoted as under:-

8. We shall take up the prayers one by one and in that light refer to the facts relevant in relation to such prayers. The first prayer made before us relates to a writ of habeas corpus for production of the petitioner before the Court and for his immediate release and for his being set at liberty forthwith. Undisputedly, the applicant was released on bail and is being physically released from custody does not arise. The learned counsel for the petitioner, however, submits that his custody still continued as he was released on bail and is not at liberty to move freely. In this connection the learned counsel for the petitioner relied on the decision of the Allahabad High Court in the case of *Zahir Ahmad v. Ganga Prasad, A.S.D.M. Ballia AIR 1963 All 4,* it was observed by a Division Bench of this High Court that the fact that a person had been granted bail did not amount to his being set at liberty. It was true that after bail was granted, he was no longer in physical custody in the sense of being in a prison but it was difficult to say that he had liberty of action or even complete liberty of movement as he continued to remain under the control of the Court and notionally in the custody of

the Court. The Court held on this reasoning that even a person who had been temporarily let out on bail but was still on trial would present an application for a writ of habeas corpus under Article 226 of the Constitution.

9. Zahir Ahmad in that case had made the application for a writ of habeas corpus to set him at liberty under certain backgrounds. A report was made to the S.D.M. by an S.I. of Police for action under Section 107 Cr.P.C. against Zahir Ahmad. The case was transferred to the Additional S.D.M. No order in writing was made by the Additional S.D.M. setting forth the substance of the information received, the amount of the bond to be executed, the term for which it was to be in force and the number, character and class of sureties required as provided under the law. He had simply issued notices along with warrants of arrest and as such is was argued that the order was not one under Section 112 Cr.P.C. and upon a preliminary objection the Division Bench had opined that although he was on bail the habeas corpus petition would lie at the instance of Zahir Ahmad.

10. On the facts of the case, however, the Division Bench was satisfied that in substance the provisions of Section 112 Cr.P.C. had been complied with and consequently it was of the view that under the circumstances operating in the case it was not possible to hold that the petitioner was being illegally detained. It was thus a case where the very detention was challenged due to some illegality in the initial order although the petitioner was released on bail. In the case at our hands the detention is said to be illegal for non compliance of certain provisions of the constitution and certain directions of the Cr.P.C. It is stated that the petitioner was not told the reasons of his arrest as required under Section 50 of the Cr.P.C. and was produced before the Court and the Court had no authority to remand him or even release him on bail rather the Court should have release him forthwith because of his unlawful arrest.

11. The aforesaid contention of the learned counsel for the petitioner is not acceptable to us. Even conceding that the applicant was not told the reasons of his arrest as required under Section 50(1) of the Cr.P.C., his production before the Court was made with an allegation of his involvement in a substantive case. Once the applicant was produced in Court the provisions of Section 167 Cr.P.C. would apply. This section states that whenever any person is arrested and detained in custody and the investigation cannot be completed within a period of 24 hours, he is to be produced before the nearest judicial Magistrate with the relevant entries in the diary. After his arrest the applicant was produced before a Magistrate. Section 167(2) Cr.P.C. requires than when such a person has been produced before a Magistrate he may authorise the detention of the accused in such custody as such Magistrate may think fit. Under Secion 437 Cr.P.C. the Magistrate was also empowered to grant him bail instead of sending him to custody. An order of the Magistrate either directing remand of the accused in custody or directing his release on bail may not be affected by any initial defect in the making of arrest. Thus the present custody of the petitioner, as being on bail under orders of the Court, may not be treated to be a wrongful detention and although suitable action may lie against the concerned police officer for non-compliance of Section 50(1) Cr.P.C., there may not be an order directing

the petitioner to be set at liberty the effect of which would be to discharge him from his bail bonds. In this connection a Full Bench decision of this High Court in the case of Bal Mukund Jaiswal v. Superintendent, District Jail, Varanasi as per Habeas Corpus Writ Petn. No. 9061 of 1994 reported in 1998 All LJ 1428 is relevant. This order was passed by the Full Bench when the matter was referred to it for answering a particular question. The Full Bench answered the question as follows (at p. 1430 of All LJ) :-

"Where an accused person is in judicial custody on the basis of a valid remand order passed under Section 209 or 309 Code of Criminal Procedure by the Magistrate or by any other competent Court then such accused person cannot be set at liberty by issuing a writ of habeas corpus solely on the ground that his initial detention was violative of a constitutional guarantee enshrined in Articles 21 and 22 of the Constitution of India."

12. In view of the aforesaid reasonings given by us and in view of the Full Bench decision, we are unable to hold that the petitioner's first prayer is tenable simply on the ground of alleged wrongful arrest."

(emphasis supplied)

14. Before proceeding further it would be relevant to take note of the provision of Article 21 of the Constitution of India, which is quoted as under:-

"21. **Protection of life and personal liberty.**- No person shall be deprived of his life or personal liberty **except according to procedure established by law."**

(emphasis supplied)

15. Article 21 clearly provides that no person shall be deprived of his life or personal liberty except "according to procedure established by law".

16. It is also relevant to take note of meaning of "habeas corpus' as provided under Law of Writs by V.G. Ramachandran Seventh Edition at page 5, which is quoted as under:-

"Habeas Corpus Meaning

"Habeas corpus" is a Latin term. It means "have the body", "have his body" or "bring the body". By the writ of habeas corpus, the court directs the person (or authority) who has arrested, detained or imprisoned another to produce the latter before it (court) in order to let the court know on what ground he has been arrested, detained, imprisoned or confined and to set him free if there is no legal justification for the arrest, detention, imprisonment or confinement.

According to the dictionary meaning, "habeas corpus" means "have the body", "bring the body-person-before us". Habeas corpus is a writ requiring a person to be brought before a judge or a court for investigation of a restraint of the person's liberty, used as a protection against illegal imprisonment.

It is a writ to a jailer to produce a prisoner in person, and to state the reasons of detention.

Habeas corpus is a writ requiring a person to be brought before a judge or court for investigation of a restraint of the

person's liberty, used as a protection against illegal imprisonment.

Habeas corpus is a writ requiring a person under arrest to be brought before a judge or into court to secure the person's release unless lawful grounds are shown for his or her detention."

17. In the same book at Sl. No. 15 at page 21 it has been provided that "when habeas corpus does not lie' and at Sl. No. 3 it had been clearly provided that where the prisoner or detenu has been released and habeas corpus has become infructuous.

"Ref: Talib Hussain vs. State of J & K, (1971) 3 SCC 118; Bhim Singh v. State of J&K, 1984 Supp SCC 504; Ram Jethmalani v. Union of India, (1984) 3 SCC 571; Manilal Chatterjee v. State of W.B., (1972) 3 SCC 836 (1); Competent Authority v. Amritlal Chandmal Jain, (1998) 5 SCC 615; Karimaben K. Bagad v. State of Gujarat, (1998) 6 SCC 264."

18. The scope of habeas corpus has been recently decided in the case of **Home Secretary (Prison) and others vs. H. Nilofer Nisha (2020) 14 SCC 161**. Paragraphs 12, 16, 20, 21, 22 and 23 whereof are quoted as under:-

12. Article 226 of the Constitution of India empowers the High Courts to issue certain writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any right conferred under Part III of the Constitution dealing with the fundamental rights. In this case, we are concerned with the scope and ambit of the jurisdiction of the High Court while dealing with the writ of habeas corpus.

16. A writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. Though the literal meaning of the Latin phrase habeas corpus is 'to produce the body', over a period of time production of the body is more often than not insisted upon but legally it is to be decided whether the body is under illegal detention or not. Habeas corpus is often used as a remedy in cases of preventive detention because in such cases the validity of the order detaining the detenu is not subject to challenge in any other court and it is only writ jurisdiction which is available to the aggrieved party. The scope of the petition of habeas corpus has over a period of time been expanded and this writ is commonly used when a spouse claims that his/her spouse has been illegally detained by the parents. This writ is many times used even in cases of custody of children. Even though, the scope may have expanded, there are certain limitations to this writ and the most basic of such limitation is that the Court, before issuing any writ of habeas corpus must come to the conclusion that the detenu is under detention without any authority of law.

20. Having held that a writ of habeas corpus is maintainable by a person who is under detention if his rights are violated, the question that remains to be answered is whether in the present case any right of the detenus was violated which could have led to the issuance of an order directing his release from prison. We may make reference to the judgment of this Court in B. Ramachandra Rao v. State of Orissa (1972(3 SCC 256, wherein it was urged before this Court that the orders of the Court directing the detention of the petitioner were illegal. In this case, the Court has held as follows:

"5....This Court does not, as a general rule, go into such controversies in proceedings for a writ of habeas corpus. Such a writ is not granted where a person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal and we are not satisfied that the present is not such a case."

21. In Kanu Sanyal v. District Magistrate, Darjeeling (1973) 2 SCC 674 this Court while dealing with the writ of habeas corpus has held as follows:

"4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty...."

22. In Manubhai Ratilal Patel v. State of Gujarat (2013) 1 SCC 314, an order of remand was challenged before this Court. After referring to a large number of judgments9, which we are not referring in detail since they have all been considered in this judgment, this Court held as follows:

"31....It is wellaccepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal...."

23. In Saurabah Kumar v. Jailor, Koneila Jail (2014) 13 SCC 436, this Court came to the conclusion that the petitioner was in judicial custody by virtue of an order passed by the judicial magistrate and, hence, could not be said to be in illegal detention. Justice T.S. Thakur, as he then was, in his concurring judgment held as follows:

"22. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced..."

(emphasis supplied)

19. For ready reference, paragraphs 5, 9, 10, 11 and 12 of **Markendey (supra)** are quoted as under:-

5. Briefly speaking, the allegation regarding malafide is that the petitioners were arrested by the executive authorities under the directions of some political party, which did not favour the petitioners and other students of their group. To us-it appears that this ground cannot now be taken, simply because the present position is that all these six petitioners have been granted bail and, therefore, they are in the custody of the Magistrate who granted bail. We have looked into the judicial record of Crime No. 63 and have found that bail has been granted to all the six petitioners. There being no allegation of malafide against the Magistrate, who granted bail, the allegation of malafide against the Police or the executive authorities has now, therefore, become irrelevant.

9. ....

The question whether a person who has been released on bail can present a petition for a writ of habeas corpus was specifically raised in Zahir Ahmad v. Ganga Prasad, and it was held that such a person remains under the control of the court and notionally in the custody of the court and he can, therefore, present a petition for a writ of habeas corpus. In the case of Babu Lal v. The State of Maharashtra, it has been laid down that a writ of habeas corpus can be presented by a person who has been released on bail.

10. We have examined the principle, which has been laid down in the aforesaid rulings. It is true that a person, who is on bail, can also present a petition, of habeas corpus, but the question still remains what relief can be granted to such a petitioner. In the case of Ram Manohar Lohia and so also in the case of Babu Lal it appears that the petitioner has challenged the legality of the provision of law under which the case was pending against him. It has been noted above that in the instant petition the legality of the provision of law has not been challenged and it has also not been said that there is no case under Sec. 188 of the Penal Code, 1860 pending against petitioners. Now the reliefs which have been claimed by the petitioners in the instant case are: (i) that the petitioners be released from jail and (ii) that the opposite parties should be restrained from enjoyment of the fundamental rights by the petitioners. Further, the petitioners have prayed that the detention should be declared illegal and invalid. So far as the first relief is already out of jail. The question of the validity of their detention has already been answered above, in the sense, that at present the petitioners are only under the notional custody of the Magistrate who has granted them bail. This notional custody could be challenged by the petitioners only on two grounds, which have already been indicated above. The question whether the detention of the petitioners prior to the granting of bail was valid or not is not relevant now. The prayer that the opposite parties should be restrained from the enjoyment of fundamental rights by the petitioners is quite vague and the Court cannot pass any such order. Thus, in brief, it is evident that the Court is unable to grant any relief whatsoever to the petitioners in the instant petition.

11. If a person who is alleged to have committed a, bailable offence is produced before a Magistrate, as provided by Sec. 436(1) of the Code of Criminal Procedure, the person so arrested shall be released on bail, if at any stage of the proceedings before the court he is prepared to give bail. This provision of law also empowers the court to release the person on executing a bond, even without sureties. Similarly Sec. 437 of the Code makes a provision for persons who have been arrested in a non-bailable offence and have been produced before a Magistrate. Thus the policy of the law is that wherever a person is arrested their for a bailable offence or for a non-bailable offence, he shall remain either in actual physical custody to which he may be remanded under the various relevant provisions of the Code, namely, Secs. 167, 209 or 309 of the Code of Criminal Procedure, or he may be released on bail on personal bond with or without sureties, which would mean that the person shall remain in the notional custody of the court. No third course is open to the Magistrate. Thus the position is that once a person has been validly arrested

in connection with an offence, he has either to remain in physical custody, and if that physical custody comes to an end, he will have to remain in notional custody so long as the proceedings are pending. Accordingly if at any stage it is found that there was some defect in the order or orders remanding the arrested person to physical custody, the order placing him in the notional custody of the court will not be necessarily vitiated. The physical restraint which once originated validly can come to an end only by placing him under the national custody of the court. If the physical custody becomes vitiated for some reason or the other, the court can order release, of the arrested person while issuing a writ of habeas corpus. But the court cannot order the release of the person from physical custody unconditionally, and it can only direct that the person be placed in notional custody of the court by admitting him to bail. In the instant case, the petitioners are in notional custody, and unless they could succeed in showing that this notional custody is illegal for some reason or the other, an order in their favour can be passed in these proceedings, even though there might the some defects in the order or orders remanding the petitioners to physical custody prior to the granting of bail to them.

12. The petition has been filed against the State of U.P. and the Superintendent of Central Jail, Naini. Because the petitioners are not confined in the Jail at all, it is evident that no relief can be granted against the Superintendent, Central Jail, Naini. It cannot also be said that the petitioners are in the custody of he State of U.P. In fact the petitioners are in the notional custody of the Magistrate who has granted bail to them, and no relief has been claimed against the Magistrate. If the petitioners are not in the custody of any of the opposite parties, the Court is unable to grant any relief. The object of a Writ of habeas corpus is not to punish previous illegality but to release a man from present illegal detention, and the writ must be directed to the person who is having the actual custody of the detenu.

(emphasis supplied)

20. Admittedly, the petitioners have already invoked provisions of Section 151 Cr.P.C. and have been released on personal bonds. The petitioners are, therefore, not in detention much less the illegal detention.

21. In the present case no defect in the procedure adopted for releasing the petitioners on personal bond has ever been alleged.

22. From the entire petition it is not clear against whom, after having been released on personal bonds, the directions are being sought for protection of the corpus. It is, therefore, clear that the main plank of argument of learned counsel for the petitioners is that even after release their liberty is curtailed in case certain conditions are imposed for production of the corpus at the command of the court or the authority.

23. In this regard judgment o**f Zahir Ahmad (supra)** is being relied on that under such facts and circumstances of the case after having been released on bail it was asserted that the personal liberty of the petitioner is still curtailed due to conditions imposed while releasing the detenu on bail, which was upheld by the Division Bench of this Court.

24. We may note that in the present case the petitioners have not been released on regular bail by the Court and have not

been put into custody of the sureties and they have been released on their own undertaking in the shape of personal bonds under Section 151 Cr.P.C. that they shall remain present whenever called for.

25. Thus, to say that the corpus is in their own custody due to personal understandings given by them only, would be a far fetched argument to sustain. In plain words, the said argument is not sustainable. Here, in the present case, the petitioners are not controlled by any body or any authority or by any other person against whom a direction can be issued to produce him or her. Moreover, to maintain their own life and liberty under Article 21 of the Constitution of India they have come forward to submit that the act (of release on personal bond) may be done with "procedure established by law". Therefore, it cannot be said that the custody of the petitioners is in illegal detention of themselves as admittedly, it is on their own undertaking / personal bonds they have been released under Section 151 Cr.P.C., which is a "procedure established by law".

26. **Zahir Ahmad (supra)** has been clearly distinguished by this Court in **Markendey (supra**) noticing the same in paragraphs 9 and 10 it was categorically held that the prayer that the opposite party should be restrained from the enjoyment of Fundamental Rights by the petitioners is vague and that the Court cannot pass any such order. In paragraph 11 question of notional custody of the Magistrate, who has granted them bail, was also considered and rejected. In paragraph 12 it was specifically mentioned that if the petitioners are in the custody of any of the opposite parties, the court is unable to grant any relief as the object of the habeas corpus is not to punish previous illegality but to release a man from present illegal detention and the writ must be directed to the person, who is in the actual custody of the detenue.

27. Subsequently, in the year 1998 also the case of **Zahir Ahmad (supra)** was considered by this Court in the case of **Udaybhan Shuki (supra)** and was clearly distinguished.

28. In aforesaid cases as held in **Zahir Ahmad (supra)** that even after release of the petitioner on bail he is not at liberty to move freely and therefore, he is in notional custody and hence habeas corpus petition would be maintainable was clearly noticed. However, in **Udaybhan Shuki (supra)** in paragraph 11 this Hon'ble Court clearly held that the contention of learned counsel for the petitioner is not acceptable to us and it was held that the custody of the petitioner as being on bail under orders of the Court, may not be treated to be a wrongful detention and may not be an order directing the petitioner to be set at liberty the effect of which would be to discharge him from his bail bonds.

29. The law laid down in **Bal Mukund Jaiswal (supra)** was also noted and the prayer of the petitioner that a writ of habeas corpus for production of the petitioner before the court after having been released on bail was specifically rejected. It is, therefore, clear that the law laid down in **Zahir Ahmad (supra)** is consistently being distinguished and in effect, is not finding favour in subsequent judgments of this Court.

30. We are also of the same view and opine that in case a person released on bail is permitted to challenge the imposition of the conditions or terms on which bail is granted, in a habeas corpus petition, on the

ground that the petitioner, although physically released is, however, in notional custody of the authority or the court and therefore writ of habeas corpus can be issued, would amount to nullifying the conditions or terms of the bail so imposed and thus, would amount to releasing the person unconditionally, which is contrary to the "procedure established by law" under Article 21 of the Constitution of India wherein, the life or personal liberty of a person can be subjected to procedure established by law. The law of grant of bail is a procedure established by law where a particular person is set at liberty from the physical custody.

31. We may also take note that the present case is even worse where the petitioners were released on their own personal bonds and are not even in notional custody of any third person or authority against whom writ of habeas corpus (to produce the corpus or set him at liberty) can be issued.

32. In our opinion the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India cannot be invoked to nullify the effect of statutory provisions and / or the procedure established by law. A reference may be made in this regard to the judgment of the Hon'ble Apex Court in the case of ***Sapmawia vs. Deputy Commissioner, Aijal, 1970 (2) SCC 399***. Relevant extract of paragraph 11 of the said judgment is quoted as under:-

"11. .....The order of release in the case of a person suspected of or charged with the commission of an offence does not per se amount to his acquittal or discharge and the authorities are not, by virtue of the release only on habeas corpus, deprived of the power to arrest and keep him in custody in accordance with law for this writ is not designed to interrupt the ordinary administration of criminal law. ....."

(Emphasis supplied)

33. We have also carefully gone through the other judgments cited by learned counsel for the parties and we find that the same are not exactly on the issue in hand. Hence, for the sake of brevity we are not inclined to deal with them separately.

34. At the cost of repetition it may be noted again that in **Markendey (supra)** in support of the argument that a writ of habeas corpus is maintainable was specifically raised in the light of judgment of **Zahir Ahmad (supra)** and was specifically considered and rejected. It was held that the court cannot order release of the person from physical custody unconditionally and it can only direct that the person be placed in notional custody of the court by admitting him to bail. While dealing with the question it was specifically held that the prayer that the opposite party should be restrained from the enjoyment of Fundamental Rights by the petitioners is quite vague and the court cannot pass such orders. After considering the scheme of Cr.P.C., specifically Sections 151, 209 and 309 it was further observed that the court cannot order to release a person from physical custody unconditionally by admitting him to bail and it can only direct that the person be placed in notional custody of the court by admitting him to bail. It was further held that if the petitioners are not in the custody under any of the opposite parties, the court is unable to grant any relief. The object of a writ of habeas corpus is not to punish previous illegality but to release a person from

illegal detention. The aforesaid observation was considered by two Division Benches of this Court in the case of **Markendey (supra)** and **Udaybhan Shuki (supra)**, which clearly reflects that a writ of the habeas corpus cannot be issued in favour of a person released on bail or on personal bond.

35. As per the Black's Law Dictionary 8th Edition, "Personal Bond' is a written document under which the obligator formally recognizes an obligation to do specific act; personal bond is a bond containing promise without security. This clearly reflects that in a case of personal bond no other person except the very individual, who is coming forward is involved. Thus, a person, who himself is making a promise to do certain act, as in the present case, to cooperate in judicial proceedings whenever required, is not even in notional custody of some/any other person.

36. Under such circumstances, it can be safely held that writ of habeas corpus would not be maintainable at the instance of a person, who has got himself released as per the procedure established by law i.e. Section 151 Cr.P.C. on his own promise, to claim that he shall be made free from his own promise made in the personal bond by issuing a writ of habeas corpus. In case, any such habeas corpus is held to be maintainable, this will give a handle to the persons, specifically, violators of law to wriggle out from their own promise and even in a case of bail or remand to get themselves free from any condition/term as may be imposed on them while releasing them from physical custody and would thus, render the entire administration of criminal justice ineffective and redundant.

37. In view of the discussions made hereinabove, we hold that the present petition after release of the petitioners on personal bonds has become infructuous. The claim of the petitioners that they are still in notional custody with their liberty curtailed and writ petition is still maintainable, is rejected. No such relief, i.e. release from custody, as claimed during course of argument by claiming that the petition is still maintainable, can be granted to the petitioners.

38. Present petition is accordingly **dismissed.**

(2023) 4 ILRA 874
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.04.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 9307 of 2020
connected with
C.M. Application No. 1A/14/2022
&
C.M. Application No. 25/2022
&
C.M. Application No. 15/2022

Master Devansh Agarwal & Anr.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Arun Sinha, Sri Siddhartha Sinha, Sri Sushil Kumar Singh

Counsel for the Respondents:
G.A., Sri Ashok Kumar Singh, Sri Deepk Agarwal, Sri Gantavya, Sri Gavrav Mishra, Sri Lalit Mohan Singh, Mr. Nirmit Srivastava, Mr. Prabhjit Jauhari, Sri Nirmit Srivastava, Sri R.P. Shukla, Sri Vivek Sonkar

Civil Law-Constitution of India, 1950-Article 226-Inter parental custody dispute pertaining to the minor child- Writ of Habeas Corpus seeking direction to the opposite parties to produce detenue and handover his custody to the petitioner No.2 (Mother)-Whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child-Welfare of the child must be decided on a consideration including the general psychological, spiritual and emotional welfare of the child-Court must be to choose the course which will best provide for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult-Custody of minor son shall remain with the mother-Visitation rights of father modified. (Para 23, 24)

Petition disposed off. (E-15)

List of Cases cited:

1. Nithya Anand Raghvan Vs St. (NCT of Delhi) & anr. 2017 8 SCC 454

2. Shradha Kannaujia (Minor) & anr. Vs St. of U.P. & ors. in Habeas Corpus No. 716 of 2020

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This case is listed before this Court being regular Bench, as per constitution/roster of this High Court.

2. C.M. Application No. 1A/14/2022 and C.M. Application No. 25/2022 have been moved by the respondent No.3 (father of the detenue) on 07.03.2022 and 02.12.2022 respectively for modification of the order dated 14.12.2021 and 06.01.2022 and C.M. Application No.15/2022 has been moved by the petitioner's next friend (mother of the detenue) on 07./08.03.2022 for modification of the order dated 06.01.2022 passed by co-ordinate Bench of this Court in the present habeas corpus writ petition.

3. Heard Shri Jyotindra Mishra, learned Senior Advocate assisted by Shri Sushil Kumar Singh, learned counsel for the petitioners, Shri Prashant Chandra, learned Senior Advocate assisted by Ms. Meha Rashmi, learned counsel for opposite parties 3 to 6 and Shri Diwakar Singh and Shri Hari Shanker Bajpai, learned AGA-I for the opposite parties 1 and 2 and perused the record.

4. The petitioners had filed this Habeas Corpus petition,bearing No. 9307 of 2020 with the following reliefs:

"(i) Issue a writ, order or direction in the nature of Habeas Corpus directing the opposite parties to produce the petitioner No.1/ Detenue and handover his custody to the petitioner No.2.

(ii) Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case."

5. The brief facts of the case are that opposite party no.3-Dr. Dinesh Agarwal and petitioner no.2 have serious differences which lead to cleavage in their matrimonial life, resulting their non judicial separation from matrimonial home situated at Katras Bazar Rajbari Road, Katras, Dhanbad, Jharkhand. The petition discloses that petitioner No.2 and opposite party No.3 married on 30.6.2017. Soon after marriage Dr. Dinesh Agarwal, opposite party no.3 and his family members started demanding Rs.40 lacs in dowry from the petitioner

no.2 as opposite party no.3 came to know that she has a P.P.F. account worth more than Rs.40 lacs. Apart from the said demand of dowry, the opposite party no.3 and his family members namely petitioner's father-in-law, Sri Jeewan Lal Agrawal and others started torturing her mentally and physically in connection with the said demand. Due to the harassment, petitioner no.1 was compulsed to live in Lucknow most of the time where the petitioner no.1, detenue was born on 3.7.2018. Petitioner no.1 and 2 were brought by the opposite party no.3 to Dhanbad after birth of detenue but due to constant harassment petitioner no.2 forced to come back to Lucknow with petitioner no.1 by the end of February, 2020 and had been staying in Lucknow ever since.

6. On 6.6.2020, the opposite party no.3 suddenly came to the house of the petitioner no.2 and pretended that he wants to reconcile with the petitioner no.2. He stayed there, but on the next morning at about 9 O'clock, the opposite party no.3 pretended to take the child out from the house. He has taken away the detenue, petitioner no.1 assuring the petitioner no.2 to come back after having a short drive with him. Opposite party no.3 even left his luggage at the house of petitioner no.2 to assure and keep her into impression that he will return with the petitioner no.1 but actually he ran away and kidnapped the petitioner no.1 detenue with the help of his driver. After that petitioner no.2 through their common friend came to know that the opposite party no.3 have reached at Katras, District- Dhanbad, State of Jharkhand taking away the detenue with him illegally from the custody of petitioner no.2. Petitioner no.2 when contacted the opposite party no.3, he told that petitioner no.2 should give access of her P.P.F. account to him if she wants petitioner no.1, detenue back.

7. Since the incident dated 7.6.2020 of abduction of petitioner no.1, the child is by his father (the opposite party no.3), he is in custody of father in Katras, District Dhanbad in the State of Jharkhand. This gave rise to the inter parental custody dispute pertaining to their minor child. For the purpose of brevity and convenience hereinafter in foregoing paras wherever contextually needed the opposite party no.3, the petitioner no.2 and the petitioner no.1 shall be addressed also as "father' "mother' and "the child/detenue' respectively.

8. At the time of incident the child detenue (petitioner no.1) was an infant of about 1 year and 9 months' age. The mother has stated that the detenue child is dependent on mother's milk and needs such care and protection which father cannot provide. She is highly educated lady, qualified in M.B.A. Finance and Human Resources, had worked as Assistant Professor in B.B.D. University at Lucknow but quit her job to take care of her child. She has been taking care of her child financially or otherwise since his birth and petitioner no.1, the detenue has never been parted from the petitioner no.2. She has a constant source of income being generated from her savings and residing with her parents in their own house at Lucknow. In support of her claim as to the financial competence, the petitioner no.2 has filed Income Tax Return of year 2019-20 issued by the Income Tax Department as Annexure-2, wherein the gross income is shown Rs.5,16,328/-. In the night of 6.6.2020, the opposite party no.3 landed at the house of the petitioner no.2 and virtually snatched away and kidnapped the

child in the morning of 7.6.2020 pretending to come back after a short drive with the child.

9. The instant petition was filed on 15.6.2020 and was first taken up on 18.6.2020. On 13.7.2020, a co-ordinate Bench of this Court had made following observations, which is reproduced hereunder:-

"Learned counsel for the petitioner submits that detenue aged about two years has been illegally snatched from the custody of petitioner no.2 and herculean effort was made by the concerned police to trace out the detenue but since the opposite party nos.3 and 4 are residents of Jharkhand State, the concerned local police is not cooperating with the U.P. Police in absence of any specific direction of this Court.

Learned AGA submits that effort was made to search out the detenue but the detenue could not be traced out.

In view of the above, issue notice to opposite party nos.3 to 6 through opposite party no. 2 i.e. Station House Officer, Police Station Aliganj, Lucknow to produce the detenue Master Devansh on 05.08.2020."

10. Again on 5.8.2020, a co-ordinate Bench of this Court had made following observations, the relevant portion is extracted and reproduced hereunder:-

"Sri R.P. Shukla, learned counsel for respondent nos. 3 to 6, submits that in pursuance to the order of this Court dated 13.07.2020, the child Master Devansh Agarwal could not be produced today as he is not well. A copy of the medical prescription dated 03.08.2020 has been produced today in Court. Sri Shukla prays for and is granted a week's time for bringing on record the said medical prescription and he would also indicate the medical condition of the child. The medical condition to be indicated on behalf of respondent nos. 3 to 6 would also indicate the medical certificate from a doctor as to whether the child is fit to travel from Jharkhand to Lucknow and in case the certificate does not indicate so then the child shall be produced before this Court on 14.08.2020."

11. On 20.1.2021, a co-ordinate Bench of this court had passed following order:-

"1. Heard Sri Siddhartha Sinha, learned counsel for the petitioners as well as learned A.G.A. for the State while Sri Vivek Sonkar, Advocate has put in appearance on behalf of opposite party No.s 3 to 6.

2. An application for recall of order dated 11.1.2021 along with vakalatnama has been filed in the registry by Sri Vivek Sonkar on 19.11.2020. Office has reported that it has not been able to trace any such application for recall of order dated 11.1.2021. In absence of the application for recall, I proceed with the matter.

3. It has been submitted by Sri Siddhartha Sinha that this Court by means of order dated 17.3.2020 had directed opposite party No.s 3 and 6 to produce the detenue Master Devansh Agrawal on 5.8.2020. A perusal of the order sheet dated 5.8.2020 indicates that on 5.8.2020 the detenue could not be produced and, therefore, by means of the order dated

5.8.2020 this Court directed for production of the detenue on 14.8.2020. It has been submitted that there was no sitting of this Court on the said date due to COVID 19 lock-down, therefore, this Court by means of order dated 27.8.2020 directed the detenue to be produced on 8.9.2020, on which date also there was no Court sitting due to the pandemic. It has been submitted that in the meanwhile opposite party No.2 in order to avoid producing the detenue moved an application for recall of the order dated 27.8.2020 which was rejected on 14.10.2020. Subsequently, on 11.1.2021 this Court directed for production of the detenue today i.e. 20.1.2021.

4. When the matter has been taken up Sri Vivek Sonkar, the new counsel appearing for opposite parties No.3 to 6, could not show any cogent reason for non-appearance of the detenue as directed by this Court vide its order dated 20.1.2021 today. He, however, submits that opposite party No.3 is in Jharkhand and they will appear on any date fixed by this Court. It has also been informed that as per direction of this Court a sum of Rs.30,000/- has already been deposited in this Court to show the bonafide and also to enable opposite party No.3 along with the detenue to appear before this Court.

5. In view of above, I see no reason as to why opposite party No.3 is not appearing before this Court along with the detenue. As, such, list this case on 28.1.2021 on which date opposite party No.3 shall appear before this Court along with the detenue Master Devansh Agarwal.

6. It is made clear that if this order is not complied with, the Court will have no option except to adopt coercive methods for their appearance."

12. That during pendency of the instant habeas corpus the opposite party No.3 filed a Special Leave to Appeal (Crl.) No.586 of 2021 against the order dated 20.1.2021. Hon'ble Supreme Court referred the matter to Supreme Court's Mediation Center and dismissed the aforesaid Special Leave to Appeal vide order dated 25.1.2021. The order dated 25.01.2021 is quoted herein below:

"The High Court directed the petitioner No.1 to be present in Court on 20.1.2021 along with the child in a writ of Habeas Corpus filed by the respondent No.3. We are informed by the learned counsel for the petitioners that the matter is now listed for hearing on 28.01.2021.

Learned counsel for the petitioners brought to our notice an order passed by this court on 11.01.2021 in Transfer Petition (c) Nos.1371-1372 of 2020 filed by Respondent No.3 by which the matrimonial dispute has been referred to the Supreme court Mediation Centre.

We are not inclined to interfere with the order impugned in the special leave petition. However, the petitioner is at liberty to bring to the notice of the High Court that the entire dispute is referred to the Supreme Court Mediation Centre and the transfer petition was directed to be listed after eight weeks.

The special leave petition is dismissed.

Pending application (s), if any, shall stand disposed of."

13. That during pendency of the mediation proceedings at Hon'ble Supreme

Court Mediation Centre, the case was re-listed before a co-ordinate Bench of this Court on 28.01.2021 and a co-ordinate Bench of this Court had passed the following order:

"1. Today when the matter has been taken up Sri Deepak Agrawal, Advocate has put in appearance on behalf of respondent no. 3. He has placed an order of Hon'ble Supreme Court dated 25.01.2021, passed in SLP (Civil) No. 586 of 2021. According to which it seems that one transfer application has been preferred before the Apex Court where the present matrimonial dispute has been referred to the Mediation Center of the Apex Court. The aforesaid SLP was filed against the earlier order of this Court dated 20.01.2021, where this Court had directed respondent no. 3 to appear before this Court alongwith detenue Master Devansh Agarwal.

2. Perused the order of Apex Court dated 25.01.2021.

3. Today, attention of this Court has been drawn towards the order of the Apex Court dated 11.01.2021, passed in Transfer Petition (Civil) No. 1371 of 2020.

4. The conduct of the counsel appearing for opposite party no. 3 is highly regrettable inasmuch as, the earlier orders passed by the Hon'ble Apex Court were never brought to the notice of this Court, which lead this Court to pass the order dated 20.01.2021.

5. In the light of the apology made by learned counsel appearing for respondent no. 3, this Court is not passing any further order in this regard.

6. Looking into the order of the Apex Court dated 11.01.2021, as well as 25.01.2021, list this case after two month's.

7. Learned counsel for the parties shall inform this Court, on the next date of listing, about the outcome of the mediation proceedings at Supreme Court."

14. Thereafter in pursuance of order dated 25.1.2021 passed in Special Leave to Appeal (Crl.) No.586 of 2021, the parties appear before the Mediation Center of Hon'ble Supreme Court and after several rounds of single and joint session of mediation and after considering options available with them parties could not arrive at any amicable solution to resolve their dispute, as such, the mediation failed. The true copy of the Mediation Report is made annexure no.2 to the supplementary affidavit, which is reproduced hereunder:-

"Comprehensive mediation sessions were held with parties on 01.02.21, 02.01.21 & 04.02.21 through virtual mode and on 08.02.21 physical mediation at Supreme Court Mediation Centre.

However, after several rounds of single and joint session of mediation and after considering options available with them parties could not arrive at any amicable solution to resolve their dispute."

15. Thereafter, the instant habeas corpus petition was listed on 14.12.2021 and a co-ordinate Bench of this Court had disposed of the instant petition and the operative portion of the observations/directions is reproduced hereunder:

" Here, in the present case the detention of the minor child by the father is held illegal and without authority of law. Further, it has been observed by this court during pendency of petition several orders of the court with regard to the production of child and even to facilitate the meeting of the mother with the child were flouted over by the father. This is enough to show that father not only has taken away the child illegally from the custody of mother but also he had not left any opportunity for the child to see his mother or the mother to see her child. This conduct of the father if taken with the facts of differences between the husband and wife i.e., the mother of the child by reason of which they are separately residing and the fact that the F.I.R. under Sections 498-A, 336, 506 of I.P.C. and Section 3/4 of Dowry Prohibition Act is lodged against father with regard to cruelty in connection with the demand of dowry and abduction of the child, there is reason to believe that father in furtherance of his malice towards mother will also make brain wash of the child towards his mother that would not be in the interest and welfare of the child. The mother is competent enough to take care, maintenance and upbringing of the child with the love and affection. She deserves to have custody of the child removing the same from the father.

In view of the above circumstances, the writ of habeas corpus is required to be issued to opposite party no.3 to produce the child before this Court on 20.12.2021 for handing over the same to the petitioner no.2 (mother), however, he will be at liberty to get finally decided his rights of exclusive custody as guardian by the family court or court of Guardians and Wards Act which are competent to declare the same in the welfare of the child on the basis of evidences produced before the said courts.

Opposite party no.3 is directed to produce the child in the court at 2:00 p.m. on 20.12.2021 for handing over the custody of the child to the petitioner no.2 (mother). The order regarding the visitation rights of opposite party no.3 will be passed after the child is produced in the court.

The opposite party no.2, S.H.O. Police Station Aliganj, Lucknow is directed to ensure the production of child alongwith opposite party no.3 in the court on the date fixed for implementation of the order. The expenses for the journey with companion if any deposited in the court pursuant to the order dated 20.1.2021 still remains unexhausted which shall be paid to the opposite party no.3 by the Senior Registrar of the court after handing over the child by the opposite party no.3 to petitioner no.2 (mother).

The instant writ petition of habeas corpus is disposed of in the above said terms.

Office is directed to list for implementation of the order on 20.12.2021.

The Senior Registrar of the court is directed to promptly serve the copy of the judgment to the opposite party no.3 in person in addition to the service in ordinary process through e-mail also and to the Superintendent of Police, Dhanbad for facilitating the implementation of order through his official Fax and e-mail.

The opposite party no.2, S.H.O., Police Station Aliganj, Lucknow shall get copy of the order promptly and constitute a police team to recover the child with opposite party no.3, so as to ensure the

production of the child before the court on the date of implementation."

16. Thereafter the case was again listed on 20.12.2021, 21.12.2022 and again on 05.01.2022 and a co-ordinate Bench of this Court passed the following order:

"This case is placed today before the Court from notice after 02:00 P.M.

The case is called out.

Learned counsel for the petitioner Sri Ram Chandra Singh, Advocate and learned A.G.A. for the State, Sri Anurag Singh Chauhan, Advocate are present in the Court.

Vide order dated 21.12.2021, the private respondent no.3 i.e. Dr. Dinesh Agarwal on the assurance of his learned counsel Ms. Rose Mary Raju, Advocate was directed to appear with child, namely, Master Devansh Agarwal before the Court at 02:00 P.M. and in case of his default, the opposite party no.2 i.e. Station House Officer, Police Station Aliganj, District Lucknow was also directed to comply with the order in terms of order dated 14.12.2021 by ensuring his production alongwith the child "Master Devansh Agarwal". Learned A.G.A. was also directed to ensure compliance of the order.

Today, the petitioner-mother of the child "Master Devansh Agarwal", Smt. Deepti Goyal is personally present before the Court, however, none is present on behalf of the opposite party no.3, namely, Dr. Dinesh Agarwal.

The Station House Officer, Police Station Aliganj, District Lucknow who was directed to ensure the production of child alongwith Dr. Dinesh Agarwal in the Court though present in the Court but the non-compliance is explained by him that a team constituted for the compliance of the order is still stayed at the place of abode of opposite party no.3 i.e. Dr. Dinesh Agarwal at Katras Bazar, Rajbari Road, Dhanbad, District Dhanbad, State of Jharkhand, which informed the Station House Officer that Dr. Dinesh Agarwal left the place for Delhi alongwith the child, he is still in Delhi and is awaited at his home district.

Learned A.G.A. informs on the basis of conversation made with the Station House Officer, Police Station Aliganj, District Lucknow that the case is placed before the Court today through notice but the Station House Officer, Police Station Aliganj, District Lucknow is present in the Court to explain the situation. He informed in accordance with the information sent by his team in District Dhanbad, State of Jharkhand that the private opposite party no.3 i.e. Dr. Dinesh Agarwal has to come tomorrow from Delhi to Lucknow through air as his Special Leave Petition against the order stands dismissed today by order of the Court.

Be so as it may.

Office of the Registrar (Listing) is directed to list the matter before the Court tomorrow i.e. on 06.01.2022.

It is further taken into notice that the office of the Registrar (Listing) was in apparent error whatsoever reason may be therefor in not listing the case in the cause list in accordance with the order dated 21.12.2021 on the date fixed i.e. 05.01.2022 for personal appearance at 02:00 P.M. Such error should not be

repeated further and the officer/official who committed the default in such non listing be called for their explanation, the conclusion be communicated to this Court by the Registrar (Listing)."

17. Thereafter, in compliance of order dated 05.01.2022, the case was again listed on 06.01.2022 and a co-ordinate Bench of this Court passed the following order:

"Called on.

Today on 06.01.2022, Sub Inspector Sri Durga Prasad Yadav, PNO 930440020 and lady Constable Ms. Antima Singh PNO 112304472, Police Station, District Lucknow appeared before the Court to produce the child Master Devansh Agarwal with his father Dr. Dinesh Agarwal in Court in compliance of judgment and order dated 14.12.2021 and subsequent order dated 21.12.2021.

In accordance with the order dated 05.01.2022 passed in Special Leave to Appeal (Crl.) No. 10080 of 2021 (Dr. Dinesh Agarwal Vs. State of U.P. and others) by Hon'ble Apex Court with direction to hand over the child to mother at 2:00 p.m., the child is handed over today to the mother Smt. Deepti Goel.

The father Dr. Dinesh Agarwal, private opposite party no. 3 and mother, next friend of the child Master Devansh Agarwal, Smt. Deepti Goel both have signed the ordersheet with regard to delivery of child to the mother and receiving by the mother, the petitioner's next friend.

In the order dated 14.12.2021, order as to visitation right to father was kept contingent upon the handing over the child by opposite party no.3, Dr. Dinesh Agarwal to the petitioner's next friend Smt. Deepti Goel, therefore this is the occasion to pass the order with regard to right of visitation of the child to the father.

(i) On conversation with opposite party no. 3, Dr. Dinesh Agarwal, father of the child Master Devansh Agarwal, as per his request, on every weekend (Sunday) shall visit the child at the residence of petitioner's next friend Smt. Deepti Goel i.e. B-47, Sector-H, Aliganj, District Lucknow where the petitioner's next friend the mother Smt. Deepti Goel use to reside with the child.

(ii) In case, for any reason if opposite party no. 3 Dr. Dinesh Agarwal fails to visit the child on Sunday, after informing the next immediate day after Sunday within one or two days to the petitioner's next friend Smt. Deepti Goel, may visit the child on that altered day.

(iii) Reciprocally, the petitioner's next friend, mother of the child Master Devansh shall ensure to remain present at the House No. B-47, Sector-H, Aliganj, District Lucknow for the purpose of complying with the direction as to the visitation right given to the father or on any other date as stipulated herein-above. The mother shall not leave or change the house of her abode with child without seeking prior permission of the Court and informing to the father of the child, opposite party no. 3. She will not leave with child Master Devansh the jurisdiction of the Court without prior permission as directed herein-above.

(iv) The father, opposite party no. 3 will have the right to visit the child Master Devansh within 10 a.m. to 5 p.m. in day time in the presence of petitioner's mother or any other family members of her parental house, in their supervision and control, however they are not permitted to make any obstruction in such visiting of the child by the father.

(v) The father of Master Devansh, opposite party no. 3, will have a right to contact with the child Master Devansh his son, telephonically either audio or video mode. For this purpose the mother will facilitate such telephonic connection with father of the child. It may be appropriate for both of them (father and mother of the child Master Devansh) to fix a particular time for the purpose of telephonic conversation with child.

(vi) The father if wants to give any gift in love and affection with child, brings anything for his use or do something necessary for well being of child, the mother, petitioner's next friend or any of the family members of her parental house will not make any forbiddance or obstruction in such acts. However, father shall keep in mind that such things would be safe in use and occupationed by the child.

(vii) Since the child is of so young age that still is under scheduled vaccination prescribed by the health department, the record of vaccination and as to the further vaccination shall be handed over by the father Dr. Dinesh Agarwal to the mother Smt. Deepti Goel as soon as possible within 15 days from the date of order so that further vaccination, if any, may be given timely without failure on her part.

(viii) It would be the duty of the father, whenever he visits the child to maintain the safe distance, put mask and keep the hand sanitized and to follow the protocol of the Covid-19 guidelines.

(ix) It is expected that the father till now has been twice vaccinated. If it is not so, he will ensure to be vaccinated twice as soon as possible. Mother shall also keep herself vaccinated twice.

(x) In case, the father is twice vaccinated with Covid-19 Vaccine, the rider of the safe distance and putting mask need not to be followed during visitation.

Looking into the pendency of matrimonial petition in competent court of law, the request of opposite party no. 3 with regard to overnight stay during visit to the child in the home of the petitioner's next friend, the mother of the child, is not permitted. However, this would be subject to the result of possible mediation held between them in such legal proceeding."

18. The respondent No.3, father of the detenue moved C.M. Application No. 1A/14/2022 and C.M. Application No. 25/2022 with a prayer to recall the order dated 14.12.2021 and 06.01.2022 and further prayed that the custody of the minor petitioner Devansh be ordered to be handed over to his own father and the orders dated 14.12.2021 and 06.01.2022 be recalled/reviewed or modified.

In the aforesaid application the respondent No.3 has submitted that vide order dated 06.01.2022 the minor child has been handed over to the mother and the visitation rights were granted to the father, which allowed the father to meet the minor

child every Sunday from 10.00 a.m. to 5 p.m. at the residence of the mother.

In the aforesaid application the respondent No.3 has submitted in terms of the order dated 06.01.2022, the respondent No.3 reached the petitioner's house at the time appointed by this Hon'ble Court ie., 10:00 am. Though the minor child was present, he was surrounded by his mother, mother's sister and the grandmother of the child, leaving no opportunity for the child to interact with the respondent No.3. The atmosphere was far from normal and the minor child was in no position to feel free to interact with the father. The respondent No.3 requested the minor petitioner's mother, her sister and her mother to kindly allow the respondent No.3 to interact with the child without the child being intimidated as was being done but his requests were not acceded to. In order to be able to converse and interact with his minor son, as specifically permitted by this Hon'ble Court, the respondent No.3 had taken a tablet (electronic device) with him, through which he could connect with his son and both converse with him as well as see him on the video, which would not only allow the strong bond which subsists between the minor child and the father is not eroded and the minor child has the advantage of shared parenting which has since been acknowledged as the best mode of parenting in the world.

The respondent No.3 has further submitted that every effort is being made by the mother to wash the mind of the child against the respondent No.3 and by not allowing the minor child to meet the respondent No.3, the petitioner No.2 is endeavouring to detach the child from the respondent No.3 even at the cost of wilful violation of the orders passed by this Hon'ble Court and against the welfare principle.

The petitioner No.2 has wilfully neglected to comply with the orders passed by this Hon'ble Court as a repercussion whereof serious detriment has been caused in the up bring of the minor child Devansh and his welfare is in jeopardy.

Learned counsel for the respondent No.3 has further submitted that respondent No.3 is a practising spine surgeon in Dhanbad, with his own clinic and established practice. He travels to Lucknow on weekends taking leave from his practice, covering a distance of over 800 kms via multiple modes including overnight train and road journey to meet his son every Sunday. His visitation from 10.00 a.m. to 5 p.m. every Sunday which currently takes place at the residence of the petitioner No.2, is always frustated by the petitioner No.2 and her family members and order dated 06.01.2022 passed by this Hon'ble Court is not being complied with by them. The minor child is being deprived of the love an affections of his own father, and the father is not able to interact with his son meaningfully. He further submitted that to be close to his son and facilitate a meaningful interation, the father has taken on rent premises barely 500 meter from the house of his wife (petitioner), situated at C-137, Sector J, Aliganj, Lucknow. The premises is a two bedroom park facing house, furnished, safe and comfortable with ample space for the child to be with the father and spend quality time with him. During this period if the mother of child wants to come and stay with the child and the father (respondent No.3), the father would have absolutely no objection. The child be permitted to interact with his cousins and grandparents. The father may

take the child for outings and bring him out of his shell by taking him around in the neighbourhood park, science centre, restaurants, mall sports activities etc.

Learned counsel for the respondent No.3 has further submitted that a good Hotel may also be serve as the neutral venue for visitation from 10 a.m. to 5 p.m. every Sunday. Hotel Clarks Awadh is situated about 3 km from house of the mother. From Monday to Friday the father may be allowed to contact his son on video calls on two days at a time to be fixed by this Hon'ble Court. The calls should be meaningful and last atleast 10 to 15 minutes and not disconnected after 30 second or so. The telephone number may be indicated in the order and must be kept on at all time.

19. The petitioner's next friend, mother of the detenue moved C.M. Application No. 15/2022 for modification of the order dated 06.01.2022 with the following relief (s):

(a) In Clause-I in the order dated 06.01.2022 of this Hon'ble Court the visitation right of the Father (opposite party No.3) on every weekend (Sunday) be reduced to one Sunday every month and if for any unforeseen reasons the Sunday (One) is not feasible then alternate day i.e. next day but the visitation be of opposite party No.3 with the minor petitioner be reduced to once in a month.

(b) In Clause-IV in the order dated 06.01.2022 of this Hon'ble Court be not construed to be from 10.00 a.m. to 5.00 p.m. continuously i.e. 7 hours meeting for opposite party No.3, it should be 1 hour or 1.5 hours or 2 hours i.e. an ideal meeting.

(c) In furtherance to the direction of this Court in its order dated 06.01.2022 a further rider be made on opposite party No.3 not to give/show the video clip to minor petitioner and no Junk Food/Drinks like Frooti, Cold Drink, Ice Cream be restricted.

(d) In furtherance to the direction of this Court in its order dated 06.01.2022 a further rider be imposed on Opposite Party No.3 while visiting to minor petitioner, he should keep Laptop, Mobile to put outside the house in the safe custody of guards of the house.

(e) In furtherance to the direction of this Court in its order dated 06.01.2022 a further rider/restrictions be imposed on Opposite Party No.3 while visiting to minor petitioner, he should keep Laptop, Mobile to put outside the house in the safe custody of guards of the house."

20. Learned counsel for the petitioners submits that the respondent No.3 on meetings days continuously shown the video games and feeding Junk Fook like Cakes, Chips, Frooti, Toffee, Lollipop and James all the time during meeting, resulting which twice the minor petitioner/detenue suffered from diarrhoea after eating lollipops. He further submits that the visitation on every Sunday by the respondent No.3 has made the distraction of the minor petitioner/detenue and had adversely affected mental and physical growth and development of minor petitioner/detenue. The behaviour of the respondent No.3 during meeting is hugging and clutching the minor petitioner for 3-4 hours continuously by showing video game and does not allow the minor petitioner/detenue to sleep and keep him awake and after over of meeting the minor

petitioner/detenue feels adversely and looks abstracted for days to come.

21. Learned counsel for the petitioners further submits that the visitation rights/meeting of respondent No.3 with the minor petitioner/detenue is not fruitful because of the defective attitude of the respondent No.3 regarding the welfare of minor petitioner/detenue should have been focused by the respondent No.3 and not to becoming a trouble for the healing development of minor petitioner.

22. Learned Counsel for the petitioners submits that the petitioner's next friend/ mother of the detenue is well educated having M.B.A. in Finance and Human Resources she is physically , financially and emotionally very much eligible for taking care of child in every way. It is further argued that the cost and expenses of delivery of the child were incurred by her She has a constant source of earning accrued from the interest over her savings in Bank. It is further argued that the mother was in a reputed job of teaching as an Assistant Professor in BBD University at Lucknow but since birth of child, only for the purpose of looking after him and care she left that job. Thus, she is mentally and financially capable to keep the detenue/ her son-Master Devansh Agarwal.

23. **After considering the arguments as advanced by learned counsel for the parties this Court finds that minor child should not be deprived of the love and affection of both the parents as deprivation results in a grave phycological impact upon the impressionable and innocent disposition of a child in his formative years and in this case the minor child is being deprived of the love an affections of his own father, and the father is not able to interact with his son meaningfully. Whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. Further the question of custody cannot be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. It is further held that the welfare of the child must be decided on a consideration including the general psychological, spiritual and emotional welfare of the child. While resolving the disputes between the rival claimants for the custody of a child, the aim of the Court must be to choose the course which will best provide for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult.**

In the case of **Nithya Anand Raghvan v State (NCT of Delhi) and another 2017 8 SCC 454**, it was held by Hon'ble Apex Court that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed

over to the care and custody of any other person. The relevant observations made in para 44 to 47 in the judgement are being reproduced herein below:

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in **Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674,** has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in **Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247**, has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In **Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42**, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at

the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

Similarly, in the case of **Shradha Kannaujia (Minor) and Another ,Vs State of U.P. and 5 others** in Habeas Corpus No. 716 of 2020 Single bench of this Hon'ble court was pleased to observe as under:

7. "It is well settled that writ of habeas corpus is a prerogative writ and an extraordinary remedy. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in case of **Sayed Saleemuddin vs. Dr. Rukhsana and others (2001)5 SCC 247** and it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. In said case it was held as under:-

"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court..."

24. In the present case the detenue is living with his mother as directed by a co-ordinate Bench of this Court vide order dated 06.01.2022. The custody of minor son Master Devansh Agarwal shall remain with the mother but the parties will be at liberty to get their exclusive rights for custody of the minor son Master Devansh Agarwal as guardian by filing appropriate application under the Guardians and Wards Act or before any other forum in accordance with law.

Further, in the interest of justice and considering the arguments advanced by learned counsel for the parties, the orders dated 14.12.2021 and 06.01.2022 are modified to the following extent:

1. During Summer Season (April to September): Dr. Dinesh Agarwal, father of the detenue-Master Devansh Agarwal as agreed will have right to visit the child Master Devansh at the residence of detenue's mother Smt. Deepti Goyal at House No. B-47, Sector-H, Aliganj, District Lucknow, where she used to reside with the child **between 10.00 a.m. to 01.00 p.m. on every Sunday of each month w.e.f. 09.04.2023 and onwards** in

the presence of mother of the detenue, namely, Smt Deepti Goyal or any other family members of her parental house, in their supervision and control, however they are not permitted to make any obstruction in such visiting of the child by the father.

Further on the same day, Dr. Dinesh Agarwal, father of the detenue-Master Devansh Agarwal, shall have visitation rights to meet Master Devansh Agarwal in the **neighbourhood park i.e. Science Centre, Aliganj, Lucknow between 5.00 p.m. to 7.30 p.m.** in the presence of detenue's mother/ her next friend Smt Deepti Goyal or any other family members of her parental house, in their supervision and control, however they are not permitted to make any obstruction in such visiting of the child by the father and **before 8.00 p.m.** the minor child should be safely given in the custody of detenue's mother/ her next friend Smt Deepti Goyal at her residence address, as noted above by the father-respondent No.3 Dr. Dinesh Agarwal.

2. **During Winter Season (October to March)**: Dr. Dinesh Agarwal, father of the detenue-Master Devansh Agarwal, shall have visitation rights to meet Master Devansh Agarawal in the **neighbourhood park i.e. Science Centre, Aliganj, Lucknow between 10.00 a.m. to 1.00 p.m. on every Sunday of each month** in the presence of mother of the detenue/ her next friend, namely Smt. Deepti Goyal or any other family members of her parental house, in their supervision and control, however they are not permitted to make any obstruction in such visiting of the child by the father and before 1.30 p.m. the minor child should be safely given in the custody of detenue's mother/ her next friend Smt Deepti Goyal at her residence address, as noted above.

Further on the same day Dr. Dinesh Agarwal, father of the detenue-Master Devansh Agarwal will have to right to visit the child Master Devansh at the residence of Smt. Deepti Goyal at House No. B-47, Sector-H, Aliganj, District Lucknow, where she used to reside with the child **between 05.00 p.m. to 07.30 p.m. on every Sunday of each month** in the presence of detnue's mother/ her next friend or any other family members of her parental house, in their supervision and control, however they are not permitted to make any obstruction in such visiting of the child by the father.

3. The grandfather and grandmother of the detenue-Master Devansh Agarwal are also permitted to meet the detenue along with Dr. Dinesh Agarwal, father of the corpus **on fourth Sunday of each month (January to December)** at any standard Hotel/Shopping Mall/Restaurant within the 5 Km radius of house of petitioner's next friend/mother-Smt Deepti Goyal for refreshment and outing and to build the social and mental ability of the child in the **morning between 10.00 a.m. to 1.00 p.m. for the first meeting and in the evening between 5.00 p.m to 7.30 p.m. for the second meeting.** The minor child should be safely given in the custody of petitioner's next friend / mother-Smt Deepti Goyal at her residence address i.e. House No. B-47, Sector-H, Aliganj, District Lucknow **before 1.30 p.m in the aftenoon after first meeting and before 8.00 pm in the night after second meeting** . The petitioner-Smt Deepti Goyal and her one relative may also accompany the detenue, if they so desired during that period.

4. In case, for any reason if respondent No. 3-Dr. Dinesh Agarwal fails to visit the child on Sunday, after informing the next immediate day after Sunday within one or two days to the petitioner's next friend/ mother Smt. Deepti Goel, may visit the child on that altered day.

5. Dr. Dinesh Agarwal, father of the detenue- Master Devansh Agarwal, has right to contact with his son telephonically either audio or video mode. For the purpose of telephonic conversation, Smt Deepti Goyal, the mother will facilitate the child with telephone/mobile phone. It may be appropriate for both of them i.e. father and mother of the detenue-Master Devansh to fix a time for telephonic conversations between the children and his father not less than **ten minutes.**

6. If the father of the child wants to give any gift on account of love and affection of his child or do anything for well- being of child at house/shopping mall/park then mother of child or any family members of Smt. Deepti Goyal will not make any objection. However, father shall keep in mind that such thing will be given, which are for use and safety of the children.

7. Reciprocally, the petitioner's next friend, mother of the child Master Devansh shall ensure to remain present at the House No. B-47, Sector-H, Aliganj, District Lucknow for the purpose of complying with the direction as to the visitation right given to the father or on any other date as stipulated herein-above. The mother shall not leave or change the house of her abode with child without seeking prior permission of the Court and informing to the father of the child, respondent no. 3. She will not leave with child Master Devansh the jurisdiction of the Court without prior permission as directed herein-above.

25. With these observations/directions C.M. Application No. 1A/14/2022, C.M. Application No. 25/2022 and C.M. Application No.15/2022 are finally **disposed off.**

(2023) 4 ILRA 890
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.04.2023

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE MANISH KUMAR, J.

Writ-C No .2119 of 2023

Hindustan Petroleum Corp. Ltd.
...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Aprajita Bansal, Sri Karan Agarwal

Counsel for the Respondents:
A.S.G.I., Sri Alok Saxena, Sri Ashwani Kumar Singh, C.S.C.

A. Constitution of India,1950 – Article 226 – Writ – Maintainability –Alternative remedy – Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) – Ss. 14 and 17 – Amendment inserting Clause (4-A) in S. 17 – Held, the High Court would not be justified in entertaining a writ petition directly under Article 226 challenging an order u/s 14 of the SARFAESI Act, 2002 as the remedy is u/s 17 of the SARFAESI Act, 2002 – Petitioner may raise all relevant issues before the Debt Recovery Tribunal u/s 17. (Para 8 and 9)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Harshad Govardhan Sondagar Vs International Assets Reconstruction Co. Ltd. & ors.; (2014) 6 SCC 1

2. Bajranj Shyamsunder Agarwal Vs Central Bank of India & anr.; (2019) 9 SCC 94

3. United Bank of India Vs Satyawati Tandon & ors.; (2010) 8 SCC 110

4. Kanaiyalal Lalchand Sachdev & ors. Vs St. of Mah. & ors.; (2011) 2 SCC 782

5. Special Leave petition Nos. 13241-13242 of 2019; Kotak Mahindra Bank Limited Vs Dilip Bhosale

6. Phoenix Arc Pvt. Ltd. Vs Vishwa Bharati Vidya Mandir & ors.; (2022) 5 SCC 345

7. Special Leave Petition No. 16013 of 2022; Balakrishna Rama Tarle Dead Thr. LRS & anr. Vs Phoenix ARC Pvt. Ltd. & ors. decided on 26.09.2022

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

1. Heard Ms. Aprajita Bansal, learned counsel for the petitioner, learned Additional Chief Standing Counsel for the State and learned Alok Saxena, learned counsel for the opposite party no. 4.

2. By means of this writ petition the petitioner- Hindustan Petroleum Corporation Ltd. has challenged an order dated 09.08.2021 passed by the District Magistrate, Sitapur in Case No. 00745 of 2021; State Bank of India Vs. M/s Shiv Geet Sales Pvt. Ltd. under Section 14 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act, 2002').

3. The contention of the petitioner's counsel in nutshell was that the petitioner was the lessee of the secured asset and that a lease was executed by the borrower in favour of the petitioner much prior to mortgage of the said property by him with the opposite party No. 4- Bank. The lease being registered and the same not having been determined as per the provisions of Section 111 of the Transfer of Property Act, 1882, the Bank erred in proceeding under Section under Section 13 of the SARFAESI Act, 2002 in respect of the said asset and the District Magistrate also erred in passing an order under Section 14 of the SARFAESI Act, 2002 without hearing the petitioner. The submission is that this action is in gross violation of the law declared by Hon'ble the Supreme Court in the Case of ***Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and Ors.*** reported in **(2014) 6 SCC 1** and subsequent decision in the case of ***Bajranj Shyamsunder Agarwal Vs. Central Bank of India and Another*** reported in ***(2019) 9 SCC 94.***

4. Learned counsel for the Bank on the other hand submitted that the petitioner has a remedy under Sub-section (1) and (4A) of Section 17 of the SARFAESI Act, 2002, therefore, in view of catena of decisions on the subject right from the case of ***United Bank of India Vs. Satyawati Tandon and Ors***. reported in ***(2010) 8 SCC 110; Kanaiyalal Lalchand Sachdev and Ors. Vs. State of Maharashtra and Ors***. reported in ***(2011) 2 SCC 782,*** a recent decision rendered by Hon'ble the Supreme Court in ***SLP Nos. 13241-13242 of 2019; Kotak Mahindra Bank Limited Vs. Dilip Bhosale and in the case of Phoenix Arc Private Limited Vs. Vishwa Bharati Vidya Mandir and Ors.*** reported in ***(2022) 5 SCC 345,*** this writ petition is not maintainable.

5. This apart, he submitted that the lease in question has been terminated vide

notice dated 03.06.2021, which, the petitioner itself has annexed as Annexure No. 3 to the writ petition, according to which, three months notice was given to the petitioner w.e.f. 07.06.2021 and after expiry of which, the lease dated 13.10.2003 shall stand determined/terminated and the petitioner was further asked to deposit lease rent of three months as agreed in terms of the lease dated 13.10.2003. Based on it, he submitted that period of notice expired on 06.09.2021 on which date the lease stood determined. In response, learned counsel for the petitioner submitted that this determination of lease, as alleged, if at all, took place after passing of the impugned order on 09.08.2021, therefore, this is not a material fact for the purposes of adjudicating the validity of the impugned action of the District Magistrate under Section 14 of the SARFAESI Act, 2002. She also contended that the petitioner is in possession of the land in question, therefore, it is gravely prejudiced by the impugned order. She also submitted that no doubt the Debt Recovery Tribunal has the power to restore possession in proceedings under Section 17(2) of the SARFAESI Act, 2002, but, it would be highly unreasonable to first dispossess lessee of the land in question and thereafter to order repossession thereof. She also submitted that in view of the apparent facts of the case remedy under Section 17(1) of the SARFAESI Act, 2002 is not available to the petitioner. In this regard she relies upon the decisions referred by her earlier.

6. At this stage learned counsel for the Bank submitted that the secured asset comprises of property measuring 8450 square meter, whereas, the petitioner is in possession of only 1600 square meter of land and in any case the lease having been determined the petitioner does not have any case and the decision relied upon ***Harshad Govardhan Sondagar's case*** (supra) does not help its cause. He reiterated that all these issues can be seen by the Debt Recovery Tribunal under the SARFAESI Act, 2002.

7. The decision in the case of ***Harshad Govardhan Sondagar*** (supra) was rendered prior to amendment of Section 17 of the SARFAESI Act, 2002, therefore, the proposition laid down therein that so far as a lessee asserting leasehold rights is concerned, there is no remedy under Section 17(1) of the of the SARFAESI Act, 2002 and the remedy lies only before the High Court under Article 226/227 of the Constitution of India, does not apply to cases where the cause of action has arisen after insertion of Sub-section (4A) in Section 17 of the of the SARFAESI Act, 2002. By insertion of Section (4A) any person who claims any tenancy or leasehold rights upon the secured asset can maintain an application under sub-section (1) of Section 17 of the SARFAESI Act, 2002 and the Debt Recovery Tribunal has been vested with power and jurisdiction to examine whether lease or tenancy - (a) has expired or stood determined; or (b) is contrary to Section 65A of the Transfer of Property Act, 1882; (c) is contrary to terms of mortgage; or (d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act and Debt Recovery Tribunal on being satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) referred hereinabove, then, notwithstanding anything to the contrary contained in any other law for the time being in force, it may pass such order as it deems fit in accordance with the provisions

of the SARFAESI Act, 2002. This amendment was made by the Act 44 of 2016 vide Notification dated 01.09.2016 and is effective from the said date.

8. Likewise, ***Bajranj Shyamsunder Agarwal's case*** (supra) is also a case where cause of action had arisen prior to insertion of Sub-section (4A) in Section 17 of the SARFAESI Act, 2002. Therefore, in view of the above discussions, it can not be said that the petitioner does not have a remedy under Section 17 of the SARFAESI Act, 2002. The legal position is very well settled by a catena of decisions of Hon'ble the Supreme Court that in such matters, considering the object behind the SARFAESI Act, 2002, the High Court would not be justified in entertaining a writ petition directly under Article 226 of the Constitution of India challenging an order under Section 14 of the SARFAESI Act, 2002 as the remedy is under Section 17 of the SARFAESI Act, 2002. We see no reason to entertain this writ petition at this stage under Article 226 of the Constitution of India.

9. As far as the contention of learned counsel for petitioner that the petitioner was not heard, we do not wish to express any opinion on this score also, as, we are not entering into the merits of the issues involved, but, suffice it is say that the proceedings under Sections 14 of the SARFAESI Act, 2002 are non adjudicatory which can be challenged under Section 17 of the SARFAESI Act, 2002 and the petitioner may raise all relevant issues including the aforesaid, before the Debt Recovery Tribunal under Section 17 of the SARFAESI Act, 2002. We may in this context refer to a recent decision rendered by Hon'ble the Supreme Court on 26.09.2022 in ***Special Leave Petition No. 16013 of 2022; Balakrishna Rama Tarle Dead Thr. LRS and Anr. Vs. Phoenix ARC Private Limited and Ors.*** wherein after considering the provisions of Section 14 of the SARFAESI Act, 2002 it has been held as under:-

"On a fair reading of Section 14 of the SARFAESI Act, it appears that for taking possession of the secured assets in terms of Section 14(1) of the SARFAESI Act, the secured creditor is obliged to approach the District Magistrate/Chief Metropolitan Magistrate by way of a written application requesting for taking possession of the secured assets and documents relating thereto and for being forwarded to it (secured creditor) for further action.

The statutory obligation enjoined upon the CMM/DM is to immediately move into action after receipt of a written application under Section 14(1) of the SARFAESI Act from the secured creditor for that purpose. As soon as such an application is received, the CMM/DM is expected to pass an order after verification of compliance of all formalities by the secured creditor referred to in the proviso in Section 14(1) of the SARFAESI Act and after being satisfied in that regard, to take possession of the secured assets and documents relating thereto and to forward the same to the secured creditor at the earliest opportunity. As observed and held by this Court in the case of NKGSB Cooperative Bank Limited Vs. Subir Chakravarty & Ors. (Civil Appeal No. 1637/2022) decided on 25.02.2022, the aforesaid act is a ministerial act. It cannot brook delay. Time is of the essence and this is the spirit of the special enactment. In the recent decision in the case of M/s R.D. Jain and Co. Vs. Capital First Ltd. & Ors. (Civil

Appeal No. 175/2022) decided on 27.07.2022, this Court had an occasion to consider the powers exercisable by District Magistrate/Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act. After considering the object and purpose of Section 14 of the SARFAESI Act and the Scheme of the Act under Section 14, it is observed and held in paragraphs 7 to 9 as under:-

"7. Now so far as the powers exercisable by DM and CMM under Section 14 of the SARFAESI Act are concerned, statement of objects and reasons for which SARFAESI Act has been enacted reads as under:-

"STATEMENT OF OBJECTS AND REASONS

The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction."

Thus, the underlying purpose of the SARFAESI Act is to empower the financial institutions in India to have similar powers as enjoyed by their counterparts, namely, international banks in other countries. One such feature is to empower the financial institutions to take possession of securities and sell them. The same has been translated into provisions falling under Chapter III of the SARFAESI Act. Section 13 deals with enforcement of security interest. Sub-Section (4) thereof envisages that in the event a default is committed by the borrower in discharging

his liability in full within the period specified in subsection (2), the secured creditor may take recourse to one or more of the measures provided in subsection (4). One of the measures is to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset. That, they could do through their "authorised officer" as defined in Rule 2(a) of the Security Interest (Enforcement) Rules, 2002.

7.1 After taking over possession of the secured assets, further steps to lease, assign or sale the same could also be taken by the secured creditor. However, Section 14 of the SARFAESI Act predicates that if the secured creditor intends to take possession of the secured assets, must approach the CMM/DM by way of an application in writing, and on receipt of such request, the CMM/DM must move into action in right earnest. After passing an order thereon, he/she (CMM/DM) must proceed to take possession of the secured assets and documents relating thereto for being forwarded to the secured creditor in terms of Section 14(1) read with Section 14(2) of the SARFAESI Act. As noted earlier, Section 14(2) is an enabling provision and permits the CMM/DM to take such steps and use force, as may, in his opinion, be necessary.

7.2 At this stage, it is required to be noted that along with insertion of sub-section (1A), a proviso has also been inserted in sub-section (1) of Section 14 of the SARFAESI Act whereby the secured creditor is now required to comply certain conditions and to disclose that by way of an application accompanied by affidavit duly affirmed by its authorised officer in that regard. Sub-Section (1A) is in the nature of an explanatory provision and it merely restates the implicit power of the CMM/DM in taking services of any officer subordinate to him. As observed and held by this Court in the case of NKGSB Cooperative Bank Ltd. (supra), the insertion of sub-section (1A) is not to invest a new power for the first time in the CMM/DM as such.

8. Thus, considering the scheme of the SARFAESI Act, it is explicit and crystal clear that possession of the secured assets can be taken by the secured creditor before confirmation of sale of the secured assets as well as post-confirmation of sale. For taking possession of the secured assets, it could be done by the "authorised officer" of the Bank as noted in Rule 8 of the Security Interest (Enforcement) Rules, 2002.

8.1 However, for taking physical possession of the secured assets in terms of Section 14(1) of the SARFAESI Act, the secured creditor is obliged to approach the CMM/DM by way of a written application requesting for taking possession of the secured assets and documents relating thereto and for being forwarded to it (secured creditor) for further action. The statutory obligation enjoined upon the CMM/DM is to immediately move into action after receipt of a written application under Section 14(1) of the SARFAESI Act from the secured creditor for that purpose. As soon as such an application is received, the CMM/DM is expected to pass an order after verification of compliance of all formalities by the secured creditor referred to in the proviso in Section 14(1) of the SARFAESI Act and after being satisfied in that regard, to take possession of the secured assets and documents relating thereto and to forward the same to the

secured creditor at the earliest opportunity. As mandated by Section 14 of the SARFAESI Act, the CMM/DM has to act within the stipulated time limit and pass a suitable order for the purpose of taking possession of the secured assets within a period of 30 days from the date of application which can be extended for such further period but not exceeding in the aggregate, sixty days. Thus, the powers exercised by the CMM/DM is a ministerial act. He cannot brook delay. Time is of the essence. This is the spirit of the special enactment. As observed and held by this Court in the case of NKGSB Cooperative Bank Ltd. (supra), the step taken by the CMM/DM while taking possession of the secured assets and documents relating thereto is a ministerial step. It could be taken by the CMM/DM himself/herself or through any officer subordinate to him/her, including the advocate commissioner who is considered as an officer of his/her court. Section 14 does not oblige the CMM/DM to go personally and take possession of the secured assets and documents relating thereto. Thus, we reiterate that the step to be taken by the CMM/DM under Section 14 of the SARFAESI Act, is a ministerial step. While disposing of the application under Section 14 of the SARFAESI Act, no element of quasi-judicial function or application of mind would require. The Magistrate has to adjudicate and decide the correctness of the information given in the application and nothing more. Therefore, Section 14 does not involve an adjudicatory process qua points raised by the borrower against the secured creditor taking possession of secured assets.

9. Thus, in view of the scheme of the SARFAESI Act, more particularly, Section 14 of the SARFAESI Act and the nature of the powers to be exercised by learned Chief Metropolitan Magistrate/learned District Magistrate, the High Court in the impugned judgment and order has rightly observed and held that the power vested in the learned Chief Metropolitan Magistrate/learned District Magistrate is not by way of persona designata."

10. It thereafter went on to observe as under:-

"Thus, the powers exercisable by CMM/DM under Section 14 of the SARFAESI Act are ministerial step and Section 14 does not involve any adjudicatory process qua points raised by the borrowers against the secured creditor taking possession of the secured assets. In that view of the matter once all the requirements under Section 14 of the SARFAESI Act are complied with/satisfied by the secured creditor, it is the duty cast upon the CMM/DM to assist the secured creditor in obtaining the possession as well as the documents related to the secured assets even with the help of any officer subordinate to him and/or with the help of an advocate appointed as Advocate Commissioner. At that stage, the CMM/DM is not required to adjudicate the dispute between the borrower and the secured creditor and/or between any other third party and the secured creditor with respect to the secured assets and the aggrieved party to be relegated to raise objections in the proceedings under Section 17 of the SARFAESI Act, before Debts Recovery

11. In view of the above discussion, leaving it open for the petitioner to avail the said remedy, we **dismiss** this writ petition as not maintainable.

(2023) 4 ILRA 897
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.04.2023

BEFORE

THE HON'BLE RAJAN ROY, J.
HE HON'BLE MANISH KUMAR, J.

Writ-C No .2282 of 2023

C/M Gandhi Grah Nirman Sahkari Ltd. Varanasi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anurag Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Gaurav Mehrotra, Sri Rakesh Kumar Chaudhary

A. UP Cooperative Societies Act, 1965 – Sections 29 (4-B) & 35 – UP St. Cooperative Societies Election Rules, 2014 – R. 8 - Proviso & R. 12 – Five years term of Committee of Management expired – An interim management committee was constituted u/s 29(4-B) – An employee of Housing Dept. was made member – Validity challenged – Whether the order can be treated as an order passed u/s 35 providing suspension of Committee – Held, there is no prohibition in appointing an employee as part of the interim managing committee u/s 29(4-B) – Held further, order cannot be treated as one passed u/s 35 because the latter provision speaks of supersession or suspension of committee of management, whereas there is no question of supersession or suspension of committee of management after the term has already expired – It is an order passed u/s 29(4-B) – High Court issued direction for conducting the election. (Para 5, 6, 11, 14 and 17)

Writ petition disposed off. (E-1)

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

1. This petition has been filed by Committee of Management Gandhi Grah Nirman Sahkari Samiti Ltd. seeking the following reliefs:-

i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 01.02.2023, passed by opposite party number 4, contained as Annexure No.1 to the writ petition;

ii) Issue a writ, order or direction in the nature of mandamus commanding the opposite party number 2 to hold the election of the Committee of Management of Gandhi Grah Nirman Sahkari Samiti Limited, Varanasi forthwith.

iii) Issue a writ, order or direction in the nature of mandamus commanding the opposite party number 3 to allow the petitioner Committee of Management to manage affairs of the Society till the elections are held."

2. It is not in dispute that term of the Committee of Management has expired and elections to the same could not be held prior to expiry of the said term. In these circumstances, Additional Registrar Co-operative Society pertaining to the Cooperative Housing Society has issued the impugned order on 01.02.2023 constituting an interim management committee u/s 29(4-B) of U.P. Cooperative Societies Act, 1965 comprising of five members including Cooperative Officer (Housing), Varanasi who happens to be an employee of the Housing Department of the Government.

3. With regard to validity of this constitution of interim management committee petitioner's contention is that opposite party No.5 being an employee of the Housing Department cannot function as an Election Officer in view of Proviso to Rule 8 of the U.P. State Cooperative Societies Election Rules, 2014, but, after notification of the election by the Election Commission, which in fact has lapsed, he is sending information pertaining to the voter list and valid members to the District Magistrate, which is a function, only the Election Officer can perform after he is appointed and in this regard. He has placed before the Court relevant provisions of the Rules.

4. On the other hand, it is informed that as per Rule 12 of the aforesaid Rules, 2014, the Secretary or the Managing Director of the society are empowered to prepare a list of all voters against whose name, disqualification, if any, as described in the Act, the Rules, 2014 or bye-laws, are to be mentioned and the members, ordinary members or sympathizers, duly enrolled 120 days before the date of election, in accordance with direction given by the Commission from time to time or the provisions for the time being in force, therefore, this function has to be performed by the interim managing committee which comprises of five members, of which Cooperative Officer Housing is only one of them.

5. We find that there is no prohibition in appointing him as part of the interim managing committee u/s 29(4) B of the Act, 1965. It is also informed that ultimately the provisional voter list is to be published by the Election Officer under Rule 13 and, thereafter, it has to be finalized by the same officer, therefore, merely because some information is being sent by the interim management committee of which the said officer is a part, this will not give a cause to the petitioner to challenge its constitution.

6. Term of every committee of management of a Cooperative Society is defined under Section 29(2)(a) as 5 years and the term of the elected members of the committee of management shall be co-terminus with the term of such committee.

7. As per sub-section 4-A of Section 29 of the Act, 1965, due to any reason, whats over, if members of the management committee have not elected and could not get elected before expiry of its five years tenure then committee of management shall cease to exist after expiry of its term notwithstanding anything to the contrary in any other provision of the Act, 1965, or the Rule made thereunder or the bye-laws of the society and in this eventuality Section 4-B comes into play and Registrar appoints an interim management committee.

8. We find merit in the contention of the opposite party firstly, for the reason, the order impugned contained in Annexure No.1 is an order passed u/s 29(4-B) of the Act, 1965; secondly this order cannot be treated as one passed u/s 35 because the latter provision speaks of supersession or suspension of committee of management, whereas there is no question of supersession or suspension of committee of management after the term has already expired. The order impugned dated 01.02.2023 is one passed u/s 29(4-B) providing for an interim management committee after the elected managing committee has ceased to exist.

9. Much emphasis was laid by learned counsel for the petitioner relying upon one of the grounds on which supersession or

suspension of the committee of management can be ordered u/s 35, that is, when the committee of management has failed to conduct election in accordance with the provisions of the Act, 1965 before the expiry of the term of the committee of the management. However, we are not impressed by this argument for the reason that the committee of management firstly does not conduct the election and as of now elections are to be conducted as per direction of the Election Commission, secondly, as already stated words "has failed to conduct election in accordance with provision of this Act before the expiry of the term of the committee of management" will have to be understood and applied reasonably considering the fact that elections are to be conducted on the directions of the Election Commission and not by the committee of management, therefore, these words, have to be read conjointly with Section 29 of the Act, 1965 relating to the committee of management. We may in this regard refer to sub-section 3 of Section 29 of the Act, 1965, according to which, election to re-constitute committee of management of every Cooperative Society shall be completed in the prescribed manner under the superintendence, control and direction of the Election Commission at least 15 days before the expiry of the term of the committee of management and the members so elected shall replace the committee of management whose terms expired under sub-section (2). Sub-section 4 says that it shall be the duty of the Secretary or the Managing Director of the Cooperative Society, as the case may be, to send to the Election Commission, four months before the expiry of the term of the committee of management, a requisition for conducting the election and to furnish all such information as may be required by the Election Commission, within such period as may be fixed by it. Therefore, the words referred in Section 35 as quoted herein-above have to be read conjointly with sub-section (4) of Section 29 and it is when the Secretary or the Managing Director of the Cooperative Society fails to send to the election commission four months before the expiry of its term a requisition for conducting the election and also fails to furnish all such information as required by the Election Commission within such period as may be fixed by it that provision of Section 35 of the Act, 1965 would be attracted. Moreover, these provisions are as already stated would be attracted in a case where the term of management committee has not expired or the Managing Committee has not ceased to exist. It will not apply to a case where the term of managing committee has already expired or it has ceased to exist. This is obvious, as, any supersession or suspension of a committee of management can take place only when the Managing Committee still exists and/or its term has not expired. There is no question of supersession or suspension of a committee of the management when it has already ceased to exist or its term has expired. The action envisaged under Section 35 of the Act, 1965 is somewhat penal in nature, whereas, the provision of Section 29(4-B) of the Act, 1965 is not so. The latter provision only provides for a stop gap arrangement for facilitating management of a Cooperative Society when the elected management committee has ceased to exist or its term has expired. The scope of the two provisions is very different.

10. Moreover, we find that as per the fourth Proviso to Section 35 of the Act, 1965, the Registrar is divested of any power to supersede or suspend a committee

of management of any Cooperative Society where there is no Government share holding or loan or financial assistance or any guarantee by the Government. It is the petitioner's own case that the society at hand is covered by the said Proviso, therefore, there is no question of application of Section 35 and this is an additional reason why the order impugned herein cannot be treated as one having been passed under Section 35.

11. From the above discussion, it is apparent that the order impugned dated 01.02.2023 has been passed after expiry of the term of the committee of management of the Cooperative Society on 30th January, 2023. It is thus an order under Section 29(4-B) of Act,1965.

12. As regards the contention of the petitioner's counsel that it is impermissible for an officer of the Housing Department to be made part of the interim management, we do not find any such provision in the Act, 1965 or any Rule made thereunder, prohibiting the inclusion of any such officer in the interim management committee. Reliance placed by the learned counsel for the petitioner on the Proviso to Rule 8 in this regard is misplaced as, the said Proviso merely says that no officer/employee of the department concerned with the management and administration of the society shall be appointed as Election Officer. It is not the case that the said officer who has been made part of the interim management has been appointed as Election Officer. The Proviso to Rule 8 cannot be read to mean that in the interim managing committee no such officer can be included.

13. As regards as the contention of the learned counsel for the petitioner that as part of the interim managing committee, the said officer is preparing the list of voters is concerned, the same is also not acceptable for the reason as per Rule 12 of the Rules 2014, it is the Secretary or the Managing Director of the society who are required to prepare a list of all voters referred therein. Assuming for a moment that this work is to be performed by the interim management committee, we may in this context, refer to sub-section 4-C of Section 29, according to which, the interim managing committee appointed under sub-section 4(B) shall exercise the powers and perform the functions of the managing committee under this Act, subject to the directions given by the Registrar from time to time. In view of this, interim management committee, unless any member of the interim management committee is functioning as Secretary or Managing Director of the Cooperative Society or the post of Secretary of society is separate, it is the interim management committee which will have to perform the obligations as mentioned in Rule 12 of the Rules 2014. The preparation of list of voters referred in Rule 12 is not a final exercise but is only a preliminary exercise to provide requisite list of voters to the Election Officer and ultimately it is the Election Officer, who has to publish the provisional voter list prepared in accordance with Rule 12 and thereafter, the said list of voters would be finalized by the Election Officer in terms of Rule 37 read with Rule 38 of Rules 2014. Therefore, the provisional list prepared under Rule 12 does not itself become the final list and ultimately it is the Election Officer, who has to finalized the same after considering objection thereto, if any. Moreover as already stated, the officer of the Housing Department is only one of the members of the interim management committee.

14. We are therefore not persuaded by this argument to hold that his inclusion in interim managing committee is not permissible in law and we reject this contention.

15. Now the only issue which remains to be considered is with regard to holding of elections to the committee of management of the Cooperative Society in question. In this regard, Shri Gaurav Mehrotra informed that earlier a notification for election was issued but on account of non-provision of list of voters by the Secretary or Managing Director of the Cooperative Society, the process could not be completed and now it will have to be re-notified and in this process the interim managing committee will have to provide relevant information as envisaged in Rule 12 of Rules 2014 including the list of voters.

16. In view of above, we provide that the interim management committee or if there is any Secretary or Managing Director shall undertake an exercise in this regard in terms of Rule 12 at the appropriate stage and provide requisite information to the Election Commission in accordance with law and the Election Commission on its part shall proceed to notify the election and ensure that it is held in fair and objective manner in accordance with law, at the earliest.

17. We further direct the interim management committee to undertake the aforesaid exercise as envisaged in Rule 12 straightaway without waiting for the notification of Election by the Commission, so that as soon as the elections are notified the information is ready at their level for being forwarded to the concerned officer or the Election Commission as the case may be, and elections may not get delayed, postponed or cancelled only on account of any omission on its part. The aforesaid in our opinion shall meet the ends of justice and redress the grievance of the petitioner, if any. So far as the impugned order Annexure No.1 is concerned, we find no reason to interfere with it.

18. Writ petition is disposed of in the aforesaid terms.

(2023) 4 ILRA 901
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-C No .2298 of 2023

Ripunjay Rai ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjeev Kumar Rai

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar Maurya, Sri Rameshwar Prasad Shukla, Sri Vijay Bhan Singh

A. Civil Law - U.P. Land Revenue Act, 1901 – Sections 33/39 & 219 – Proceeding arising out of expungement of the name from the revenue records – Report of Revenue Inspector, supported by Akaar Patra 45, reveals that the plot, in question is recorded as pond along with some other sharers under the capacity of bhumidar with transferable rights – Non-consideration of the report – Effect – High Court quashed the impugned orders on the ground of non consideration of material placed before the Authority. (Para 9, 10 and 11)

Writ petition allowed. (E-1)

List of Cases cited:

1. Writ C No.14880 of 2015; Chandra Public School Vs St. of U.P. & ors. decided on 02.08.2019

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

1. Heard Sri Sanjeev Kumar Rai, learned counsel for the petitioner, learned Standing Counsel for the State-respondent Nos.1 to 3, Sri Vijay Bhan Singh, learned counsel holding brief of Sri R.P. Shukla, learned counsel for the respondent no.4 and Sri Ashok Kumar Maurya, learned counsel for the respondent no.5.

2. The present petition has been instituted for challenging the orders dated 29.07.2017 and 10.02.2021 passed by the respondent nos.3 and 2 respectively during the proceedings initiated under Section 33/39 of the U.P. Land Revenue Act, 1901 and revision under Section 219 of U.P. Land Revenue Act, 1901.

3. The motion has been initiated over the complaint as preferred by the respondent no.5 for seeking expungement of the name of the petitioner from the revenue records on the basis of record of rights wherein the pond has been mentioned against old Plot No.293, situated at Village Banahra, Pargana Sikandarpur, District Ballia and after receiving the report dated 20.05.2014 from the concerned Revenue Inspector along with legal opinion of the District Government Counsel (Revenue), notices have been issued to the petitioner for calling his objection/reply for substantiating his rights over the Plot No.293 which has been subsequently numbered as Plot No.117 situated in the same village. In response to the call of the respondent no.3, a detailed objection was preferred by the petitioner on dated 10.09.2014, wherein specific stand taken up that the Plot No.116-117 has recorded in 1356, 1359, 1360 F against the name of predecessors of the petitioners and now he is well occupant of the same and extract of the records of right have been appended along with the petition as Annexure-1.

4. It is the specific stand taken by the petitioner that the old Plot No.293 which has been converted and given a new number i.e. Plot No.117 is not solely entered in the revenue record against pond, whereas there are several other co-sharers who are having their legal possession over the same under the capacity of the entries available in the revenue records for a long time.

5. The stand taken up by the petitioner before the proceedings initiated by the respondent no.3 is somehow co-relates with the report submitted by the concerned Revenue Inspector on dated 20.05.2014. The extract of the report is quoted hereinbelow:-

"...मौजा बडहरा पर0 सि0पूर्वी तह0 सिकन्दरपुर के गाटा सं0 117 व 116 का अभिलेखीय व स्थलीय जॉच किया। गाटा सं0 117 मिनजुमिला नम्बर है तथा उसके अंकित खातेदारान संक्रमणीय भूमि है। गाटा सं0 117 का दौरान चकबन्दी रकबा के अनुसार विभाजन किया गया है– खाता सं0–130 में 117 क/0–07डि0 व खाता सं0 49 में 117ख/0–11डि0 खाता सं0 14 में 117ग/0–14 डि0 खाता सं0 177 में 117ध/0–32 डि0 व खाता सं0 203 में 117ड/0.39डि0 अनुसार खेत चकबन्दी आकार पत्र 41, 45 में विभाजित किया गया है।ण.."

6. The abovementioned findings which have been reported by the concerned Revenue Inspector with regard to Plot

No.117 is concerned, the same has been mentioned in Akaar Patra 41 and 45 during the consolidation carried out in the same village. The same has been placed before the respondent no.3 while filing his detailed objection with regard to substantiating his rights over the Plot No.117. It is apparent from the record that while adjudicating the Case No.227 of 2015, under Section 33/39 of the Land Revenue Act, 1901 although the basis of the order dated 29.07.2017 has been given on the report dated 20.05.2014 submitted by the concerned Revenue Inspector but there is hardly any discussion available in the order with regard to fragmentation of the Khata No.203 wherein the Plot No.117 has been divided into several parts and specific 117^3 measuring 0.39 decimal has been mentioned against pond in the complete Plot No.117 which is crystal clear from Akaar Patra 45 appended along with the petition as Annexure-11 and as such, the non availability of the discussion of the fragmentation of Plot No.117 which is reported by the concerned Revenue Inspector also, the order dated 29.07.2017 is lacking on merits and the same is liable to be quashed.

7. Having aggrieved by the order dated 29.07.2017, the petitioner preferred a revision bearing Computerized Case No.C20171500666 (Ripunjay Rai Vs. Chandeshwar Rai) under Section 219 of U.P. Land Revenue Act, 1901. While deciding the same as preferred by the petitioner, the respondent no.2 vide order dated 10.02.2021 determined that the Plot No.117 is solely recorded against pond which is contrary to the revenue record as well as report submitted by the concerned Revenue Inspector during the proceedings initiated by the respondent no.3 under Section 33/39 of the Land Revenue Act, 1901.

8. Per contra, learned Standing Counsel and learned counsel for the respondent no.5 supported the orders dated 29.07.2017 and 10.02.2021 passed by the respondent nos.3 and 2 respectively, with regard to submission of the petitioner which has been substantiated by the revenue record as well as the report submitted by the concerned Revenue Inspector, the same has been admitted to the extent with regard to the report submitted by the concerned Revenue Inspector but denying the stand of the petitioner that the Plot No.117 is having co-sharers and which has been fragmented during the proceedings of consolidation.

9. The stand of learned counsel for the respondent no.5 is not sustainable since the report as submitted by the concerned Revenue Inspector during the pendency of the Case No.227 of 2015, under Section 33/39 of the Land Revenue Act, 1901 itself reveals that the Plot No.117 which is recorded as pond along with some other sharers under the capacity of bhumidar with transferable rights. The report is perfectly matched with the Akaar Patra 45 as appended to the petition and the same has been submitted before the respondent no.3 while filing the objection preferred by the petitioner.

10. It was justified action which ought to be initiated by the respondent no.3 while adjudicating the controversy under Section 33/39 by way of dealing the detailed discussion and observations over the report submitted by the concerned Revenue Inspector as well as by giving thoughtful consideration over the previous proceedings which have been initiated over the Plot No.117 and the same is lacking in the present order which impugned the instant petition i.e. order dated 29.07.2017.

A coordinate Bench of this Court in the case of **Chandra Public School Vs. State of U.P. and 3 others (Writ C No.14880 of 2015,** decided on 02.08.2019) wherein the impugned order was quashed on the ground of non consideration of material placed before the Authority. The relevant paragraph of the said judgment is quoted hereinbelow:-

"As I have already discussed hereinabove, in my considered opinion, the principal order passed by the Tehsildar under Section 122-B of U.P.Z.A.& L.R. Act, 1950 cannot pass the test of Article 14 of the Constitution whereunder whatever is arbitrary is bad and in matters where element of adjudication is involved, it clearly requires not only due application of mind to the objections filed by the person aggrieved but also proper adjudication of issues, the evaluation of the pleadings raised and appreciation of material placed before the Authority. Fair play requires recording precise and cogent reasons when an order affects right of a citizen [Punjab State Electricity Board and others v. Jit Singh (2009) 13 SCC 118]. All this is quite wanting in the order impugned and, therefore, the order dated 13th June, 2012 deserves to be set aside. "

11. In view of the aforesaid discussions and arguments raised by learned counsel for parties, the orders dated 29.07.2017 and 10.02.2021 passed by the respondent nos.3 and 2 respectively are hereby quashed. The matter is remanded back to the respondent no.3 for deciding afresh by way of giving proper findings while adjudicating the same with regard to Plot No.117 which has been reported by the concerned Revenue Inspector as different numbers as 117d, 117[k, 117x, 177/k, 117M. A fine consideration to the earlier proceedings which have been initiated during the proceedings of consolidation, may also be given consideration at the time of final adjudication of the proceedings initiated in Case No.227 of 2015.

12. In view thereof, the petition stands **allowed**.

(2023) 4 ILRA 904
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Writ-C No. 2760 of 2006

M/s East India Packaging Pvt. Ltd. ...Petitioner
Versus
U.P. State Industrial Development Corp. Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Sri J.H. Khan, Sri Sri W.H. Khan (Sn. Adv.)

Counsel for the Respondents:
Sri Swapnil Kumar, Sri Chandan Sharma, Sri Deepak Kr. Jaiswal, Sri Dilip Srivastava, Sri Mahesh Chandra Chaturvedi, S.C., Sri S.P. Singh, Sri Swapnil Kumar, Sri Rahul Agarwal

A. Civil Law – Allotment of industrial area – Cancellation on the ground of failure in deposit of reservation amount – Legality challenged – No notice and opportunity of hearing was given – Effect – Clause of automatic cancellation, how far relevant – Held, even if there is stipulation in allotment letter for automatic cancellation of allotment in case of non deposit of reservation amount, even then, notice was required before cancelling the allotment of petitioner to provide him opportunity of hearing, as non grant of opportunity of

hearing has seriously prejudiced his right – Supreme Court's decision of MD, HSIDC relied upon. (Para 8 and 11)

Writ petition disposed of. (E-1)

List of Cases cited:

1. M D, HSIDC Vs Hari Om Enterprises; 2009 (16) SCC 208

2. ITC Ltd. Vs St. of U.P. & Ors.; 2012 AIR SCW 2421

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

1. Heard Sri W.H. Khan, learned Senior Counsel assisted by Sri Ramanuj Pandey, learned counsel for the petitioner, Sri Swapnil Kumar, learned counsel for respondent nos.1 and 2 and Sri Rahul Agarwal, learned counsel for respondent no.4.

2. Present petition has been filed challenging the order dated 01.12.2005 passed by respondent no.2 by which allotment of industrial plot in favour of the petitioner was cancelled on the ground that petitioner has failed to deposit reservation money of Rs.74,160/- within the time stipulated as per the allotment letter dated 08.02.2005.

3. Contention of learned counsel for the petitioner is that before passing the impugned order, no opportunity of hearing was given to him by issuing any notice. In support of his contention, learned counsel for the petitioner has relied on the following judgements in the cases of M D, HSIDC Vs Hari Om Enterprises reported in 2009 (16) SCC 208 and ITC Ltd. Vs. State of U.P. & Ors. reported in 2012 AIR SCW 2421.

4. On the other hand, learned counsel for respondent nos.1 and 2 submits that in the allotment order dated 08.02.2005, it was clearly mentioned that in case the allottee fails to deposit the reservation money within the stipulated time then his allotment will automatically cancelled and whole amount of money deposited by him stands forfeited. Therefore, there was no requirement to issue notice to petitioner to provide further opportunity.

5. Learned counsel for respondent no.4 submits that after the cancellation of allotment of the petitioner, the subsequent allottee executed agreement to sell in his favour with the permission of respondent no.2 and he also deposited the entire amount but during pendency of present petition allotment of subsequent allottee was cancelled. Therefore, petition deserves to be dismissed.

6. Considering the above submission as well as pleadings and from perusal of record, we find that no notice was given to the petitioner before passing impugned order. This fact was not disputed by respondent no.1.

7. Sole question arises for consideration is whether respondent no.2 should have issued notice to petitioner before cancellation of his allotment despite the condition in allotment letter dated 08.02.2005 that, in case of non deposit of reservation amount, his allotment will automatically cancelled.

8. Hon'ble Supreme Court in paragraph nos.33, 34 and 36 of **M D, HSIDC Vs Hari Om Enterprises (supra)** are quoted hereinunder :

"33. The question as to whether the allottee had failed to comply with the terms and conditions was required to be determined. The terms of the contract would have to be construed having regard to the respective rights and obligations of the parties to perform their part of contract. It provides for issuance of a show cause notice. It provides for refund of the principal amount, of course, without any interest.

34. Resumption of plot, it is trite, would not be automatic.

36. The jurisdiction of a `State' to resort to the drastic power of resumption and forfeiture ordinarily should be undertaken as a last resort. Keeping in view the fact that the Corporation was obligated to comply with the principles of natural justice and, particularly, in view of the fact that was required to determine the capacity as also bona fide of an entrepreneur to start an industrial undertaking on the plots, the Corporation was required to assign some reasons as to why the plot in question had to be resumed. While doing so, it evidently was required to take into consideration its own conduct. A party cannot take advantage of its own wrong. While a State takes penal action against the allottee, its bona fide would be one of the relevant factors before an order of resumption and forfeiture of the amount deposited is passed."

9. Relevant part of paragraph no.16 in **ITC Ltd. Vs. State of U.P. & Ors. (supra)** is quoted hereinunder:

"16..... Even otherwise, when valuable rights had vested in the appellants, by reason of the allotments and grant of leases, such rights could not be interfered with or adversely affected, without a hearing to the affected parties....."

10. Hon'ble Supreme Court clearly observed in above cases that clause of automatic cancellation of allotment in allotment letter will not give right to the authority to deprive the allottee from opportunity of hearing by not issuing any notice before passing the cancellation order and cancellation of allotment should be the last recourse.

11. Therefore, even if there is stipulation in allotment letter for automatic cancellation of allotment in case of non deposit of reservation amount, even then, notice was required before cancelling the allotment of petitioner to provide him opportunity of hearing, as non grant of opportunity of hearing has seriously prejudiced his right.

12. In view of the above, the petition is allowed. The impugned order dated 01.12.2005 passed by respondent no.2 is quashed and respondent no.2 is directed to issue notice providing opportunity of hearing to the petitioner and then pass order.

13. In case, after hearing the petitioner, respondent no.2 decides to restore the allotment in favour of the petitioner, then petitioner will be permitted to deposit the entire cost of plot along with interest stipulated in the allotment letter dated 08.02.2005 itself, within a period of three months, from the date of the order passed by respondent no.2. Any amount already deposited by petitioner will be adjusted in the cost of plot in question.

14. It would also be appropriate to direct that the amount deposited by subsequent allottee will also be refunded by

respondent no.2 along with interest of 6.5% per annum.

15. With the aforesaid direction, the present writ petition is **disposed of.**

(2023) 4 ILRA 907
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-C No. 7024 of 2023

Bhura ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Kumar

Counsel for the Respondents:
C.S.C., Sri Arun Kumar Pandey

A. UP Revenue Code, 2006 – Sections 67 & 67A – Illegal encroachment – Determination – Defence of Section 67-A, how far relevant – Held, when the defence of Section 67-A of the Code is taken in proceedings of Section 67 of the Code, the same issues will be directly and substantially in issue in both the proceedings – Failure of the learned courts below to enquire into the validity of the defence of the petitioner u/s 67-A of the Code has resulted in a miscarriage of justice. (Para 14 and 17)

Writ petition allowed. (E-1)

List of Cases cited:

Chairman LIC of India & ors. Vs A. Masilamani; 2013 (32) LCD 30: (2013) 6 SCC 530

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

1. Heard Shri Amit Kumar, learned counsel for the petitioner and the learned Standing Counsel for the State respondents.

2. The impugned order dated 25.8.2022 passed by the respondent No.3-Tehsildar(Judicial), Tehsil-Amroha, District-Amroha, rendered in proceedings registered as Computerized Case No. T202113380101336 under Section 67 of the Uttar Pradesh Revenue Code, 2006 (hereinafter referred to as the 'Code'), finds that the petitioner had illegally encroached over the disputed parcels of land, and accordingly it was directed that the petitioner be evicted from the disputed parcel of land. Damages and other charges were also imposed upon the petitioner.

3. The learned appellate court/Collector, Amroha, by the impugned order dated 19.11.2022 agreed with the findings of the learned trial court-Tehsildar (Judicial), Tehsil-Amroha, District-Amroha, and affirmed its order dated 25.08.2022.

4. Shri Amit Kumar, learned counsel for the petitioner contends that the defence of Section 67A of the U.P. Revenue Code, 2006 taken by the petitioner was not adverted to by both the courts below. Further without proper demarcation of the lands, a finding of illegal encroachment cannot be determined.

5. Due to inadvertence, Section 67-A of the Code could not be referred to the Court when the judgement was rendered on 29.07.2021, this necessitated the review application.

6. Learned Standing Counsel for the State-respondent contends that protection of Section 67-A of the U.P. Revenue Code,

2006 can only be allowed to persons who satisfy the mandatory preconditions for the same.

7. All these relevant facts for just adjudication of the controversy can be prised out from the impugned orders. Exchange of affidavits shall unnecessarily delay the disposal of the controversy. With consent of parties the matter is being decided finally.

8. To make a finding of illegal encroachment upon any disputed parcel of land in proceedings taken out under Section 67 of the U.P. Revenue Code, 2006, the demarcation of the boundaries of the disputed parcel of land is an essential prerequisite. Admittedly, the same has not been done in this case. On this count alone the finding of illegal encroachment made by the learned court below is vitiated.

9. The petitioner claimed entitlement to the protection of Section 67A of the U.P. Revenue Code, 2006. The learned courts below have clearly neglected to consider the aforesaid issue. This reflects non application of mind.

10. Section 67 as well as Section 67-A of the Code reflect the composite intent of legislature. The legislature by enacting the aforesaid provision has recognized the vulnerability of the State land to illegal encroachment and the need for urgent corrective measures. Simultaneously the legislature has also acknowledged the reality of a large number of persons who have erected dwelling units on lands which are not reserved for any public purposes. The legislature has protected their rights in the manner prescribed in the provision. For ease of reference the provisions are extracted hereunder:

"67 Power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property.- (1) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a Gram Panchayat or other local authority is damaged or misappropriated, or where any Gram Panchayat or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as ma be necessary, and may direct that the amount

of compensation for damage or 34 misappropriation of the property or for wrongful occupation, as the case may be, be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the Assistant Collector under sub-section (3) or sub-section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provision of this Code, and subject to the provisions of this section every order of the Assistant Collector under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation. - For the purposes of this section, the word 'land' shall include the trees and buildings standing thereon

11. 67-A Certain house sites to be settled with existing owners thereof.-

(1) If any person referred to in sub-section (1) of section 64 has built a house on any land referred to in section 63 of this Code, not being land reserved for any public purpose, and such house exits on the November 29, 2012, the site of such house shall be held by the owner of the house on such terms and conditions as may be prescribed.

(2) Where any person referred to in sub-section (1) of section 64, has built a house on any land held by a tenure holder (not being a government lessee) and such house exits on November 29, 2000, the site of such house, notwithstanding anything contained in this Code, be deemed to be settled with the owner of such house by the tenure holder on such terms and conditions as may be prescribed.

Explanation. - For the purpose of sub-section (2), a house existing on November 29, 2000, on any land held by a tenure holder, shall, unless the 35 contrary is proved, be presumed to have been built by the occupant thereof and where the occupants are members of one family by the head of that family. "

12. The aforesaid ingredients have to be established as a mandatory prerequisite for grant of protection under Section 67-A of the U.P. Revenue Code, 2006. Section 67-A of the Code confers rights on certain people who have encroached upon public land. The conditions precedent for invoking the protection of Section 67-A of the Code are these. The person against whom proceedings are taken out has built his house on any land referred to in Section 63 of the Code, the person who seeks protection of Section 67-A of the Code should be in the category of persons referred to in Section 63 of the Code. The land should not be reserved for any public purpose. The date of the construction of the house should be prior to 29 November, 2012. The house of such persons should be existing on the disputed parcels of land on or before 29 November 2012.

13. In many instances, as in the present case, a noticee under Section 67 of the Code may invoke the protection of

Section 67-A of the Code to resist the proceedings under Section 67 of the Code.

14. The authority/ court having jurisdiction to decide the proceedings taken out under Section 67 of the Code or Section 67-A of the Code is the same. When the defence of Section 67-A of the Code is taken in proceedings of Section 67 of the Code, the same issues will be directly and substantially in issue in both the proceedings. Usually in such matters pleadings, defence, and evidence of the parties are same in both the proceedings. In case proceedings under Section 67 and 67-A of the Code are conducted separately and in isolation to one another, it would lead to multiplicity of litigation and inconsistent judgments. There will also be an avoidable delay in decision of the controversy and may even result in miscarriage of justice.

15. The courts in proceedings under Section 67 of the Code are under obligation of law to decide the eligibility of the noticee for protection under Section 67-A of the Code. In case defence under Section 67-A of the Code is taken by the noticee, the said proceedings shall be registered separately. But both cases will be consolidated and heard and decided together.

16. This procedure would faithfully implement the legislative intent and also serve the interest of justice.

17. In the facts and circumstances of this case, the failure of the learned courts below to enquire into the validity of the defence of the petitioner under Section 67-A of the Code has resulted in a miscarriage of justice.

18. In wake of preceding discussion, the impugned orders dated 19.11.2022 passed by the appellate court/Collector, Amroha and the order dated 25.8.2022 passed by the trial court-Tehsildar(Judicial), Tehsil-Amroha, District-Amroha, are vitiated and contrary to law. The orders dated 19.11.2022 and 25.08.2022 are liable to be set aside and are set aside, and needs for remand.

19. It has been held by the Hon'ble Apex Court in **2013 (32) LCD 30:(2013) 6 SCC 530 (Chairman LIC of India & ors. vs. A. Masilamani)** if an Authority/Court sets aside the order on technical grounds then the matter may be remanded back to the Authority, in the instant matter non consideration of Section 67(A) is the technical error on part of the responding authorities and as such the matter is thus remitted to the Tehsildar(Judicial), Tehsil-Amroha, District-Amroha, for a fresh determination consistent with the observation made in this judgment.

20. The following directions are being passed to serve the interest of justice in this case:

(i) The petitioner shall file a fresh application under Section 67-A of the Code before the Tehsildar (Judicial), Tehsil-Amroha, District-Amroha, within a period of one month from the date of receipt of a certified copy of this order.

(ii) The Tehsildar (Judicial), Tehsil-Amroha, District-Amroha, shall register the proceedings under Section 67-A of the Code upon submission of such application.

(iii) Proceedings under Section 67-A of the Code so instituted shall be consolidated and heard with proceedings under Section 67 of the Code registered as

Computerized Case No. T202113380101336 and decided by a common order, consistent with the observations made in this judgement.

(iv) Prior to entering a final judgement the court below shall ensure that demarcation of disputed parcels of lands is completed as per law.

21. The writ petition is **allowed** to the extent indicated above.

(2023) 4 ILRA 911
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.03.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No .14503 of 2022

Bajaj Allianz General Insurance Co. Ltd. ...Petitioner

Versus

Motor Accident Claim, Shahjahanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pawan Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Motor Vehicle Act, 1988 – Section 167 – Bar – Scope – Multiplicity of claim – Award passed, earlier, under the Workmen's Compensation Act was not disclosed in the claim petition – Effect – Held, Section 167 clearly restricts the right to claim compensation on account of a tort from one of the forums prescribed namely the Motor Vehicles Act or the Workmen's Compensation Act – As the respondents have obtained the order from the Motor Accidents Claims Tribunal by concealing the true facts and in contravention to Section 167 of the Act, there was a clear case of statutory fraud on the Tribunal. (Para 18 and 22)

B. Review – Procedural review – Scope – Held, although a review, does not lie unless it is prescribed by the statutes, a procedural review is implicit in all the courts – Grindlays Bank Limited's case relied upon. (Para 23)

Writ petition disposed off. (E-1)

List of Cases cited:

1. National Insurance Co. Vs Mastan & anr.; (2006) 2 SCC 641.

2. Oriental Insurance Co. Ltd. Vs Dyamavva & ors.; (2013) 9 SCC 406

3. First Appeal No. 1998 of 2017; Madinabibi Dasotbhai Sheikh & ors. Vs Jagdishchandra Ramanlal Kachiya Patel & ors. decided on 23.06.2017

4. re: WCC Ref. No.1 of 2010, Commissioner of Workmen's Compensation; 2010 SCC online Ker 4805

5. New India Assurance Co. Ltd. Vs Annapurna Gupta & ors.; 2018 (9) ADJ 784

6. National Insurance Co. Vs Mastan & anr.; (2006) 2 SCC 641

7. Oriental Insurance Co. Vs Dyamavva & ors.; (2013) 9 SCC 406

8. FAFO No. 1946 of 2018; New India Assurance Co. Ltd. Vs Smt. Annapurna Gupta & anr. decided on 17 April, 2018

9. Grindlays Bank Ltd. Vs Central Government Industrial Tribunal & ors.; 1981 SCR (2) 341

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard counsel for the parties and Sri Bhanu Pratap for respondent no. 2 to 7.

2. Present petition has been filed challenging the order dated 02.02.2022, whereby the application filed by the

petitioner for recall of the award dated 18.12.2018 was rejected.

3. The facts in brief are that husband of the respondent no. 2 died on 14.04.2013 in an accident caused on 28.12.2012 with the vehicle bearing No. UP 27 E 4671. The deceased was the cleaner in a truck bearing No. UP 27 T 2264 and on the ill fated day, when he went to repair the tyre, the tempo bearing No. UP 27 T 4671 hit the deceased which caused grievous injuries and ultimately led to his death.

4. The respondent no. 2, claiming compensation filed a case No. 50/E.C.A./2013 before the Workmen's Claims Commissioner claiming compensation on account of the death of the husband of the claimant, respondent no. 2. In the said case final order was passed on 06.11.2013 granting compensation of Rs. 588913/- amount awarded was decided to be paid by the insurer of truck No. UP 27 T 2264 mainly on the ground that the deceased died while on duty and was entitled for compensation from the employer under the Workmen's Compensation Act. As the employer was indemnified by the insurance company, the amount as granted was directed to be paid by the ensurer of truck No. UP 27 T 2264, namely Sri Ram General Insurance Company Ltd..

5. After award was passed on 06.11.2013, the respondent no. 2 alongwith the respondent no. 3 to 7 filed a claim petition under Section 166 of the Motor Vehicles Act claiming compensation from the owner of tempo No. UP 27 T 4671, which was said to be insured with the petitioner company. The said claim petition was allowed vide judgment dated 06.04.2017, wherein an amount of Rs. 4,57,000/- was determined as compensation under Motor Vehicles Act. While passing the said award, the amount was directed to be paid (1/6th share to each) to the claimants, wife of the deceased (respondent no. 2), the minor children of the respondent no. 2 as well as the mother and father of the deceased in the proportion as indicated.

6. The petitioner company subsequently moved an application seeking recall of the award dated 06.04.2017 mainly on the ground that prior to filing of the claim petition, the claimant, respondent no. 2 had filed proceedings under Workmen's Compensation Act and the award was passed in her favour, which fact was not disclosed by the respondent no. 2 in the claim petition No. 148 of 2014. The contention of the petitioner was that the claim as decided in MACT No. 148 of 2014 was barred by virtue of the Section 167 of the Motor Vehicles Act. The said application for recall was rejected by means of order dated 02.02.2022 mainly on the ground that the application for recall/review was not maintainable before the Tribunal.

7. The contention of the counsel for the petitioner is that in view of the bar created under Section 167 of the Motor Vehicles Act, a right of election of remedy vested in favour of the claimant and once the remedy/right was chosen, the right to claim compensation under the different Act was specifically barred. He argues that in view of the bar created under Section 167 coupled with the fact that there were no disclosure made in the claim petition, the award was obtained by the misrepresentation and contrary to the statutory provisions and thus, was liable to be recalled. In support of his contention, he places reliance on the judgment of Hon'ble

Supreme Court in the case of ***National Insurance Company Vs. Mastan and Anr. (2006) 2 SCC 641.***

8. He also places reliance on the judgment of the Hon'ble Supreme Court in the case of ***Oriental Insurance Company Ltd. Vs. Dyamavva and Ors.(2013) 9 SCC 406.*** He then places reliance on the judgment of the Gujarat High Court in the case of ***Madinabibi Dasotbhai Sheikh and Ors. Vs. Jagdishchandra Ramanlal Kachiya Patel and Ors. Decided on 23.06.2017 in First Appeal No.1998 of 2017*** and lastly placed reliance on the judgment of the Kerala High Court in re: WCC Ref.No.1 of 2010 ***Commissioner of Workmen's Compensation reported at 2010 SCC online Ker 4805.***

9. Counsel for respondent, on the other hand, argues that in the present case, the compensation was claimed from two different insurance companies. In respect of the Workmen's Compensation Act, the claim of compensation was made against the insurer of truck, whereas in the Motor Vehicles Act the claim was made against the insurer of tempo which are two different companies and thus, there is no bar in claiming the compensation. He relies on the provisions of Section 145, 146, 147 of the Motor Vehicles Act read with Section 150 to submit that the the insurer is different and thus, the liability of payment arises out of two different contracts of insurance. He next argues that the list of dependents under Section 2B of the Workmen's Compensation Act is separate from the concept of legal heirs, who are entitled to file compensation under Section 166 of the Motor Vehicles Act.

10. He further placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***National Insurance Company Vs. Mastan (supra)*** to argue that the arguments raised by the counsel for the petitioner are liable to be rejected. He also placed reliance judgment of this Court in the case of ***New India Assurance Co. Ltd. Vs. Annapurna Gupta and Ors. 2018 (9) ADJ 784.*** He lastly argues that in any event, no case for review was made out and the petitioner should have taken recourse to filing the appeal and in the said appeal, he could have placed evidence in terms of the mandatory provisions of Order 41 Rule 27, which would apply in principle.

11. To decide the issue as raised, this Court is to see the genesis which led to enactment of the Motor Vehicles Act and the Workmen's Compensation Act.

12. The genesis of the entire action of claiming damages flow from the tortious action or a civil wrong inflicted upon the deceased. It flows from the civil cause of action and for which the compensation is recoverable. The basic principle underlying tort law is that no one should be harmed by the acts of the others for a wrongful act.

13. In India, the general procedure prescribed was, by way of filing a suit for claiming compensation, for the wrongful acts caused on account of tort or the civil wrong. With passage of time, the procedure for claiming damages was streamlined and prescribed in statute namely the Fatal Accidents Act and thereafter in various statutes such as the Motor Vehicles Act, the Workmen's Compensation Act and the Public Liability Insurance Act, to name a few.

14. The said enactments only provided for the procedure for claiming the damages on account of tort suffered by the

claimant or his dependents. The said statutes provided for a remedy which was faster and easier than the remedy of a civil suit. Thus, the damages claimed under the Motor Vehicle Act or the Workmen's Compensation Act owe its genesis to the loss caused due to the civil wrong. The legislature in its wisdom provided for various forums for claiming the damages on account of the civil wrong under the various acts.

15. Section 167 of the Act was incorporated to avoid multiplicity of claims on account of the wrong sustained by the person or on behalf of the said person by his legal representatives.

16. The contention of the counsel for the petitioner that in various cases, the claim for claiming money under the Life Insurance Policy and claiming money under the Motor Vehicles Act can go simultaneously, cannot be applied to the present case as the two are wholly different, one being a civil wrong caused on account of the irresponsible action and the second arising out of a contract of insurance.

17. It is well settled that that a contract is found upon the consent whereas a tort is inflicted against or without consent. For an action of breach of contract, a privity in between the parties is essential whereas for tort no such privity is needed. A tort is clearly distinguishable from a pure breach of contract as a tort is clearly a violation of a right in "rem' whereas breach of contract is infringement of a right in "personam'.

18. In the present case, section 167 of the Motor Vehicles Act clearly restricts the right to claim compensation on account of a tort from one of the forums prescribed namely the Motor Vehicles Act or the Workmen's Compensation Act.

19. The issue and the scope of section 167 of the Act came up for consideration before the Supreme Court in the case of ***National Insurance Company vs. Mastan and another (2006) 2 SCC 641*** wherein after analysing the provisions, the court has held as under:

"22. Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. Section 167 contains a non obstante clause providing for such an option notwithstanding anything contained in the 1923 Act.

23.The "doctrine of election" is a branch of "rule of estoppel", in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.

24. In Nagubai Ammal v. B. Shama Rao [1956 SCR 451 : AIR 1956 SC 593] it was stated: (SCR p. 470)

"It is clear from the above observations that the maxim that a person

cannot "approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto."

25. In C. Beepathumma v. Velasari Shankaranarayana Kadambolithaya [(1964) 5 SCR 836 : AIR 1965 SC 241] it was stated: (SCR p. 850)

"The doctrine of election which has been applied in this case is well settled and may be stated in the classic words of Maitland--

"That he who accepts a benefit under a deed or Will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it.'

The same principle is stated in White and Tudor's Leading Cases in Equity, Vol. (sic) 18th Edn. at p. 444 as follows:

"Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.... That he who accepts a benefit under a deed or Will must adopt the whole contents of the instrument.' "

26. Thomas, J. in P. R. Deshpande v. Maruti Balaram Haibatti [(1998) 6 SCC 507] stated the law thus: (SCC p. 511, para 8)

"8. The doctrine of election is based on the rule of estoppel -- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."

27. The first respondent having chosen the forum under the 1923 Act for the purpose of obtaining compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by Section 143 thereof.
28. We, therefore, with respect do not subscribe to the views of the Full Bench of the Karnataka High Court.

29. Mr. P. R. Ramasesh is not correct in contending that both the Acts should be read together. A party suffering an injury or the dependents of the deceased who has died in course of an accident arising out of use of a motor vehicle may have claims under different statutes. But when cause of action arises under different statutes and the claimant elects the forum under one Act in preference to the other, he cannot be thereafter permitted to raise a contention which is available to him only in the former."

20. The Supreme Court in the case of ***Oriental Insurance Company vs. Dyamavva and others; (2013) 9 SCC 406*** had the occasion to consider the scope of section 167 and following the judgment in the case of ***National Insurance Company (supra)*** recorded as under :

12. The issue to be determined by us is, whether the acceptance of the

aforesaid compensation would amount to the claimants having exercised their option to seek compensation under the Workmen's Compensation Act, 1923.The procedure under Section 8 aforesaid (as noticed above) is initiated at the behest of the employer "suo motu", and as such, in our view cannot be considered as an exercise of option by the dependants/claimants to seek compensation under the provisions of the Workmen's Compensation Act, 1923. The position would have been otherwise if the dependants had raised a claim for compensation under Section 10 of the Workmen's Compensation Act, 1923. In the said eventuality, certainly compensation would be paid to the dependants at the instance (and option) of the claimants. In other words, if the claimants had moved an application under Section 10 of the Workmen's Compensation Act, 1923, they would have been deemed to have exercised their option to seek compensation under the provisions of the Workmen's Compensation Act. Suffice it to state that no such application was ever filed by the respondent claimants herein under Section 10 aforesaid. In the above view of the matter, it can be stated that the respondent claimants having never exercised their option to seek compensation under Section 10 of the Workmen's Compensation Act, 1923, could not be deemed to be precluded from seeking compensation under Section 166 of the Motor Vehicles Act, 1988."

21. Coming to the judgment of this Court in the case of ***New India Assurance Co. Ltd. vs Smt. Annapurna Gupta And Another decided on 17 April, 2018 in FAFO No. - 1946 of 2018*** relied upon by the counsel for the respondents, the court proceeded on the assumption that two insurance companies were involved in the affair, one under the Workmen's Compensation Act and the other which was a party Motor Accident Claims Tribunal under section 166. The said judgment does not consider the fact, that the genesis of the claim in two different forums is one and the same, being a tort sustained by the deceased for which the claim is raised by the legal heirs, the court although noticed the judgment of the Supreme Court in the case of **National Insurance Co. Ltd. (supra)** has clearly not dealt with the issue as decided by the Supreme Court. Thus, the said judgment is clearly not applicable and does not qualify as precedent as the same suffers from the vice of sub-silentio.

22. As the respondents have obtained the order from the Motor Accidents Claims Tribunal by concealing the true facts and in contravention to Section 167 of the Act, there was a clear case of statutory fraud on the Tribunal.

23. It is well settled that although a review, does not lie unless it is prescribed by the statutes, a procedural review is implicit in all the courts as has been held by the Supreme Court in the case of ***Grindlays Bank Limited vs. Central Government Industrial Tribunal and others; 1981 SCR (2) 341***

24. In view of the fact, that this court is of the view that the order passed by the Tribunal was clearly contrary to the bar created under Section 167 of the Act, the Tribunal ought to have allowed the recall application and should have heard the matter on merits.

25. Thus, the impugned order dated 02.02.2022 is quashed. The matter is remanded to the Claims Tribunal to recall the award dated 18.12.2018 and to decide the same afresh in accordance with law.

26. It is informed at the bar that the amount awarded by the Tribunal vide order dated 18.12.2018 has not been withdrawn by the respondents, thus, it is directed that the amount deposited, if any, by the petitioner shall continue to remain deposit subject to the fresh award that may be passed by the Tribunal, as directed above.

27 . The writ petition stands disposed off with the said observations.

(2023) 4 ILRA 917
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No .19391 of 2022

S.K. Associates ...Petitioner
Versus
State Of U.P.& Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Agarwal, Sri Shashinandan (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri Dharmendra Singh Chauhan, Sri Ashok Mehta (Sr. Adv.)

A. Constitution of India,1950 – Article 226 – Writ – Scope – Discretionary power, how can be exercised – Petitioner not coming with clean hand, whether can claim equity – Held, power under Article 226 is a discretionary power. A writ can be issued only in case of a grave miscarriage of justice or where there has been a flagrant violation of law. The power being discretionary, the court has to balance competing interests, keeping in mind that the interests of justice and public interest coalesce generally – A court of equity, when exercising its equitable jurisdiction must act so as to prevent perpetration of a legal fraud and promote good faith and equity – A petitioner whose claim is not founded on valid grounds, is not entitled to claim equity. A person who claims equity must come before the court with clean hands as equities have to be properly worked out between parties to ensure that no one is allowed to have their pound of flesh vis-a-vis the others unjustly. (Para 15)

B. Ceiling Law – Urban Land (Ceiling and Regulation) Act, 1976 – Ss. 8, 10(1), 10(3), 10(4) and 10(5) – Surplus land – Purchase of the surplus land vide sale-deed, how much accrue the right – Held, the disputed land vested in the St. and the alleged sale deed is totally null and void in view of Section 10(4) of the Act, 1976 – The petitioner being an alleged purchaser, has even no locus standi. (Para 7 and 16)

B. Ceiling Law – Urban Land (Ceiling and Regulation) Repeal Act, 1999 – S. 3 – Abatement of proceeding – Possession – Relevancy – Held, 'taking over possession' forms the lifeline of Section 3 of the Repeal Act and a person seeking the benefit of the Repeal Act for restoration of the land should plead and prove that possession was not taken over. [Para 17 (e)]

Writ petition dismissed. (E-1)

List of Cases cited:

1. St. of T. N. & ors. Vs M.S. Viswanathan & ors.; (2021) 10 SCC 614

2. Sulochana Chandrakant Galande Vs Pune Municipal Transport & ors.; (2010) 8 SCC 467

3. St. of U.P. & ors. Vs Adarsh Seva Sahkari Samiti Ltd.; (2016) 12 SCC 493

4. St. of U. P. & ors. Vs Surendra Pratap & ors.; (2016) 12 SCC 497

5. St. of Assam Vs Bhaskar Jyoti Sharma & ors.; (2015) 5 SCC 321

6. Shiv Ram Singh Vs St. of U.P. & ors.; 2015 (7) ADJ 630

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Shashinandan, learned Senior Advocate assisted by Sri Rahul Agarwal, learned counsel for the petitioner, Sri Ashish Kumar Nagvanshi, learned Standing Counsel for the State-respondents and Ashok Mehta, learned Senior Advocate assisted by Sri Dharmendra Singh Chauhan, learned counsel for the respondent No.4.

2. This writ petition has been filed praying for the following relief:

"(A) Issue a writ, order or direction in the nature of certiorari quashing the entire proceedings under the Urban Land (Ceiling and Regulation), Act drawn against the Tara Chand in Case No.1820/122/82 State of UP. Versus Tara Chand in respect of land of Gata No.825 area 2363.47 sq.m. situated in village Bihar Man Nagla, District Bareilly as having abated in accordance with the provisions of the The Urban Land (Ceiling and Regulation) Repeal Act, 1999.

(A) Issue a writ, order or direction in the nature of mandamus directing commanding the respondents not to dispossess the petitioner from land of Gata No.825 area 2363.47 sq.m. situated in village Bihar Man Nagla, District Bareilly.

(C) Issue a writ, order or direction in the nature of mandamus directing and commanding the respondents to correct the revenue records by recording the name of petitioner on land of Gata No.825 area 2363.47 sq.m. situated in village Bihar Man Nagla, District Bareilly."

3. Briefly stated facts of the present case are that Thakur Das, Tara Chand and Tula Ram were the recorded tenure-holders of certain khasra plots including khasra plot No.825 as per copy of khatauni available in the original record of Ceiling Case No.1339/61/82 produced before the court by the respondents. A notice dated 01.01.1983 under Section 8 of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as "the Act, 1976') was issued to the aforesaid Thakur Das, who filed his objection on 02.02.1983 being Case No.1339/61/82 (State vs. Thakur Das). After considering objection an order under Section 8(4) of the Act, 1976 was passed on 27.03.1984 d**eclaring certain land as surplus which included 2363.47 square meters surplus land of khasra plot No.825**. Thereafter, a notice under Section 9 of the Act, 1976 was sent to the aforesaid Thakur Das through registered post which was served upon him. Notification under Section 10(1) of the Act, 1976 was issued on 28.08.1985, which was published in the Gazette on 28.02.1986. After publication of the notice under Section 10(1) of the Act, 1976, a notification dated 11.06.1986 under Section 10(3) of the Act, 1976 was sent which was published on 13.09.1986. Notice under Section 10(5) of the Act, 1976 was sent to the recorded tenure-holder on 28.11.1989. According to the respondents, the possession was taken on 16.11.1990. Since none had filed any objection against the possession, therefore, the name of the State Government was recorded in the khataunis over the surplus land free from all encumbrances. On 16.11.1990, the possession was transferred to the respondent No.4, i.e. the Bareilly Development Authority. It is also relevant to mention that on perusal of the original records of Case No.1820/122/82 (State vs.

deceased Tara Chand) (Page-16/1), it appears from the noting/ reports dated 25.04.1995 that Thakur Das had also filed some appeal which was pending. However, further particulars of appeal or decision are not available in the records as produced by the State-respondents. This is how there was some link between the ceiling case against the aforesaid Thakur Das and co-tenure-holder Tara Chand.

4. That similarly against the **co-tenure-holder Tara Chand**, a Ceiling Case No.1820/122/82 (State vs. Tara Chand) was registered. A notice under Section 8 of the Act, 1976 was issued to the aforesaid Tara Chand on 06.02.1984, who had not filed his objection and as such an order dated 04.04.1985 under Section 8(4) of the Act, 1976 declaring 6932.23 square meters as surplus land, was passed which included portion of khasra plot No.825 in question. Notification under Section 10(1) of the Act was issued on 25.10.1989, which was published on 17.03.1990. Notification under Section 10(3) of the Act was issued on 27.06.1990, which was published on 17.11.1990. Notice under Section 10(5) of the Act, 1976 was issued on 25.10.1991 to the aforesaid Tara Chand and thereafter on 19.06.1993 to the heirs of Tara Chand which was served upon the wife of Late Tara Chand, namely Smt. Bilaso, which fact is evident from the acknowledgement of Bilaso Devi on the back side of the notice available in the original records of of Case No.1820/122/82 (State vs. Tara Chand) at Page 14/6. One of the heirs of Tara Chand, namely Ram Das filed an objection dated 08.10.1993 stating that his brother had received the notice with whom he had not good terms and, therefore, he was not having knowledge of orders dated 04.04.1985 and 28.01.1989. By order dated 26.03.1996, the objection of the aforesaid Ram Das and Amar Singh, son of late Tara Chand and Smt. Bilaso, wife of Tara Chand were rejected by the Competent Authority, Urban Land Ceiling, Bareilly. The name of the State was mutated in the revenue records on 02.02.1994 in the khatauni for the Fasli 1400-1405, in respect of certain plots including plot No.825M, measuring 2363.47 square meters. It further appears that some appeal filed by heirs of Tara Chand against the order under Section 10(8) of the Act, 1976 was dismissed by the court of District Judge, Bareilly on 13.07.1998.

5. In paragraph-28 of the writ petition, the petitioner has stated that legal heirs of Tara Chand being Jagdish Prasad, Ram Das and Amar Singh sons of Tara Chand as well as Bhagwan Das and Sukhlal, sons of Tula Ram sold the total land of khasra plot No.825 measuring 3 bighas and 1 biswas to the petitioner by a registered sale deed dated 20.03.2003, through their power of attorney holders. From the alleged sale deed dated 20.03.2003, it appears that power of attorney given by Jagdish to one Jasveer Singh, was registered on 17.07.2002. Power of attorney given by Bhagwan Das and Sukhlal sons of Tula Ram and Sundar Devi wife of Tula Ram, was registered on 23.07.2002 in favour of the aforesaid Jasveer Singh. Another power of attorney was given by Ram Das and Amar Singh sons of Tara Chand to one Satvir Singh, which was registered on 02.09.2002.

6. In paragraph-26 of the counter affidavit dated 16.01.2023, the respondent Nos.1, 2 and 3 have stated that "on 05.09.2002 *Jagdish Prasad has cancelled the power of attorney dated 17.07.2002 executed in favour of Jasveer Singh.*" In paragraph-26 of the rejoinder affidavit, the

petitioners have admitted this fact. Thus, the sale deed dated 20.03.2003 executed by Jasveer Singh, power of attorney holder was without authority as it was executed subsequent to cancellation of power of attorney. However, on the basis of the aforesaid sale deed, the petitioner got his name mutated on 22.05.2003 against which a recall application was filed by Jagdish Prasad on 11.07.2007 being Case No.729/732/7 (S.K. Associates vs. Jasveer Singh), which was allowed and the mutation order dated 22.05.2003 was cancelled. It remains undisputed that over the surplus land of khasra plot No.825, the name of the State is continuing in the khataunis from about three decades. As per annexure CA-3 to the short counter affidavit, the possession over the surplus land of khasra plot No.825, measuring 7714.06 square meters was taken under Section 10(6) of the Act, 1976.

7. Thus, from the records **it is evident that the petitioner claims to be a subsequent purchaser of the surplus declared land under the Act, 1976**, by way of a sale deed dated 20.03.2003 which was executed by the alleged power of attorney holder in favour of the petitioner after the power of attorney was cancelled on 05.09.2002.

8. From the facts as aforenoted, it is evident that the land in question vested in the State and after taking possession thereof, it was transferred to the Bareilly Development Authority. As per photographs filed along with the short counter affidavit on behalf of respondent No.4 (Bareilly Development Authority, Bareilly) and also as per averments made in paragraph-15 of the said short counter affidavit, **the land in question is in actual physical possession of the Bareilly Development Authority.** The original tenure-holders or their successors have neither objected at any point of time during last about three decades nor they have filed the present writ petition. The present writ petition has been filed by a so-called purchaser of the disputed land, who allegedly purchased it by a sale deed dated 20.03.2003 through an alleged power of attorney holder whose power of attorney was cancelled on 05.09.2002. The aforesaid alleged sale deed has been got executed after vesting of the disputed land in the State about two decades ago and the name of the State stood recorded in the revenue records. There is nothing on record to show that the petitioners have any authority of law to possess the disputed land. No evidence has been filed by the petitioners to establish that they are in possession of the disputed land. On the contrary, the short counter affidavit filed by the respondent No.4 and photograph annexed therewith indicates physical possession of the respondent No.4 over the land in question and the disputed land is enclosed by a boundary-wall constructed by the respondent No.4.

9. Considering the question of proving possession for the purposes of Section 3 of the Repeal Act, 1999, in a recent judgment in the case of **State of Tamil Nadu and others vs. M.S. Viswanathan and others, (2021) 10 SCC 614 (Paras-16 and 24);** Hon'ble Supreme Court has held as under:

"16. In essence, "taking over possession" forms the lifeline of Section 3 of the Repeal Act and a person seeking the benefit of the Repeal Act for restoration of the land should plead and prove that possession was not taken over.

24. Unfortunately, the High Court did not even look into the letter dated 11-

11-1980 nor did the High Court examine the records of the Department. Both the Single Judge as well as the Division Bench proceeded on the premise that the land was lying vacant with a compound wall and that therefore, the claim of the landowner to be in possession must be correct. There can hardly be any such presumption. The existence of the compound wall enclosing even the land that had already been sold by the land owner to the Trust, is admitted by the land owner herself in her letter dated 11-11-1980. Therefore, the High Court committed a grave error in granting the benefit of Section 3(2) of the Repeal Act to the respondents herein."

10. In the case of **Sulochana Chandrakant Galande vs. Pune Municipal Transport and others, (2010) 8 SCC 467 (para-36)**, Hon'ble Supreme Court held that in case where the possession has been taken, repeal of the Act, 1976 would not confer any benefit on the owner of the land. In the present set of facts, it is undisputed that the land in question was allegedly purchased by the petitioners by way of alleged sale deed dated 20.03.2003, i.e. much subsequent to conclusion of proceedings under the Act, 1976 including the proceeding under Section 10(5). Thus, the **petitioner is a third party purchaser who has no locus standi** to claim any benefit by alleging that possession was not taken.

11. Since as per own case set up by the petitioner, he has allegedly purchased the land in question after statutorily vesting of the land in the State Government under Section 10 of the Act, 1976, therefore, a statutory bar on transfer stood created by sub-Section (4) of Section 10. Hence, in any case, the alleged transfer of property made in contravention of the statutory mandate, is null and void. The correctness of taking over possession of the surplus declared vacant land by the competent authority or his authorised officer, cannot be examined in writ jurisdiction and no relief can be granted by the High Court at the instance of the petitioner herein, who allegedly has purchased the land after vesting of the land with the State Government. Thus, the petitioner has even no locus standi either to challenge possession or to file the present writ petition. The view being taken by us is supported by the law laid down by Hon'ble Supreme Court in the case of **State of U.P. and others vs. Adarsh Seva Sahkari Samiti Limited, (2016) 12 SCC 493 (paras-4 to 8),** as under:

"4. We have examined this aspect. Having regard to the undisputed fact that the respondent has purchased the property from the declarant which is vested with the State Government under Section 10(5) of the Act in terms of of Section 10(3) Notification, therefore, ***the transfer of property in favour of the respondent, who is claiming its interest in the said property is void ab initio in law****. On this ground alone, the order passed by the High cannot be allowed to sustain.*

5. It is also brought to our notice by the learned senior counsel Mr. Misra that after the proceedings Under Sections 10(3) and 10(5), notice and the alleged taking over possession of the land in question, the subsequent event has taken place, namely, the said property has been transferred to the Lucknow Development Authority by the State Government and the development authority has laid a park for public use. On this, learned senior counsel for the respondent submits that the said event has taken place during the pendency

of the proceedings before the High Court. Though it may be the fact, subsequently, after the transfer of the property in favour of the development authority, the authority has developed a park is an undisputed fact. This is also a very relevant aspect of the matter for this Court to annul the impugned judgment/order passed by the High Court.

6. ***In our opinion, the respondent herein has no locus standi to challenge the inaction on the part of the appellants viz. not taking possession legally strictly complying with the statutory provisions under Section 10(5) of the Act and taking over possession as provided under Section 10(6) of the Act. At this juncture, this aspect need not be examined by this Court at the instance of the respondent.***

7. For the reasons stated supra, the impugned order passed by the High Court to the extent it granted relief to the respondent herein is liable to be set aside and is hereby set aside accordingly. The appeals are allowed accordingly. There shall be no order as to costs.

8. Having allowed the appeals, considering the respondent's submission that the possession of the land was taken over under Section 10(6) of the Act, it is open for the respondent to prefer a claim under Section 11 of the Act for compensation by filing an appropriate application under the provisions of the Act before the appropriate authority, which claim shall be examined independently by the competent authority and pass appropriate orders in accordance with law expeditiously but not later than six months from the date of receipt of such application." (Emphasis supplied by us)

12. The aforesaid two judges bench judgment of Hon'ble Supreme Court was affirmed by a three judges bench judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others vs. Surendra Pratap and others, (2016) 12 SCC 497 (paras-8 and 9), as under:

"8. Moreover, in State of U.P. and others vs. Adarsh Seva Sahkari Samiti Limited, (2016) 12 SCC 493, this Court has observed that ***after the vesting of the surplus land with the State Government u/s 10(5) of the Act, if any transfer of the property in question is effected, such transfer would be void ab initio and the transferee would not be entitled to challenge the alleged inaction on part of the State Government or the Competent Authority in not taking possession in compliance with the provisions u/s 10(5) of the Act.***

9. In the aforesaid circumstances, the view taken by the High Court in the instant case is completely unsustainable. This appeal is, therefore, allowed and the Writ Petition preferred by the respondent Nos.1 and 2 herein stands dismissed with costs."

(Emphasis supplied by us)

13. In the case of **State of Assam vs. Bhaskar Jyoti Sharma and others, (2015) 5 SCC 321 (Paras-16, 17 and 19)**, Hon'ble Supreme Court held as under:

"16. The issue can be viewed from another angle also. Assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is ***whether such grievance could be made long after the alleged violation of Section 10(5).*** *If actual physical possession was taken over from the erstwhile land owner*

on 7th December, 1991 as is alleged in the present case any grievance based on Section 10(5) ought to have been made within a reasonable time of such dispossession. If the owner did not do so, forcible taking over of possession would acquire legitimacy by sheer lapse of time. ***In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would, in our opinion, give a licence to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure.***

17. ***Reliance was placed by the respondents upon the decision of this Court in Hari Ram's case (supra). That decision does not, in our view, lend much assistance to the respondents. We say so, because this Court was in Hari Ram's case (supra) considering whether the word 'may' appearing in Section 10(5)gave to the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of Section 10(5)and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eye of law did not fall for consideration in that case.*** *In our opinion, what Section 10(5)prescribes is an ordinary and logical course of action that ought to be followed before the authorities decided to use force to dispossess the occupant under Section 10(6). In the case at hand if the appellant's version regarding dispossession of the erstwhile owner in December 1991 is correct, the fact that such dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because Bhabadeb Sarma-erstwhile owner had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so.*

19. In support of the contention that the respondents are even today in actual physical possession of the land in question reliance is placed upon certain electricity bills and bills paid for the telephone connection that stood in the name of one Mr. Sanatan Baishya. It was contended that said Mr. Sanatan Baishya was none other than the caretaker of the property of the respondents. There is, however, nothing on record to substantiate that assertion. The telephone bills and electricity bills also relate to the period from 2001 onwards only. There is nothing on record before us nor was anything placed before the High Court to suggest that between 7th December, 1991 till the date the land in question was allotted to GMDA in December, 2003 the owner or his legal heirs after his demise had continued to be in possession. All that we have is rival claims of the parties based on affidavits in support thereof. We repeatedly asked learned counsel for the parties whether they can, upon remand on the analogy of the decision in the case of Gyanaba Dilavarsinh Jadega (supra), adduce any documentary evidence that would enable the High Court to record a finding in regard to actual possession. They were unable to point out or refer to any such evidence. ***That being so the question whether actual physical possession was***

taken over remains a seriously disputed question of fact which is not amenable to a satisfactory determination by the High Court in proceedings under Article 226 of the Constitution no matter the High Court may in its discretion in certain situations upon such determination. *Remand to the High Court to have a finding on the question of dispossession, therefore, does not appear to us to be a viable solution."*

(Emphasis supplied by us)

14. The aforesaid judgment of Hon'ble Supreme Court in the case of **Bhaskar Jyoti Sharma and others** (supra) has been followed by a coordinate bench of this court in the case of **Shiv Ram Singh vs. State of U.P. and others, 2015 (7) ADJ 630** and the writ petition was dismissed on the ground of laches, observing as under:

"We must also advert to another aspect of the matter particularly having regard to the recent decision of the Supreme Court in Bhaskar Jyoti Sarma (supra). The petitioner moved the first writ petition in 2002 nearly three years after the Repeal Act had come into force. After the earlier writ petition was disposed of by directing the District Magistrate to pass an order on the representation of the petitioner, an order was passed by the District Magistrate on 10 May 2007. The petitioner thereafter waited for a period of over two years until the present writ petition was filed in July 2009. ***If the petitioner had been dispossessed of the land without due notice under Section 10(5), such a grievance could have been raised at the relevant time.*** *As a matter of fact, it has been the case of the State all along that a notice under Section 10(5) was, in fact, issued in the present case which would be borne out from the original file which has been produced before the Court.* ***The issue is whether such a grievance could be made long after, before the Court. The petitioner had waited for nearly three years after the Repeal Act came into force to file the first writ petition and thereafter for a period of over two years after the disposal of the representation despite the finding of the District Magistrate that possession was taken over on 25 June 1993. In our view, such a belated challenge should not, in any event, be entertained."***

(Emphasis supplied by us)

15. Apart from above, the power under Article 226 is a discretionary power. A writ can be issued only in case of a grave miscarriage of justice or where there has been a flagrant violation of law. The power being discretionary, the court has to balance competing interests, keeping in mind that the interests of justice and public interest coalesce generally. A court of equity, when exercising its equitable jurisdiction must act so as to prevent perpetration of a legal fraud and promote good faith and equity. A petitioner whose claim is not founded on valid grounds, is not entitled to claim equity. A person who claims equity must come before the court with clean hands as equities have to be properly worked out between parties to ensure that no one is allowed to have their pound of flesh vis-a-vis the others unjustly.

16. In the present set of facts, we have already noted that the disputed land vested in the State and the alleged sale deed is totally null and void in view of Section 10(4) of the Act, 1976, apart from the fact that the power of attorney was withdrawn much before the execution of the alleged

sale deed. The petitioner being an alleged purchaser, has even no locus standi. Thus, on the present set of facts, we also find that **it is not a fit case to exercise equitable discretionary jurisdiction.**

17. Thus, we reach to the following conclusions:

(a) **The petitioner claims to be a purchaser of the surplus declared land under the Act, 1976,** by way of a sale deed dated 20.03.2003 which was executed by the alleged power of attorney holder in favour of the petitioner after the power of attorney was cancelled on 05.09.2002.

(b) The land in question vested in the State. The State took its possession and transferred it to the Bareilly Development Authority. As per photographs filed along with the short counter affidavit on behalf of respondent No.4 (Bareilly Development Authority, Bareilly) and also as per averments made in paragraph-15 of the said short counter affidavit, **the land in question is in actual physical possession of the Bareilly Development Authority**.

(c) The original tenure-holders or their successors have neither objected at any point of time during last about three decades to the vesting of the land in question nor striking off the names of original tenure holders and mutation of name of the State/ respondent No.4 in revenue records, i.e. Khatauni etc., nor they have filed the present writ petition. The present writ petition has been filed by a so-called purchaser of the disputed land, i.e. the petitioner, who allegedly purchased it by a sale deed dated 20.03.2003 through an alleged power of attorney holder whose power of attorney was cancelled on 05.09.2002, i.e. much prior to the execution of the aforesaid sale deed.

(d) The aforesaid alleged sale deed has been got executed after vesting of the disputed land in the State about two decades ago and the name of the State stood recorded in the revenue records. There is nothing on record to show that the petitioners have any authority of law to possess the disputed land. No evidence has been filed by the petitioners to establish that they are in possession of the disputed land.

(e) **In essence, "taking over possession" forms the lifeline of Section 3 of the Repeal Act and a person seeking the benefit of the Repeal Act for restoration of the land should plead and prove that possession was not taken over.**

(f) Where the possession has been taken, repeal of the Act, 1976 would not confer any benefit on the owner of the land. In the present set of facts, it is undisputed that the land in question was allegedly purchased by the petitioners by way of alleged sale deed dated 20.03.2003, i.e. much subsequent to conclusion of proceedings under the Act, 1976 including the proceeding under Section 10(5). Thus, **the petitioner is a third party purchaser who has no locus standi t**o claim any benefit by alleging that possession was not taken.

(g) After statutorily vesting of the land in the State Government under Section 10 of the Act, 1976, a statutory bar on transfer stood created by sub-Section (4) of Section 10. Therefore, in any case, the alleged transfer of property made in contravention of the statutory mandate, is null and void. Thus, claim of interest by the

petitioner in the disputed land is void ab initio in law.

(h) Even assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is **whether such grievance could be made long after the alleged violation of Section 10(5). In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would give a licence to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure.**

(i) The question whether actual physical possession was taken over remains a seriously disputed question of fact which is not amenable to a satisfactory determination by the High Court in proceedings under Article 226 of the Constitution. However in its discretion, this court may decide the question of possession if there are sufficient evidences to establish that possession was not taken by the State Government and the land owner is continuing in possession.

(j) In view of the facts briefly noted in paras 3 to 6 above, the writ petition is also not even entertainable on the ground of laches.

(k) In the present set of facts, we have already noted that the disputed land vested in the State and the alleged sale deed is totally null and void in view of Section 10(4) of the Act, 1976, apart from the fact that the power of attorney was withdrawn much before the execution of the alleged sale deed. The petitioner being an alleged purchaser, has even no locus standi. Thus, on the present set of facts, we also find **that it is not a fit case to exercise equitable discretionary jurisdiction.**

18. For all the reasons aforestated and also in view of the law laid down by Hon'ble Supreme Court in M.S. Viswanathan and others (supra), **Sulochana Chandrakant Galande** (supra), **Adarsh Seva Sahkari Samiti Limited** (supra), **Surendra Pratap and others** (supra), **Bhaskar Jyoti Sharma and others** (supra) and also the law laid down by a coordinate bench of this court in the case of Shiv Ram Singh (supra), we do not find any merit in this writ petition, apart from the fact that the petitioner has no locus standi and the writ petition is also hit by laches. Consequently, the writ petition is **dismissed.**

(2023) 4 ILRA 926
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-C No .26259 of 2014

Suresh Chandra Srivastava & Ors. ...Petitioners

Versus

Sub Divisional Officer, Tehsil Sadar , Jhansi & Ors. ...Respondents

Counsel for the Petitioners:
Sri R.C. Singh, Sri K.P. Tiwari, Sri Tarun Verma, Sri Vinod Kumar, Sri Bajinder Singh, Sri Narayan Dutt Shukla, Sri Anand Varma

Counsel for the Respondents:

C.S.C., Sri K.P. Tiwari, Sri K.K. Tiwari, Sri Rajeev Kumar, Sri S.R. Srivastava, Sri Shashi Nandan (Sr. Adv.)

A. Civil Law – Civil Procedure Code – Sections 9 & 47 – UP Tenancy Act, 1939 – Section 242 – Maintainability of civil suit – Earlier, an order declaring the order of the Revenue Court null and void was passed by the Civil Court, which has also been affirmed by Appellate Court and which has remain unchallenged – Jurisdiction of Civil Court challenged – Held, S. 9 of the C.P.C. provides for filing of suit unless barred expressly or impliedly – Section 47 of C.P.C. shall not be applicable in the suits covered under the provision of Section 242 of Act of 1939 – Held further, once it is undisputed that the order of Revenue Court dated 20.07.1996 has been declared null and void by the Civil Court, which has been affirmed by the Appellate Court, no relief can be granted to petitioner. (Para 20 and 21)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Civil Appeal No. 658 of 2008: Chief engineer, Hydel Project & ors. Vs Ravinder Nath & ors. decided on 24.01.2008

2. Civil Appeal No. 1346 of 2010: Milkhi Ram Vs Himachal Pradesh St. Electrity Board, decided on 08.10.2021

3. Civil Appeal No. 5617 of 1999: Balvant N. Vishwamitra & ors. Vs Yadav Sadashiv Mule & ors., decided on 13.08.2004

4. Shiva Poojan Dubey & anr. Vs Baban Lal and Ors: AIR 1959 Pat 13.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Bajinder Singh, Advocate, holding brief of Sri Vinod Kumar, learned counsel for the petitioners, learned standing counsel for respondent Nos. 1 & 2 and Sri Shashi Nandan, learned Senior Counsel assisted by Sri K.P. Tiwari, learned counsel for private respondents.

2. Present petition has been filed with the following prayers:

"i. issue a writ, order or direction in the nature of certiorari calling for record and quash the order dated 22.02.2014, so far as it is against the petitioners.

ii. Issue a writ, order or direction in the nature of mandamus commanding Sub Divisional Officer to issue fresh warrant and Parwana Amaldaramad and put the petitioners into possession over the entire area of plots comprising in Khewat No. 22 including entire area of plot no. 1380."

3. The case was heard on 3.07.2019 and the Court has passed the following order:

"Learned counsel for the petitioners submits that a supplementary affidavit has been filed in March 2018 and the substitution application has been filed in March 2019, however, the same are not on record.

Office is directed to trace out and place the same on record.

By means of present petition, the petitioner has sought a relief for handing over the possession of the land in question by Sub-Divisional Magistrate, Jhansi pursuant to the order and decree of the revenue court dated 20.07.1996 and 24.07.1996 respectively which have stood affirmed upto the highest court of appeal under the revenue law of the State. An order of Sub-Divisional Magistrate, Jhansi

dated 12.12.2011 has also been annexed as Annexure No. 9 to the writ petition, whereunder the then Sub-Divisional Magistrate, Jhansi considered all aspects of the matter and directed for execution of the order and decree dated 20.07.1996 and 24.07.1996 respectively and consequential action was directed to be taken in respect to the revenue entries of the land as well. However, it transpires that subsequently on some objections filed by the contesting respondents, the Sub-Divisional Magistrate came to pass an order dated 22.02.2014 by which it virtually rejected the request of petitioner for carrying out the order dated 12.12.2011 and hence this petition was preferred challenging the said order as well. However, it is admitted to the parties that subsequently, during pendency of the present writ petition, the Additional Commissioner (Administration), Jhansi Division, Jhansi allowed the revision filed by the judgment debtors themselves and set aside the order dated 22.02.2014.

In view of the above fact emerging out of the pleadings raised by the parties as far as the prayer no. 1 of the present writ petition is concerned, it has got rendered infructuous. The question is now for consideration before this Court regarding execution of judgment and decree still standing in favour of the petitioner as far as revenue courts are concerned and the land admittedly being agricultural land, under the state revenue laws, it is contended that the revenue courts are the ultimate authorities.

A counter affidavit has been filed on behalf of the respondent nos. 1 & 2 namely the Sub-Divisional Officer, Tehsil Sadar, Jhansi and Tehsildar, Tehsil Sadar, Jhansi sworn by Tehsildar Rajendra Bahadur himself in which vide para 19 it has been stated in quite unequivocal terms that the respondents have been dispossessed by the state authorities and the possession of the land in question has got vested with the Sub Divisional Officer and memo of possession to that effect dated 08.04.2013 has been filed.

In the face of facts that the order of Sub Divisional Magistrate, Jhansi dated 22.02.2014 has already been set aside by the Additional Commissioner in Revision No. 3/35 of 2013-14 vide order dated 10.11.2017 and the possession memo also shows that the land has been in possession of the Sub Divisional Officer concerned, this Court fails to understand as to why and under what circumstances, no further action has been taken, more especially when the earlier order of the Sub Divisional Officer, Jhansi dated 12.12.2011 is still surviving.

Let the Sub Divisional Officer, Jhansi file his personal affidavit before this Court by the next date fixed explaining as to what further course of action has been adopted by him after the order dated 22.02.2014 passed by him has come to be set aside by Additional Commissioner in revision.

List this matter on 29.07.2019 peremptorily.

A certified copy of this order be supplied to Sri Rahul Malviya, learned Advocate free of cost, within 48 hours, for necessary compliance."

4. Pursuant to order of this Court dated 03.07.2019, compliance affidavit dated 25.07.2019 has been filed by respondent No. 2 and it is stated in para 12 of the said affidavit that against the order

dated 20.07.1996, passed by Sub-Divisional Officer, Jhansi, an Orginal Suit No. 319 of 2010 has been filed before Additional Civil Judge(J.D.), Court No. 11, Jhansi and vide order dated 10.04.2015, the said suit was allowed declaring the order dated 20.07.1996 as null and void. Against the order dated 10.04.2015, Civil Appeal No. 31 of 2015 has been filed by the petitioner-defendant which has also been dismissed by the appellate court, i.e. Additional District Judge, Jhansi vide order dated 8.4.2021.

5. The facts mentioned hereinabove as well as in order dated 03.07.2019 of the Court have not been disputed by the counsel for the parties.

6. Learned counsel for the petitioner-defendant firmly submitted that present dispute is covered under Section 242 of the U.P. Tenancy Act, 1939(hereinafter referred to as, 'Act of 1939') and therefore, Civil Suit No. 319 of 2010 is not maintainable. He also submitted that during the pendency of the execution proceeding, Section 47 of Code of Civil Procedure, 1908 (hereinafter, referred to as, 'C.P.C.') bars for filing a fresh suit for the same cause of action. The sole argument of learned counsel for the petitioner is that once the Civil Court is having no jurisdiction, any order passed by the Civil Court cannot be given effect and once the order of Revenue Court has attained finality up to Board of Revenue, it is required on the part of revenue authorities to comply the same.

7. He next submitted that during the course of execution proceeding, once the possession has been taken by the respondent No. 1, S.D.M. it is required on the part of respondent No. 2, Tehsildar to hand over the possession to petitioner-defendant ignoring the order of Civil Court dated 10.04.2015 and order of Appellate Court dated 08.04.2021.

8. He also submitted that question of jurisdiction can be raised at any stage of proceeding as it goes to the root cause of dispute.

9. In support of his contention, learned counsel for the petitioner placed reliance upon the judgment of Apex Court in ***Civil Appeal No. 658 of 2008: Chief engineer, Hydel Project & Ors. Vs. Ravinder Nath & Ors.*** *decided on 24.01.2008****, Civil Appeal No. 1346 of 2010: Milkhi Ram Vs. Himachal Pradesh State Electrity Board,*** *decided on 08.10.2021,* ***Civil Appeal 5617 of 1999: Balvant N. Vishwamitra And Ors. Vs. Yadav Sadashiv Mule (D) Through LRs. And Ors.***, decided on 13.08.2004 Judgment of Patna High Court in ***Shiva Poojan Dubey And Anr. Vs. Baban Lal And Ors: AIR 1959 Pat 13***.

10. Sri Shashi Nandan, learned Senior Counsel for the private respondents firmly submitted that there is no dispute on the point that Civil Court vide order dated 10.04.2015 passed in Suit No. 319 of 2010 has declared the order dated 20.7.1996 as null and void, against which Civil Appeal No. 31 of 2015 was filed by the petitioner, which has also been dismissed by the appellate court vide order dated 8.4.2021. In Suit No. 319 of 2010, an issue was framed that as to whether order dated 20.07.1996 passed by Deputy Collector, Jhansi in Case No. 1/93-94 : **Suresh Chandra Vs. Ram Dayal** under Section 80 of U.P. Tenancy Act was illegal or a nullity due to lack of jurisdiction. The question was decided in favour of plaintiff-

respondent. The order dated 10.04.2015 was affirmed by the Appellate Court vide order dated 8.4.2021, therefore, the only remedy available to the petitioner is to file second appeal under Section 100 of C.P.C.

11. He also pointed out that civil suits are filed under Section 9 of the C.P.C., which clearly provides that unless there is any specific bar, Civil Court has jurisdiction to try all suits of civil nature.

12. He further submitted that Section 47 of C.P.C. is only applicable for civil suits filed under the provision of C.P.C. and is not applicable in the suits filed under Act of 1939. He reiterated that unless orders of Civil Courts dated 15.042015 and 8.4.2021 are holding the field, execution proceeding cannot be proceeded and possession of the land in question cannot be given to petitioner-defendant.

13. I have considered the submissions made by learned counsel for the parties, perused the record as well as judgment so relied upon.

14. There is no dispute on the point that order dated 20.7.1996 has attained finality up to the highest Court of appeal under the revenue law of the State and it is also not disputed that the very same order i.e. dated 20.7.1996 has been declared null and void by the Civil Court in its order dated 10.04.2015, which has been affirmed by the Appellate Court vide order dated 8.4.2021.

15. The facts of the first case, i.e. ***Chief engineer, Hydel Project & Ors(Supra)*** relied upon by the learned counsel for the petitioner is that the Suit is to be decided on the issues which are within the domain of Industrial Disputes Act, 1947 and, therefore, Civil Court is having no jurisdiction to try the suit, as it was expressly barred and the suit could only be adjudicated by the Labour Court. In this case, the Apex Court ultimately declared the order of Civil Court without jurisdiction.

16. This case is of no use in the present controversy for the very same reason that order of Civil Court after disposal of appeal has attained finality against which no second appeal has been preferred by the petitioner-defendant. Further, an issue of jurisdiction of S.D.M. was before the Civil Court, in which it was held that S.D.M. has no jurisdiction to pass order dated 20.7.1996.

17. The Second judgment relied upon by the learned counsel for the petitioner is ***Milkhi Ram(Supra).*** This case is also having a different fact, i.e. Civil Court has no jurisdiction to entertain the claim based upon the Industrial Disputes Act, 1947 and further if any decree is passed by the Court without jurisdiction, the same shall have no force of law. In that matter, decision of Civil Court was under challenge and in the present case, the same is lacking as the order of appellate court dated 8.4.2021 has never been challenged and the same has attained finality. Therefore, this case is also of no use.

18. The third judgment relied upon by the learned counsel for the petitioner is ***Balvant N. Vishwamitra And Ors.(Supra)*** about the argument made by learned counsel for the petitioner with regard to void ab initio or voidable. This judgment is also not coming in the rescue of the petitioner for the reason that the Civil Court vide order dated 10.04.2015 has declared the order of S.D.M. Jhansi dated

20.07.1996 as null and void after framing the issue of jurisdiction and the same has also been affirmed by the Appellate Court vide order dated 8.4.2021. Therefore order of Civil Court dated 10.4.2015 and order of Appellate Court dated 8.4.2021 cannot be said to be void ab initio without its reversal from the Higher Court and the same cannot be ignored by the Revenue Authorities.

19. So far as fourth judgment of Patna High Court in the matter of ***Shiva Poojan Dubey(Supra)***, relied upon by the learned counsel for the petitioner is concerned, that also says that during the pendency of execution proceeding, Section 47 of C.P.C. bars for filing any civil suit, therefore suit No. 319 of 2010 is not maintainable. This judgment is also not applicable to the case of the petitioner for the very same reason that during the pendency of execution proceeding, a fresh suit has not been filed for the same cause of action, but order of Sub Divisional Magistrate dated 20.07.1996 has been challenged before the Civil Court and the Civil Court vide order dated 10.04.2015 has declared the order dated 20.07.1996 as null and void. Therefore this judgment is also of no use.

20. Further, Section 9 of the C.P.C. provides for filing of suit unless barred expressly or impliedly and Section 47 of C.P.C. shall not be applicable in the suits covered under the provision of Section 242 of Act of 1939.

21. Once it is undisputed that the order of Revenue Court dated 20.07.1996 has been declared null and void by the Civil Court vide order dated 10.04.2015, which has been affirmed by the Appellate Court vide order dated 8.4.2021, no relief can be granted to petitioner.

22. In views of the facts and circumstances of the case, no mandamus can be issued for grant of possession to petitioner as prayed.

23. The petition lacks merit and is accordingly **dismissed**.

24. No order as to costs.

(2023) 4 ILRA 931
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No .34252 of 2000

State of U.P. ...Petitioner
Versus
The Presiding Officer, Labour Court, Allahabad & Anr. ...Respondents

Counsel for the Petitioner:
S.C.

Counsel for the Respondents:
C.S.C.

A. Labour Law – Industrial Disputes Act, 1947 – Sections 2(Z), 6 & 33 (C) (2) – Workman – Definition – Junior Engineer, whether come within definition of workman – Held, the irrigation department is an industry, therefore, the employees of the irrigation department are covered under the definition of "Workman", therefore it is concluded that a junior engineer is the workman u/s 6 and 2 (Z). (Para 13)

B. Labour Law – Industrial Disputes Act, 1947 – Section 33 (C) (2) – Absent from service for which 'Leave without pay' was granted – Labour court passed the award holding that employer was also responsible for payment of arrears of salary – Validity challenged by the St. – Held, the impugned order appears to be non-speaking, sketchy and ex-parte – The labour court has not considered the facts that the 'workman' was granted 'leave

without pay' for the period for which he cannot get salary until it is converted into the 'paid leave'. (Para 8 and 15)

Writ petition allowed. (E-1)

List of Cases cited:

1. W.P. (M/S) No. 1129 of 2012; St. of U.P. & anr. Vs Pawan Kumar & anr. decided on 01.12.2016 by Uttrakhand High Court.

2. Des Raj & ors. Vs St. of Pun. & ors.; 1988 (2) SCC 537

3. Banglore Waster Supply Sewerage Board Vs A. Rajappa; A.I.R 1978 S.C 548.

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

1. Heard Shri Arvind Kumar Mishra, learned Standing Counsel for the petitioner-State and perused the record.

2. Service of summons was presumed to be sufficient upon opposite party no. 2 on 26.09.2022 as the same had not returned back.

3. None appeared for opposite party no. 2. Hence the petition is decided on merit.

4. By this writ petition the State has challenged the order passed by opposite party no. 1 (the Presiding Officer, Labour Court, Allahabad), in favour of respondent no. 2 (Dinesh Chandra Rai), by which the labour court allowed the application of respondent no. 2 moved under Section 33 (C) (2) of the Industrial Disputes Act, 1947, for payment of his salary for the months of March and April, 1990 and of 01st and 02nd May, 1990.

5. In brief, the facts of the case are that respondent no. 2 - Dinesh Chandra Rai, Junior Engineer, Irrigation Department-II, 1, Rampriya Road, Allahabad, moved an application that he was appointed as Junior Engineer on 28.03.198. On 03.05.1990, he was transferred to Irrigation Division, (Construction Division-Ist) District Lalitpur and thereafter he was transferred under the control of Executive Engineer, Irrigation Department-II, Allahabad - defendant no. 2, Allahabad on 06.06.1992. He has not been provided his salary for the months of March and April, 1990 and for the dates 01st and 02nd May, 1990, he had been provided salary amounting to Rs.,2800/- for the month of Fab. 1990.

6. According to him, the said department is liable to pay Rs.5,788 with interest.

7. A notice was issued to the employer on 20.05.1998, which was served upon him on 27.05.1998 and thereafter several applications were moved in this regard and lastly the Superintendent Engineer, Irrigation Department-II, Allahabad objected that he was not the proper party. Since he joined in Allahabad, no salary is in arrear and the applicant does not come under the definition of ***''workman***'. Since, the employer has not filed any written statement, therefore they were deprived of filing the same. Later on they filed the written statement on 16.10.1998, which was not accepted and the proceeding was concluded ex-parte. The learned trial court was of the view that it is an undisputed fact that a Junior Engineer is covered under the definition of "workmen'. The trial court concluded that the arguments of employer that the arrears relates / pertains to the Irrigation Department 01st Lalitpur, therefore, he is not responsible for the payment of the salary for the period when the applicant

was serving in Lalitpur is not the correct law.

8. Learned labour court concluded that since the workers has joined under him on transfer, therefore employer-opposite party no. 2 was also responsible for the payment of the arrears of salary of the workmen. The learned labour court allowed the application and directed to pay Rs.5,788/- with an amount of Rs.1,000/- as damages within a month. In case of non-compliance of the order, it was also directed to pay the aforesaid amount with twelve per cent annual interest to the workman after the expiry of one month.

9. Being aggrieved the State has challenged the judgment and order by this writ petition.

10. In brief, in the writ petition, the State has taken plea that the department does not come under the purview of an "***industry***', hence, the labour court had no jurisdiction to decide the claim of the respondent no. 2 and also that he was absented from his duty. For the concerned period he was granted leave without pay. The post of junior engineer false under the purview of Utter Pradesh Public Services Commission and it does not fall under the purview of "***workman'***. The proceedings under Section 33 (C) (2) of the Industrial Disputes Act, 1947 read with Section 6 and X (2) of the Act are the proceedings of execution in nature and without any order or award of any court, the labour court has no jurisdiction to pass such order. The claim of respondent no. 2 was already considered and decided by the competent authority and he has also been paid his entire wages for which he was entitled and he has also received the said money through voucher form no. 28 by his signature. The respondent no. 2 was working in the office of Executive Engineer Evam Niyozan Jal Sansthan Department, Civil Lines, Jhansi on 01st March, 1990 and 02nd March, 1990, and he was absent on the said dates and the order has been passed for ***''leave without pay'*** by the competent authority and his entire claim has been settled even then by concealing these facts the respondent no. 2 has filed the application under Section 33 (C) and (2). The respondent no. 1 has placed reliance on the averments of the application and the impugned order. The case set up by the petitioner was not considered at all and the respondent no. 1 by misconstruing and misreading the document and facts has passed the impugned order, therefore the writ petition be allowed and the impugned order be quashed.

11. During the course of arguments learned counsel for the opposite party no. 2 did not appear in-spite of service of notices, hence heard Sri Jitendra Narain Rai, Additional C.S.C, for the petitioner and the order is passed on merit.

12. So far as the question regarding the inclusion of post of junior engineer as "**workman**' under the definition of the Industrial Dispute Act, 1957 is concerned, in following the judicial precedents:-

(1). State of U.P. & Anr. Vs. Pawan Kumar & Anr. W.P. (M/S) No. 1129 of 2012 dated 01.12.2016, Uttrakhand High Court.

(2) Des Raj & Ors. Vs. State of Punjab & Ors. 1988 (2) SCC 537,

(3) Banglore Waster Supply Sewerage Board Vs. A. Rajappa A.I.R 1978 S.C 548.

13. It has been held that the irrigation department is an industry, therefore, the employees of the irrigation department are

covered under the definition of "***Workman",*** therefore on the basis of above citation, it is concluded that a junior engineer is the workman under Sections 6 and 2 (Z) of the Industrial Disputes Act, 1947.

14. So far as the arrears of salary for the month of March and April, 1990 and for the days of 01st and 02nd May, 1990 is concerned, in this regard the petitioner had barely pleaded that its written statement was not accepted by the labour court. After transfer, no salary is in arrears and this fact has not been mentioned. This fact has also not been mentioned that the plaintiff - opposite party no. 2 was granted ***''leave without pay'*** for the aforesaid period, though in this writ petition, the petitioner has annexed a copy of an order dated 08th March, 1991 as Annexure No. 4 that since 05th March, to 30th April, 1990 the opposite party no. 2 was absent from his service and he was treated to be absent and for that period ***''leave without pay'*** was granted by the Executive Engineer. This fact was not brought into the knowledge of the labour court and this fact has also not been considered by the labour court. Further, the petitioner has filed the paper (Annexure No. 5) to this writ petition, which discloses that an amount of **Rs.1,615.10/-** was paid to opposite party no. 2 for the period of March, 1990 to April, 1990. This fact was also not brought in the knowledge of the labour court. This fact and evidence has also not been considered by the labour court.

15. On the basis of above this Court, is of the view that until the order regarding the sanction of ***''leave without pay'*** is converted into earned leave or any other leave an employee cannot get his salary for the period for which he was granted ***''leave without pay'.*** The impugned order appears to be non-speaking, sketchy and ex-parte. The labour court has not considered the facts that the ***''workman'*** was granted ***''leave without pay***' for the period for which he cannot get salary until it is converted into the ***''paid leave'.***

16. Inspite of service upon him, the respondent no. 2 has not filed counter affidavit to controvert the allegations and the questions raised from the side of the petitioner, hence the petition is liable to be **allowed.**

O R D E R.

17. This writ petition is allowed and the impugned order dated 03.05.2000 passed by the Labour Court, Allahabad in Misc. Case No. 24 of 1997 - Deepak Chandra Rai Vs. The Executive Engineer and another is hereby **quashed.**

18. The labour court is directed to permit the petitioner to file the written statement alongwith the aforesaid documents. After affording an opportunity of hearing and production of documents and the evidence to the petitioner, the learned labour court shall decide the matter within a period of six months.

(2023) 4 ILRA 934
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2014

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-C No .39791 of 2014

Rakesh Kumar Goel ...Petitioner
Versus
Commissioner, Moradabad & Ors.

...Respondents

Counsel for the Petitioner:
Sri Ramesh Kumar Shukla

Counsel for the Respondents:
C.S.C., Sri Alok Tiwari

A. Constitution of India,1950 – Article 226 – UP Land revenue Act, 1901 – Section 34 – Mutation proceeding – Nature – Maintainability of writ – Held, an entry in revenue records is only for fiscal purpose and does not confer title on a person whose name appears in record-of-rights and title to the property can only be decided by a competent civil court – The existence of an efficacious statutory alternative remedy would therefore also be a reason for not entertaining a writ petition in exercise of discretionary jurisdiction under Article 226. (Para 9 and 21)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Mathura Vs St. of U.P. & ors.; 2012 (4) AWC 3825

2. Sri Lal Bachan Vs Board of Revenue, U.P., Lucknow & ors.; 2002 (93)

RD 6

3. Narain Prasad Aggarwal Vs St. of M. P.; (2007) 11 SCC 736

4. Suraj Bhan & ors. Vs Financial Commissioner & ors.; (2007) 6 SCC 186

5. Faqruddin Vs Tajuddin; (2008) 8 SCC 12

6. Bhimabai Mahadeo Kambekar Vs Arthur Import and Export Company & ors.; (2019) 3 SCC 191

7. Balwant Singh Vs Daulat Singh; (1997) 7 SCC 137

8. Narasamma Vs St. of Karn.; (2009) 5 SCC 591

8. Mahesh Kumar Juneja & ors. Vs Addl. Commissioner Judicial, Moradabad Division & ors.; 2020 (3) ADJ 104

9. Harish Chandra Vs U.O.I.& ors.; 2019 (5) ADJ 212

10. U.O.I.(UOI) & ors. Vs Vasavi Coop. Housing Society Ltd. & ors.; MANU/SC/0001/2014

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Shri Ramesh Kumar Shukla, learned counsel for the petitioner, Shri K. R. Singh, learned Standing Counsel for respondent Nos.1 to 3 and Sri Alok Tiwari, learned counsel for respondent No.4.

2. The petitioner has preferred the present writ petition seeking to raise a challenge to the orders dated 29.03.2014, 22.07.2013 and 25.06.2010 passed by respondent No.1, 2 & 3 namely Commissioner Moradabad Division Moradabad, Parganadhikari Najibabad District Bijnor and Tehsildar, Najibabad District Bijnor respectfully. By the aforesaid order, the application filed by the petitioner for mutation was rejected.

3. The case set up by the petitioner was based on the Registered Mortgage Deed dated 16.09.1973 and a non-registered Family Settlement dated 21.09.1986. On the basis of the aforesaid documents, the petitioner stated that he is entitled for mutation of his name in the Revenue Records. On the other hand, the case set up by the respondent No.4 is on the basis of Registered Will Deed dated 18.01.2005 executed by Sri Ved Prakash Goyal/husband of the respondent No.4. The claim set up by the petitioner was rejected by all the courts below on the ground that the Family Settlement dated 21.09.1986 is an unregistered documents and the same will not prevail over the Registered Will Deed dated 18.01.2005.

4. It is argued by learned Standing Counsel for the respondent Nos.1 to 3 and

Sri Alok Tiwari, learned counsel for respondent No.4 that no writ petition lies against summary proceedings and in the present case mutation proceedings had been contested by the petitioner till the stage of revision and no writ petition lies against the order of revisional authority and the only relief can be claimed by filing a regular suit for declaration of title. It is further argued that as the mutation proceedings are summary in nature, petitioner has remedy of filing a declaratory suit for declaring his right under Section 144 of the U.P. Revenue Code, 2016.

5. Having heard learned counsel for the parties and from perusal of the record, it appears that petitioner had contested the mutation proceedings filed under Section 34 of the U.P. Land Revenue Act till the stage of revision. It had been a constant view of this Court as well as the Apex Court that mutation proceedings are summary in nature wherein the title over the land is not decided and the proceedings are only for fiscal purpose to enable the State to collect revenue from the person whose name is on record. The mutation proceedings does not confer upon any right or title on the person whose name is entered in the revenue records.

6. In **Mathura Vs. State of U.P. and others, 2012 (4) AWC 3825** this Court while dealing with this aspect as regards the proceedings under Section 35 of the U.P. Land Revenue Act held as under;

"5. In pith and substance proceedings of mutation, correction of revenue entries and settlement of disputes as to entries in annual registers as prescribed under Section 33 of the Act initiated or decided under 40 and 54 of the Act are all summery proceedings subject to determination of rights of the parties in holding by the competent court of jurisdiction.

6. The law is well-settled that:

(i) mutation proceedings are summary in nature wherein title of the parties over the land involved is not decided;

(ii) mutation order or revenue entries are only for the fiscal purposes to enable the State to collect revenue from the person recorded;

(iii) they neither extinguish nor create title;

(iv) the order of mutation does not in any way effect the title of the parties over the land in dispute; and (v) such orders or entries are not documents of title and are subject to decision of the competent court.

3. It is equally settled that the orders for mutation are passed on the basis of the possession of the parties and since no substantive rights of the parties are decided in mutation proceedings, ordinarily a writ petition is not maintainable in respect of orders passed in mutation proceedings unless found to be totally without jurisdiction or contrary to the title already decided by the competent court. The parties are always free to get their rights in respect of the disputed land adjudicated by competent court."

7. The question with regard to the maintainability of a writ petition arising out of mutation proceedings fell for consideration in the case of ***Sri Lal Bachan Vs. Board of Revenue, U.P., Lucknow &***

Ors. 2002 (93) RD 6 and it was held that the High Court does not entertain a writ petition under Article 226 of the Constitution of India for the reason that mutation proceedings are only summarily drawn on the basis of possession and the parties have a right to get the title adjudicated by regular suit. The observations made in the judgment are extracted below:-

"11. This Court has consistently taken the view as is apparent from the decisions of this Court referred above that writ petition challenging the orders passed in mutation proceedings are not to be entertained. To my mind, apart from there being remedy of getting the title adjudicated in regular suit, there is one more reason for not entertaining such writ petition. The orders passed under Section 34 of the Act are only based on possession which do not determine the title of the parties. Even if this Court entertains the writ petition and decides the writ petition on merits, the orders passed in mutation proceedings will remain orders in summary proceedings and the orders passed in the proceedings will not finally determine the title of the parties."

8. A similar observation was made in ***Narain Prasad Aggarwal Vs. State of Madhya Pradesh (2007) 11 SCC 736,*** wherein it was held as follows:-

"19. Record-of-right is not a document of title. Entries made therein in terms of Section 35 of the Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable..."

9. The principle that an entry in revenue records is only for fiscal purpose and does not confer title on a person whose name appears in record-of-rights and title to the property can only be decided by a competent civil court was reiterated in the decision of ***Suraj Bhan and others Vs. Financial Commissioner and others (2007) 6 SCC 186*** and it was stated as follows :-

"9...It is well settled that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. It is settled law that entries in the revenue records or jamabandi have only "fiscal purpose" i.e. payment of land revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent civil court..."

10. Reference may also be had to the judgment in ***Faqruddin Vs. Tajuddin (2008) 8 SCC 12,*** wherein it was held that the revenue authorities cannot decide questions of title and that mutation takes place only for certain purposes. The observations made in this regard are as follows:-

"45. Revenue authorities of the State are concerned with revenue. Mutation takes place only for certain purposes. The statutory rules must be held to be operating in a limited sense... It is well-settled that an entry in the revenue records is not a document of title. Revenue authorities cannot decide a question of title."

11. The proposition that mutation entries in revenue records do not create or extinguish title over land nor such entries have any presumptive value on title has been restated in a recent decision in the

case of ***Bhimabai Mahadeo Kambekar Vs. Arthur Import and Export Company & Ors. (2019) 3 SCC 191*** placing reliance upon earlier decisions in ***Balwant Singh Vs. Daulat Singh (1997) 7 SCC 137 and Narasamma Vs. State of Karnataka (2009) 5 SCC 591***. The observations made in the judgment are as follows:-

"6. This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over such land nor has it any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. (See Sawarni v. Inder Kaur, Balwant Singh v. Daulat Singh and Narasamma v. State of Karnataka)."

12. A coordinate Bench of this Court in case of **Mahesh Kumar Juneja and Ors. Vs. Addl. Commissioner Judicial, Moradabad Division and Ors. 2020 (3) ADJ 104** reiterated the same view and held as under;

"16. The settled legal position that entries in revenue records do not confer any title has been considered and discussed in a recent judgment of this Court in Harish Chandra Vs. Union of India & Ors.13.

17. In view of the foregoing discussion, it may be restated that ordinarily orders passed by mutation courts are not to be interfered in writ jurisdiction as they are in summary proceedings, and as such subject to a regular suit.

18. The mutation proceedings being of a summary nature drawn on the basis of possession do not decide any question of title and the orders passed in such proceedings do not come in the way of a person in getting his rights adjudicated in a regular suit. In view thereof this Court has consistently held that such petitions are not to be entertained in exercise of powers under Article 226 of the Constitution of India."

13. In **Harish Chandra Vs. Union of India & Ors. 2019 (5) ADJ 212** Division Bench of this Court while dealing with an issue in regard to the land acquisition proceedings had the occasion to discuss the matter relating to revenue records and held as under;

"37. This Court may also take into consideration that it is settled law that the revenue records do not confer title and even if the entries in the revenue record of rights carry value that by itself would not confer any title upon the person claiming on the basis of the same.

38. The Supreme Court in Guru Amarjit Singh Vs. Rattan Chand & Ors.3 held that entry in Jamabandi (revenue records) are not proof of title, and it was stated as follows:-

"2. ...It is settled law that entries in the Jamabandi are not proof of title. They are only statements for revenue purpose. It is for the parties to establish the relationship or title to the property unless there is unequivocal admission..."

14. Apex Court in case of Union of India (UOI) & Ors. Vs. Vasavi Co-op. Housing Society Ltd. & Ors. MANU/SC/0001/2014 while dealing with the entries of the revenue records relying upon the earlier judgments of the Apex Court, held that revenue records are not the

document of title and the same cannot be basis for declaration of title. Relevant paragraph no. 17 is extracted here as under;

"17. This Court in several Judgments has held that the revenue records does not confer title. In Corporation of the City of Bangalore v. M. Papaiah and another (1989) 3 SCC 612 held that "it is firmly established that revenue records are not documents of title, and the question of interpretation of document not being a document of title is not a question of law." In Guru Amarjit Singh v. Rattan Chand and others (1993) 4 SCC 349 this Court has held that "that the entries in jamabandi are not proof of title". In State of Himachal Pradesh v. Keshav Ram and others (1996) 11 SCC 257 this Court held that "the entries in the revenue papers, by no stretch of imagination can form the basis for declaration of title in favour of the plaintiff."

15. The reluctance of the Courts to interfere with orders arising out of mutation proceedings is primarily for the reason that the question at issue is with regard to correction of record of rights which is primarily maintained for revenue purposes and an entry therein has reference only to possession and does not ordinarily confer upon the person in whose favour it is made any title to the property in question.

16. The aforesaid inference that revenue entries made on the basis of orders of mutation do not ordinarily confer upon a person in whose favour they are made, any title to the property in question, stands fortified from the express provision contained under Section 39 of the Code which states in clear terms that the orders passed under the provisions relating to mutation of revenue records would not act as a bar against any person from establishing his rights to the land by means of a declaratory suit.

17. Section 39 of the Code, as referred to above, is being extracted below :-

"39. Certain orders of Revenue Officers not to debar a suit :- *No order passed by a Revenue Inspector under Section 33, or by a Tehsildar under sub-section (1) of Section 35 or by a Sub-Divisional Officer under sub-section (3) of Section 38 or by a Commissioner under sub-section (2) of Section 35 or sub-section (4) of Section 38 shall debar any person from establishing his rights to the land by means of a suit under Section 144."*

18. The aforementioned section clearly provides that no person shall be debarred from establishing his rights to the land by means of a declaratory suit under Section 144, irrespective of the fact that an order has been passed by; (i) a Revenue Inspector under Section 33 (mutation in case of succession), or (ii) a Tehsildar under sub-section (1) of Section 35 (mutation in case of transfer or succession), or (iii) a Sub-Divisional Officer under sub-section (3) of Section 38 (correction of error or omission), or (iv) a Commissioner under sub-section (4) of Section 38 (correction of error or omission).

19. Section 39 which expressly provides that the orders passed by revenue officers in cases of a mutation and correction of revenue entries would not debar filing of a declaratory suit, is a substantive provision, and corresponds to a similar provision contained under Section 40-A of the U.P. Land Revenue, 1901 (now repealed).

20. The language of the section emphasizes that it applies to all orders passed by the revenue officers in matters relating to mutation and correction of errors or omission of revenue entries and it provides in clear terms that such order shall not debar any person from establishing his rights to the land by means of a declaratory suit under Section 144.

21. The object of the section being to enable a person to seek declaration of his rights on questions of title irrespective of the orders passed in mutation proceedings with regard to correction of revenue entries, the remedy of seeking a declaration on questions of title by filing a declaration suit remains open. The existence of an efficacious statutory alternative remedy would therefore also be a reason for not entertaining a writ petition in exercise of discretionary jurisdiction under Article 226.

22. Thus, it had been constant view of the Hon'ble Apex Court as well as this Court that mutation proceedings are summary in nature and no right or title is created. The revenue entries is only for the collection of revenue from the person whose name is entered in the records. The title can only be seen in a regular suit filed for declaration and not in a writ petition which arises out of summary proceedings.

23. In view of the above the orders passed by the revenue authorities need no interference and writ petition is dismissed, accordingly. However, it is open to the petitioner to file declaratory suit claiming his right over the land in dispute.

(2023) 4 ILRA 940
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ-C No .54850 of 2009

Viswatosh Narayan Singh ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anubhav Chandra, Sri B.K. Srivastava

Counsel for the Respondents:
C.S.C.

A. Indian Stamp Act, 1899 – Section 47-A - Schedule 1-B, Article 35(a)(v) and 35(a)(vi) – Expiry of term of lease – Renewal – Stamp duty has been paid as per Article 35(a)(v) of Schedule 1-B Effect – Effect – Lease deed provide that at the time of renewal of lease, the parties shall execute fresh lease, which necessarily means fresh registration – Effect – *Gopal Swarup Chaturvedi's case* relied upon – Held, such lease deed is not covered under Article 35(a)(vi) of the Indian Stamp Act. (Para 6, 12 and 13)

Writ petition allowed. (E-1)

List of Cases cited:

1. Gopal Swarup Chaturvedi Vs St. of U.P. & ors.;

2007 (102) RD 574

2. Reliance Industries Ltd. Vs St. of U.P. & others; 2018(10) ADJ 137

3. Ashish Kumar Vs Deputy Commissioner (Stamp) and Ors; (2010) 110 RD 822

4. Manish Jain Vs St. of U.P; (2011) 5 All LJ 388

5. Smt. Sudama Devi Vs St. of U.P.; (Manu/UP/2818/2018)

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri Anubhav Chandra, learned counsel for the petitioner, Sri

Siddharth Singh, learned Addl. Chief Standing Counsel.

2. Present petition has been filed for quashing the impugned orders dated 27.12.2006, 29.9.2007 passed by Respondent no.3/ Sub Divisional Officer, Tehsil Kerakat, District Jaunpur and order dated 4.9.2009 passed by Respondent no.2/ Deputy Commissioner (Stamps), Varanasi Division, Varanasi.

3. By the impugned order dated 27.12.2006 passed by Respondent no.3/ Sub-Divisional Officer, Tehsil Kerakat, District Jaunpur, treating the lease deed to be in perpetuity in proceedings initiated under Section 47-A of the Indian Stamps Act, deficiency of stamp duty was found in the light of Schedule 1-B Article 35(a)(vi) of the Indian Stamps Act. The revision filed against the same was also dismissed.

4. It was submitted by learned counsel for the petitioner that initially order dated 27.12.2006 was passed by Respondent no.3 against the petitioner without granting proper opportunity of hearing to him and without following proper procedure of law. It was further pointed out that in fact, lease deed was surrendered on 2.6.2006.

5. The restoration application filed against the same was rejected. Therefore, two revisions filed by the petitioner before the Revisional Authorities and both were dismissed by Respondent no.2 / Deputy Commissioner (Stamps), Varanasi Division, Varanasi.

6. Several arguments have been raised to contend that the facts as well as law on the issue involved have not been appreciated by the authorities concerned. By drawing attention to the various clauses of the lease deed dated 20.4.2005, it was submitted that a lease deed was executed for a period of 30 years only with a clause of renewal of the same, hence, the stamp duty could have been levied under Schedule 1-B Article 35(a)(v) of the Indian Stamp Act and not under Sub-Clause (vi) and therefore, the impugned orders are liable to be set aside. He has specifically drawn the attention to Clause (c)(iv), (v) and Clause 3(b) of the Lease Deed to contend that the lease deed was for a period of 30 years only and it was specifically clarified that at the time of such renewal, the parties shall execute fresh lease deed.

7. Submission, therefore, is that stamp duty could have been levied under Article 35 (a) (v) and not under Article 35(a)(vi) of the Schedule 1-B. He has placed reliance on the judgment of this Court passed by a Division Bench of this Court in ***Gopal Swarup Chaturvedi Vs. State of U.P. and others, 2007 (102) RD 574*** and a judgment of this Court passed in ***Reliance Industries Limited vs. State of U.P. & others, 2018(10) ADJ 137.***

8. Per contra, Sri Siddharth Singh, learned Addl. Chief Standing Counsel by drawing attention to lease deed submitted that the lease deed provided that the lessor shall not terminate the lease before the expiry of the period of 30 years. He had further submitted that the lease deed further provided that the lessor agrees that at the expiry of the said term of 30 years this lease will automatically and without any further act of the parties hereto shall stand renewed for a further similar period. Submission, therefore, is that the lease therefore is to be treated lease in perpetuity and, therefore, would be covered by Article 35 (a)(vi) of Schedule 1-B of the Indian Stamps Act. Submission, therefore, is that

the impugned orders warrant no interference by this Court and the petition is devoid of merits and is liable to be dismissed.

9. I have considered the rival submissions and perused the record. For disposing of the petition, it would be appropriate to take note of the Clause (c) and 3(b) of the Lease Deed, which are quoted hereunder:

"c) The LESSOR has made the following representations to the LESSEE--

i) The LESSOR has full power and absolute authority to grant this lease to the LESSEE.

ii) The Demised Premises are free from all encumbrances and charges and the LESSOR is not holding valid and marketable tilt to the same

iii) The Demised Premises can be used for Non Agricultural purpose and the LESSOR has obtained the necessary Non Agricultural permission and the Demised Premises have been made commercially usable.

iv) The LESSEE shall be at liability to sub-lease the said premises in favour of ESSAR OIL LIMITED (EOL) a Company incorporated under the provisions of Companies Act 1956 and having its registered office at Khambhalia PO, Box No. 24, Distt. Jamnagar Gujrat-361305 and Brnahc office at Urvanshi Complex First Floor Sigra, Varanasi period of 30 years for the said business.

v) The LESSOR shall not terminate the lease before the expiry of the said period of 30 years.

"3. The LESSOR doth hereby covenant with the LESSEE as follows:-

a) .....

(b) The LESSOR agrees that at the expiration of the said term of 30 years this lease will automatically and without any further act of the parties hereto shall stand renewed for a further similar period, unless either party shall, prior to the expiration of the last mentioned term have given to the other party three calendar month's previous notice in writing of its intention not to renew the lease. The renewed lease will be on a monthly rent as may be mutually agreed between the parties subject to the same covenants, conditions and agreement as are herein contained including the present covenant for renewal. It being clarified that at the time of such renewal the parties shall execute fresh lease deed."

(Emphasis supplied)

10. A perusal of the aforesaid clause clearly reveals that although there is a provision for renewal of the lease deed, however, it has also been provided that three calendar month's previous notice in writing of can be given for its intention not to renew the lease and it has further been clarified that at the time of such renewal, the party shall execute fresh lease.

11. In ***Gopal Swarup Chaturvedi (supra)*** after discussing various judgments of Hon'ble Apex Court, it has been held that the renewal of lease means the grant of fresh lease, which requires fresh registration. Relevant paragraph of the said judgment is quoted hereunder:

"11. Renewal of a lease is nothing but a grant of a fresh lease. The Hon'ble

Supreme Court in Delhi Development Authority v. Durga Chand Kaushish, AIR 1973 SC2609, has held that while considering such an issue the terms and conditions incorporated in the lease have to be examined as a whole and effect has to be given to each and every term incorporated therein. The Court observed that it is called a renewal simply because it postulates the existence of a period lease which generally provides for renewal as of right. In all other respects it is really a fresh lease. Renewal is merely used to enable the Government to given preference to the previous permit holders who are to be treated on a different footing from the new applicants.

12. In Gajraj Singh and others v. State Transport Appellate Tribunal and others, AIR 1997 SC 412, the Hon'ble Supreme Court explained that renewal is a fresh grant, though it brings life to the previous lease or licence granted as per the existing appropriate provisions of the statute and though it is not a vested or accrued right, an application for renewal has to be dealt with according to the law in operation after compliance with the preconditions. There is a distinction between the right acquired or accrued and a privilege, hope and expectations to get a right. However, a right to apply for renewal and to get a favourable order would not be deemed to be a right accrued, unless some positive acts are done.

13. In Pravash Chandra Dalul and another v. Vishwanath Banerjee and another, AIR 1989 SC 1834, the Hon'ble Supreme Court dealing with a case under the provisions of Calcutta Thika Tenancy Act, 1949, explained the distinction between extension and renewal of lease, observing that extension merely means prolongation of the lease where renewal means a new lease.

14. Similar observations that renewal is nothing but a fresh lease between the parties have been made by the Courts as is evident from the judgments in Dasarathi Kumar v. Sarat Chandra Ghose and another, AIR 1934 Cal 135; Mahadeb Ram Kahar v. Tinkori Roy, AIR 1954 Cal 539, and Chotey Lal v. Sheo Shankar, AIR 1951 All 478.

15. The word 'renewed' has been used by the legislature in the provisions of section 116 of the Transfer of Property Act, 1882 and it had been interpreted by the Courts time and again as grant of fresh lease.

16. In Kai Khushro Bezonjee Capadia v. Bal Jerbal Hirjibhoi Warden, AIR 1949 FC 129, the Federal Court considered the provisions of Section 16 'of the Transfer of Property Act, 1882 and explained the meaning of 'renewed', observing that it is nothing but a new lease drawn into existence by the bilateral act of the lessor and lessee.

17. Renewal has been given the meaning in various Dictionaries as to begin again, to repeat, to make again, to substitute new for, to acquire again, to restore, re-establish, to set up again, bring back into use or in existence, to take up again or recommence, to replace by some new or fresh thing of the same kind or a fresh supply. Thus, renewal of lease is nothing but a grant of lease for a fresh period.

18. In R.M. Mehta v. HPFM Co. Ltd, AIR 1976 Mad 194, the Madras High Court considered a similar issue and placed

reliance upon the Dictionary meaning of the "renewal of lease" given in Ballentine's Law Dictionary 2nd Edn. wherein it has been defined as under:--

"There is a distinction between a stipulation in a lease to renew it for an additional term and one to extend it. In that stipulation, to re-new requires the making of a new lease, while stipulation to extend does not."

19. Thus, in view of the above, the inescapable conclusion that follows is that renewal of lease means grant of a fresh lease."

(Emphasis supplied)

12. In the present petition, in the lease deed in question, it has been specifically provided that at the time of renewal of lease, the parties shall execute fresh lease, which necessarily means fresh registration.

13. In ***Gopal Swarup Chaturvedi (supra)***, it was clearly held that such lease deed is not covered under Article 35(a)(vi) of the Indian Stamp Act. Placing reliance on judgment in ***Gopal Swarup Chaturvedi (supra)*** in the case of ***Reliance Industries Limited (supra),*** identical question as involved in the present case, was considered and the impugned orders were set aside. Relevant paragraph of Reliance Industries Limited ***(supra)*** is quoted hereunder:

"6. Having heard the learned counsel for the parties, I am of the view that when the lease deed provided that it was only for a period of 20 years and that it could be extended thereafter, then it would only mean that the lease was for a period of 20 years and that it could be renewed after the 20 years period. After twenty years there was an option with either of the parties to opt out of the agreement. In that case there would be no extension. However, if there was an extension then it would mean a fresh agreement followed by a fresh registration. This is exactly what has also been held in Gopal Swarup Chatruvedi Vs. State of U.P. and others, 2007 (102) RD 574."

(Emphasis supplied)

14. Same view has been taken in (I) ***(2010) 110 RD 822, Ashish Kumar v. Deputy Commissioner (Stamp) and Ors,*** (ii) (***2011) 5 All LJ 388, Manish Jain Vs. State of U.P,*** and (iii) ***(Manu/UP/2818/2018), Smt. Sudama Devi Vs. State of U.P.,***

15. In view of the aforesaid, the impugned orders are not sustainable in the eye of law. It is nobody's case that the stamp duty has not been paid as per Article 35(a)(v) of Schedule 1-B of the Indian Stamp Act.

16. In such view of the matter, impugned orders dated 27.12.2006, 29.9.2007 passed by Respondent no.3/ Sub Divisional Officer, Tehsil Kerakat, District Jaunpur and order dated 4.9.2009 passed by Respondent no.2/ Deputy Commissioner (Stamps), Varanasi Division, Varanasi are hereby quashed.

17. Accordingly, the writ petition is **allowed**.

18. Any amount lying deposited pursuant to the order of this Court dated 23.10.2009 shall be refunded to the petitioner with an interest of 9% per annum from the date of deposit, within a period of

2 months from the date of production of a self attested copy of this order, which may be verified from the web-site of Allahabad High Court.

(2023) 4 ILRA 945
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 638 of 1996

Akhilesh Shukla & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri A.K. Singh, Sri Shashi Prakash Rai, Sri Himanshu Mishra

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Indian Penal Code, 1860 – Sections 147, 148, 323, 324 & 307 - The Code of Criminal Procedure, 1973 – Section 360 – Probation of Offenders Act, 1958 – Section 4 - Appeal against conviction - On 25.05.1985, the informant was taking bath at his door - Accused hurled abuses on informant, exhorted the co-accused to kill him - Hearing this, informant ran to his verandah - Accused armed with lathi, pharsa and gun with the object of committing murder, entered into his verandah - He was dragged, beaten severely by accused - The informant received injuries caused by lathi and pharsa – Charges framed - Prosecution examined P.W.1, P.W.2 as witnesses of fact - P.W.3, P.W.4 were examined as formal witnesses – Held, on careful perusal of evidence of P.W.1, P.W.2 it is found that their evidence is cogent, reliable - There is long standing enmity and litigation has taken place between them – Generally, independent witness could not come to support either side, if he supports one party, the other party will become inimical to him - Evidence of P.W.1, P.W.2 is corroborated by documentary evidence - Considering the evidence of P.W.1, P.W.2, the alleged contradictions in their evidence is minor and natural - It doesn't affect prosecution case in its entirety - The prosecution has proved charge under aforesaid sections beyond all reasonable doubts - After convicting, the trial court instead of sending them to jail, have released them on probation – No illegality in the impugned order, conviction is upheld. (Para 2, 7, 9, 10, 30, 31, 37, 38, 39, 46,)

Appeal is dismissed. (E-13)

List of Cases cited:

1. Suresh Sitaram Surve Vs St. of Mah., AIR 2003 SC 344

2. Baleshwar Mahto Vs St. of Bihar, AIR 2017 SC 827

3. Karthik Malhar Vs St. of Bihar, 1996 Cr.L.J. 889

4. St. of Andhra Pradesh Vs Punati Ramulu, AIR 1993 SC 2644

5. Leela Ram (dead) through (Duli Chandra) Vs St. of Har. & ors., 2000 SC (Cr) 222

6. Krishna Mochi & ors. Vs St. of Bihar, 2002 SCC (Cri) 1220

7. Subhash Chand & ors. Vs St. of U.P., 2015 Lawsuit (Alld) 1343

8. St. of Maharashtra Vs Jagmohan Singh Kuldip Singh Anand & ors. (2004) 7 SCC 659

9. Jagat Pal Singh & ors. Vs St. of Har., AIR 2000 SC 3622

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Shashi Prakash Rai, learned counsel for the appellants and learned A.G.A. for the State.

2. This criminal appeal has been instituted against the judgement and order dated 30.03.1996 passed by Sessions Judge, Siddharthnagar, in Sessions Trial No. 135 of 1991, State Vs. Ram Ashish and others, arising out of Case Crime No. 38 of 1985 u/s 147, 148, 323, 324, 307 I.P.C., P.S.- Uska Bazar, District- Siddharthnagar.

3. By the impugned judgement and order, the trial court has convicted the accused, namely, Ram Ashish, Ram Kishor, Akhilesh, Arvind, Ravindra, Satyadeo and Girjesh u/s 147, 148, 323, 324 r/w 149 I.P.C. and released on probation for two years on the condition of maintaining good conduct and peace in society on furnishing personal bonds of Rs.5,000/- and two sureties in the like amount.

4. The trial court acquitted all the accused from charge u/s 307 I.P.C. No appeal has been filed against acquittal u/s 307 I.P.C. as the order of acquittal has become final.

5. During pendency of appeal, appellant no. 6, Satyadeo and appellant no. 7, Ram Kishor, have died and criminal appeal qua these appellants was abated vide order dated 18.08.2018.

6. It is submitted in the grounds of appeal that the conviction is against the evidence on record. It is also submitted that the conviction is wrong and the sentence is too severe. It is also submitted that appellant, Ravindra Kumar Shukla is a government employee and posted as police constable at Gonda. Appellant, Arvind is in service in Delhi. It has also been submitted that appellant, Ram Ashish is studying in L.L.B. IInd year from Ram Manohar Lohia University, Faizabad, now Ayodhya.

7. The prosecution case in brief is that informant, Govind, is the resident of village, Mehaniyna Bujurg, Police Station- Uska Bazar, District- Siddharthnagar. The accused are also resident of the same village. There was enmity due to litigation between the informant and co-accused Satyadeo. The informant Govind is a commission agent and often remains outside his village. The tilak ceremony of informant's nephew, Arun Kumar was to be held on 29.05.1985. Therefore, informant had gone to his village on 25.05.1985 to participate in the ceremony. On 25.05.1985 at 7.30 p.m., the informant was taking bath at his door. Accused, Ram Ashish, hurled abuses on informant and exhorted the co-accused to kill the informant. Hearing the exhortation, informant ran to his verandah. Thereupon, the accused, Ram Ashish, Akhilesh, Girjesh, Arvind, Ravindra all sons of Satyadeo and Ram Kishor armed with lathi, *pharsa* and gun with the object of committing murder of the complainant, entered into his verandah. He was dragged out and beaten severely by the accused. Accused, Ram Ashish assaulted with *pharsa* and remaining accused with lathi. The informant made hue and cry on which witnesses Harihar, Shiv Raj, Parsadi and other villagers reached there, saw the occurrence and saved the informant. The informant received injuries caused by lathi and *pharsa*.

8. On the basis of the written report of informant, Constable Moharrir, Ram Kamal Mani Tripathi, registered the first information report on 25.05.1985 at 20.05 o'clock. The chik F.I.R. was prepared by him as (Ext.Ka.2). He made entry in G.D. about the registration of criminal case on 25.05.1985 at 20.05 o'clock as G.D. No. 36. The certified carbon copy of the G.D. is (Ext.Ka.4). The investigation was done by

Investigating Officer, S.I. Shyam Kishor Mishra who visited the place of occurrence and prepared *fard* of plain mud and blood-stained mud collected from the spot which was kept in two separate containers which were wrapped by cloth and sealed. The recovery memo of aforesaid mud is (Ext.Ka.5). The plain mud is (material Ext.1) and blood-stained mud is (material Ext.2). The Investigating Officer recorded the statement of the witnesses and after investigation, submitted charge-sheet (Ext.Ka.6) u/s 147, 148, 149, 323, 324, 307 I.P.C. against the accused, namely, Akhilesh, Arvind, Ravindra, Ram Ashish, Girjesh all sons of Satyadeo and Satyadeo and Ram Kishor, sons of Ram Chandra Shukla.

9. On 04.12.1992, the court framed charge u/s 147, 148, 323, 149, 324, 307 I.P.C. against the accused. The accused denied the charge and claimed trial.

10. To prove the charge, prosecution examined informant P.W.1 Govind Prasad and P.W.2 Harihar as witnesses of fact. It also examined P.W.3 Dr. Ashok Kumar and Investigating Officer P.W.4 S.I. Shyam Kishor Mishra as formal witnesses.

11. On 21.01.1995, the court recorded statement of accused u/s 313 Cr.P.C. All the accused stated that false case was registered by the informant due to enmity. They stated that witnesses are giving false evidence. The accused expressed their ignorance about the documentary and material exhibits proved by the prosecution. Accused, Ram Kishor stated that he was outside his village on the date of occurrence and had gone to visit the house of his ailing sister. Accused, Ram Ashish stated that he had gone along with co-accused, Ravindra to attend the marriage of his brother-in-law and was not present in the village. Accused, Arvind stated that on the date of occurrence he was in Delhi. Accused, Akhilesh stated that he had gone to his village- Thakurapur. Accused, Satyadeo stated that informant Govind's cow was eating grains kept in his verandah. He chased away his cow. Then, Govind came with others to his house assaulted him and his son, Girjesh. He visited the police station but the *daroga* kept him sitting there and registered his first information report on 26.05.1985. The medical examination was done through the constable sent by the police station.

12. The accused examined D.W.1 Prabhunath Pandey and D.W.2 Hemant Kumar in their defence. D.W.1 Prabhunath Pandey has stated that accused, Ram Ashish and his younger brother, Ravindra had gone to village- Sheetalpur, P.S.- Manjhi, District- Chhapra on invitation. They participated in marriage ceremony from 23.05.1985 to 26.05.1985. He proved the marriage card as (Ext.Kha.1). D.W.2 Hemant Kumar stated that accused, Akhilesh was present in village- Mahua, P.S.- Nauchandwa, District- Maharajganj from 24.05.1985 to 26.05.1985 and proved his certificate (Ext.Kha.2). There was *barhi* of one Vikram Shukla. He had gone to participate in the ceremony.

13. In defence, the accused have also filed copy of charge-sheet, site plan, first information report, injury report and statements of S.O., Shyam Kishor and Dr. Ashok Kumar relating to criminal case lodged by them against accused. The documents are (Exts.Kha.1 to Kha.5), statements of Investigating Officer (Ext.Kha.6) and that of Dr. Ashok Kumar (Ext.Kha.7) and carbon copy of F.I.R. (Ext.Kha.8).

14. Heard the learned counsel for both the parties and perused the entire lower court record.

15. The informant and injured P.W.1 Govind Prasad has stated that on the date of occurrence on 25.05.1985 at 7.30 p.m., he was taking bath in his verandah. Ram Ashish exhorted all other accused to kill him. On hearing this, accused, Akhilesh, Arvind, Ravindra, Satyadeo, Girjesh and Ram Kishor reached in his verandah. They dragged him out of it and with an intention to kill him, started beating him with *pharsa*, fists and kicks and also by lathi and danda. He received lathi and *pharsa* injuries. He lodged first information report and was medically examined by Dr. Ashok Kumar in P.H.C.- Uska Bazar.

16. P.W.2 Harihar stated in his evidence that he is the brother of the informant, Govind. On hearing his hue and cry, he reached on the spot. He saw that all the accused, namely, Akhilesh, Arvind, Ravindra, Satyadeo, Girjesh, Ram Ashish and Ram Kishor were beating his brother with fists, kicks, *pharsa*, lathi, danda, causing him injury.

17. P.W.1 Govind and P.W.2 Harihar have supported the charge framed against the accused. They have deposed about the date, time and place of occurrence, manner of assault, manner of initiation of occurrence, the participation of accused in the assault and marpeet, the weapons used by them, the injury caused to informant Govind and after the occurrence, registration of F.I.R. in P.S.- Uska Bazar and medical examination of informant, Govind at P.H.C., Uska Bazar by Dr. Ashok Kumar.

18. P.W.3 Dr. Ashok Kumar has proved the injury report (Ext.Ka.1) of informant P.W.1 Govind Prasad. He has stated that he examined the informant Govind on 25.05.1985 at 8.30 p.m. He found following injuries on the person of injured Govind Prasad :-

(i) Incised wound measuring 5.5 cm x 0.5 cm x scalp deep on the rt. side of head 10 cm away from the root of rt. ear, blood oozing from the wound.

(ii) Lacerated wound measuring 6 cm x 0.5 cm x scalp deep on the lt. side of head 9 cm away from the root of left ear.

(iii) Incised wound measuring 5.5 cm x 0.5 cm x bond-deep on the lt. side of head, 4 cm away & above from the lt. upper eye lashes.

(iv) Contusion measuring 21 cm x 1.5 cm on the lt. side of back in vertical portion starting from upper part of back towards lower part reddish and of rt. side of back. Reddish colour.

(v) Abraded contusion measuring 16 cm x 1.5 cm on the upper part rt. side of back. Reddish colour.

(vi) Contusion measuring 12 cm x 2 cm on the rt. side of back 3 cm away from injury no. 5. Reddish colour.

(vii) Abraded contusion measuring 17 cm x 2 cm on the lower part of lt. side of back. Reddish colour.

(viii) Contusion measuring 10 cm x 1 cm on the lower part of back.

(ix) Contusion measuring 12 cm x 2 cm on the lower part of back.

(x) Contusion measuring 10 cm x 1 cm on the lower part of back.

(xi) Contusion measuring 5 cm x 2 cm on the upper part of lt. side of forearm. Reddish colour.

(xii) C/O paid on the both buttock but no external injury are seen.

19. In the opinion of P.W.3 Dr. Ashok Kumar, all the injuries were simple and caused by hard and blunt object except injury nos. 1 and 3 which were caused by some sharp-edged weapon. Duration of the injuries was fresh.

20. The Investigating Officer, P.W.4 Shyam Kishor Mishra proved the chik F.I.R. (Ext.Ka.2), entry of institution of criminal case in the G.D. as G.D. no. 36 dated 25.05.1985 at 20.05 o' clock (Ext.Ka.3), site plan (Ext.Ka.4), recovery memo of plain mud and blood-stained mud recovered from the place of occurrence (Ext.Ka.5), plain mud (material Ext.1) and blood-stained mud (material Ext.2) and charge-sheet (Ext.Ka.6).

21. Although the defence has filed copy of charge-sheet, chik F.I.R., site plan, injury report and statements of S.O., Shyam Kishor and Dr. Ashok Kumar as (Exts.Kha.1 to Kha.5), statements of Investigating Officer (Ext.Kha.6) and that of Dr. Ashok Kumar (Ext.Kha.7) and carbon copy of F.I.R. (Ext.Kha.8) relating to Case Crime No. 38A of 1985, P.S.- Uska Bazar, these documents have not been proved through examination of defence witnesses in this case. Therefore, they cannot be read in evidence in favour of defence. Exhibits were mentioned on these documents but from the perusal of the record, it is clear that these documents were not proved by Investigating Officer, Shyam Kishor Mishra and Dr. Ashok Kumar in the case.

22. According to the prosecution case and evidence of prosecution witnesses, P.W.1 Govind Prasad and P.W.2 Harihar, the occurrence took place on 25.05.1985 at 7.30 p.m. The distance of the police station from the place of occurrence is about 1 mile. The report was promptly lodged and the injured, Govind Prasad was examined on 25.05.1985 at 8.30 p.m. The injuries received by Govind Prasad is mentioned in the G.D. (Ext.Ka.3). It shows that the injured received injuries in the occurrence of marpeet. The injuries were caused to him by blunt and sharp-edged weapon. The Medical Officer, P.W.3 Dr. Ashok Kumar has corroborated by his evidence the evidence given by P.W.1 Govind Prasad and P.W.2 Harihar regarding the injuries received by informant Govind Prasad. There is nothing found in the cross of aforesaid prosecution witnesses which may raise doubt on the reliability and veracity of their evidence.

23. It has been argued by learned counsel for the defence that the prosecution has not explained the injuries received by accused, Satyadeo and Ram Kishor. Therefore, the prosecution has not proved the genesis of the case properly and accused should be given benefit of doubt.

24. There is no force in the arguments advanced on behalf of the defence as the alleged injury report of Satyadeo and Ram Kishor has not been proved by cross-examining P.W.3 Dr. Ashok Kumar or producing him in defence. There is nothing on record to prove that in the incident, accused Satyadeo and Ram Kishor have received injuries. The defence has not proved the prosecution papers, namely, chik F.I.R., copy of G.D., site plan, charge-sheet relating to the alleged cross case Case Crime No. 29A/1985 and injury reports of Satyadeo and Ram Kishor. By simply filing the certified copies of these documents, it cannot be said to have been proved as per law and cannot be used in favour of defence.

25. It has also been argued by learned counsel for the defence that the prosecution has examined only two witnesses of facts, one the informant injured P.W.1 Govind and the other informant's brother, P.W.2 Harihar. They are interested witnesses and in the absence of independent witnesses, the prosecution case cannot be said to be proved.

26. In ***Suresh Sitaram Surve Vs. State of Maharashtra, AIR 2003 SC 344***, the Apex Court has explained the law relating to injured witness :-

"the evidence of an injured eye-witness cannot be discarded in toto on the ground of inimical disposition towards the accused particularly where his evidence, when tested in the light of broad probabilities, it can be concluded that he was a natural eye-witness, and had no reason to concoct a case against the accused."

27. In ***Baleshwar Mahto Vs. State of Bihar, AIR 2017 SC 827,*** the Apex Court has held :-

"where the eye-witness is also an injured person, due credence to his version needs to be accorded. The presence of the injured witness thus becomes established beyond all doubt. Their testimony could not be rejected just only because they were inimical to the accused."

28. In **Karthik Malhar Vs. State of Bihar, 1996 Cr.L.J. 889,** the Apex Court has stated the law relating to interested or relative witness :-

"a close relative who is an interested witness cannot be rejected as an interested witness having a direct interest in having the accused somehow or other convicted. Relationship can never be a factor to affect the credibility of the witness as it is always not possible to get an independent witness."

29. In **State of Andhra Pradesh Vs. Punati Ramulu, AIR 1993 SC 2644**, the Apex Court has held :-

"the evidence of witness cannot be discarded for the mere fact that he was an interested witness. The relationship or the partisan nature of the evidence only puts the court on its guard to scrutinize the evidence more carefully."

30. In the light of the law propounded by the Apex court regarding the appreciation of evidence of injured, relative or partisan witness on careful perusal of the evidence of P.W.1 Govind and P.W.2 Harihar, it is found that their evidence is cogent, truthful and reliable. Nothing has emerged in their cross-examination which may raise doubt about truthfulness and reliability of their evidence.

31. In the present case from the evidence on record, it is clear that there is long standing enmity between informant and the accused and litigation has taken place between them. They are inimical to one another. Under these circumstances, generally independent witness could not come to support either side because if he supports one party, the other party will become inimical to him. Under these circumstances, independent witness would desist from giving evidence in court. In such a case, only partisan and interested witness would come to support the case. The evidence of P.W.1 Govind and P.W.2 Harihar is corroborated by documentary

evidence, namely, the injury report (Ext.Ka.1), the chik F.I.R. (Ext.Ka.2), G.D. relating to registration of the case (Ext.Ka.3), site plan (Ext.Ka.4), recovery memo relating to plain mud and blood-stained mud (Ext.Ka.5), (material Ext.1 and Ext.2) and charge-sheet filed against the accused (Ext.Ka.6).

32. Accused, Satyadeo and Girjesh have admitted that they were present at the place of occurrence at the time of the incident. Accused, Ram Kishor, Ram Ashish, Arvind & Akhilesh has taken the plea of alibi and have stated that they were not present in the village at the time of occurrence. Accused, Ram Kishor and Arvind have not produced any evidence in support of their plea of alibi. Accused, Ram Ashish has produced his brother-in-law, D.W.1 Prabhunath Pandey to prove that he was attending the marriage of the daughter of his brother-in-law and accused, Ravindra was present in his village from 23.05.1985 to 27.05.1985. D.W.1 Prabhunath Pandey is a relative of Ram Ashish. He could not tell from where accused, Ravindra had arrived to his village during that period. Regarding the marriage card, he has admitted that there is no signature on the marriage card. He had also admitted that such card can get printed on a later date from any printing press. He has admitted that he has sent the marriage card by post but he did not produce the envelope on which the seal of postal department is fixed. There is no seal of postal department on the marriage card. Therefore, the statement of D.W.1 Prabhunath Pandey regarding the participation of accused, Ram Ashish and Ravindra on that date cannot be accepted.

33. D.W.2 Hemant Kumar who had deposed on 08.02.1995 that accused, Akhilesh was present from 24.05.1985 to 26.05.1985 in his village and he has seen him in the *barhi* ceremony of Vikram Shukla. He has produced a certificate (Ext.Kha.2) in proof of the presence of accused, Akhilesh in his village- Mahua, P.S.- Nautanwa, District-Maharajganj. D.W.2 Hemant Kumar has given the evidence after 10 years from the date of *barhi* ceremony. He admitted that large number of persons had participated in the *barhi* ceremony. He did not clarify how he could remember the presence of Akhilesh after 10 years whereas Akhilesh is not his relative and has not stayed in his house during the period of attending the *barhi* ceremony. He admitted that the certificate (Ext.Kha.2) was prepared by some Mohd. Haneef during the period of presence of accused, Akhilesh in his village on a later date. Thus, the statement of evidence of D.W.2 Hemant Kumar regarding the presence of accused in the *barhi* ceremony at the time of occurrence is not acceptable and is accordingly, rejected.

34. Learned counsel for the defence has mentioned certain contradictions in the statements of P.W.1 Govind and P.W.2 Harihar. Since the evidence of P.W.1 Govind and P.W.2 Harihar was recorded in the court more than 8 years after the date of occurrence, therefore, minor contradictions in their evidence is natural. Apart from this, different witnesses had seen the occurrence from different angle. Their capacity to remember facts also differs. Therefore, some contradictions in their statements about the incident is natural.

35. In the case of **Leela Ram (dead) through (Duli Chandra) Vs. State of Haryana and others, 2000 SC (Cr) 222**, the Apex Court has held :-

"There are bound to be discrepancies between the narration of

different witnesses. When they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. One hardly comes across a witness whose evidence does not contain some exaggeration or embellishment. Total repulsion of evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness."

36. Similar law has been propounded by the Apex Court in **Krishna Mochi and others Vs. State of Bihar, 2002 SCC (Cri) 1220.**

37. Considering the evidence of P.W.1 Govind and P.W.2 Harihar, the alleged contradictions in their evidence is minor and natural. It does not affect the prosecution case in its entirety. Thus, the plea advanced on behalf of the defence in this regard is not acceptable.

38. From the appreciation of above documentary and oral evidence on record , the prosecution has proved that on the alleged date, time and place of occurrence, the accused, namely, Ram Ashish, Akhilesh, Girjesh, Arvind, Ravindra all sons of Satyadeo and Ram Kishor formed an unlawful assembly, armed with deadly weapons like lathi and *pharsa*. In pursuance of common object of unlawful assembly, they committed rioting and caused simple and grievous injury to informant Govind. Thus, prosecution has proved the charge u/s 147, 148, 323/149 & 324/149 I.P.C. beyond all reasonable doubts.

39. After convicting the accused under the aforesaid sections, the trial court instead of sending them to jail to undergo the sentence, have released them on probation for a period of two years on furnishing personal bond and two sureties on condition that they will maintain peace and they will have good conduct and desist from committing any crime.

40. Law relating to probation as given in Section 4 of the Probation of Offenders Act, 1958 is as follows :

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

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

(2) Before making any order under sub-section (1), the court shall take

into consideration the report, if any, of the probation officer concerned in relation to the case.

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

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

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

41. A similar provision finds place in the Code of Criminal Procedure. Section 360 Cr.P.C. provides:

360. Order to release on probation of good conduct or after admonition.

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty- one years of age or any woman is- convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub- section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub- section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub- section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

42. These statutory provisions very emphatically lay down the reformatory and correctional object of sentencing and obligates the trial court as well as appellate courts to give benefit of probation in fit cases as provided under law. Unfortunately, this branch of law has not been much utilized by the courts. It becomes more relevant and important in our system of administration of justice where trial is often concluded after a long time and by the time decision assumes finality, the very purpose of sentencing looses its efficacy as with the passage of time the penological and social priorities change and there remains no need to inflict punishment of imprisonment, particularly when the offence involved is not serious and there is no criminal antecedent of the accused persons. The

facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

43. In the case of **Subhash Chand and others vs. State of U.P., 2015** Lawsuit (Alld) 1343, this court has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:

"It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellate courts. The Registrar General of this Court is directed to circulate copy of this Judgment to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgment. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

44. In addition to the above judgment of this Court, this Court finds that the Hon'ble Apex Court in the case of **State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659**, giving the benefit of Probation of Offenders Act, 1958 to the accused has observed as below:

"The learned counsel appearing for the accused submitted that the incident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The incident is not such as to direct the accused to undergo sentence of imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them to execute a bond of one year for good behaviour."

45. Similarly, in **Jagat Pal Singh & others Vs. State of Haryana, AIR 2000 SC 3622,** the Hon'ble Apex Court has given the benefit of probation while upholding the conviction of accused persons under

Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

46. In the light of above discussion, I find no illegality, irregularity or impropriety nor any jurisdictional error in the impugned judgment and order of the court below. The conviction recorded by the court below u/s 147, 148, 323/149 & 324/149 I.P.C. is upheld and is not required to be disturbed.

47. Since the informant/victim and accused belong to same village and are neighbours and accused did not have any criminal antecedents to their credits, the incident has taken place in the year 1985 and more than 36 years have passed since then, there is no ground to interfere in the probation granted by the trial court to the accused.

48. In the facts and circumstances of the case, there is no sufficient ground to allow the criminal appeal. The criminal appeal is accordingly, dismissed.

49. Let a copy of the judgement along with trial court record be sent to the trial court for execution of the trial court order which has become final. The appellants-accused shall appear in the trial court within two months from the date of judgement and file requisite probation bonds and personal bonds accordingly.

(2023) 4 ILRA 956
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 1817 of 1995

Phool Chandra ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ajay Singh, Nisha Singh Parihar, Sri R.P. Parihar

Counsel for the Opposite Party:
Govt. Advocate

Criminal Law - Indian Penal Code, 1860 – Sections 395, 410, 411 & 412 – Dishonestly receiving stolen property - The Code of Criminal Procedure, 1973 – Sections 313, 360 - The Arms Act, 1959 – Section 25 – The Probation of Offenders Act, 1958 – Sections 4, 5 – Appeal against conviction - As per FIR - in the night of 15/16.12.1998, accused persons along with two or three other persons entered in house of informant - The accused committed theft of clothes which were being sold by informant - The informant lodged F.I.R. - Prosecution examined P.W.1 to P.W.7 – Held, the arrest of appellant and recovery of stolen quilt-cover, sarees and cloth has been proved by evidence of P.W.7, who had arrested the appellant and recovered articles from his possession – PW.7 proved recovery memo relating to appellant's arrest and recovery memo of stolen property – PW.7 also proved articles which have been recovered from possession of appellant - P.W.7 has also proved by his evidence the arrest of appellant who was carrying a bag containing the articles - P.W.3, informant has identified the articles as stolen from his house - In cross-examination of P.W.3, P.W.5 and P.W.7 nothing emerges which may raise doubt about their evidence - The evidence of PW.5 has not been challenged on behalf of appellant in his cross-examination – The evidence of PW.5 has been corroborated by evidence of P.W.7 - The informant was a hawker

who used to carry clothes and sell them on streets - The articles recovered from possession of appellant were new clothes - The appellant has not claimed ownership of those articles - These articles were recognized by informant in test identification proceeding – Therefore, the trial court has rightly convicted appellant u/s 411 IPC – Hence, no illegality in the impugned order and conviction is upheld (2, 3, 4, 6, 23, 24, 25, 35)

Appeal is partly allowed. (E-13)

List of Cases cited:

1. Mir Naqvi Askari Vs CBI 2 (2009) 15 SCC 643

2. Trimbak Vs St. of M. P., AIR 1954 SC 39

3. Subhash Chand & ors. Vs St. of U.P., 2015 Lawsuit (Alld) 1343

4. St. of Maharashtra Vs Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659

5. Jagat Pal Singh & ors. Vs St. of Har., AIR 2000 SC 3622

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri R.P. Singh Parihar, learned counsel for the appellant and learned A.G.A. for the State.

2. This criminal appeal has been instituted against the judgement and order dated 20.10.1995 passed by IVth Additional Sessions Judge, Fatehpur, in Sessions Trial No. 508 of 1990, State Vs. Deshraj Singh and others, arising out of Case Crime No. 91 of 1988 u/s 395/397/412 and connected Sessions Trial No. 286 of 1995, State Vs. Phool Chandra, arising out of Case Crime No. 94 of 1988 under Section 25 of Arms Act, P.S.- Jafarganj, District- Fatehpur. The trial court convicted and sentenced co-accused Deshraj Singh Thakur, Shiv Kumar Yadav and Lakhan Lal under Section 380 IPC. They were acquitted from the charge under Section 395 IPC. The trial court convicted appellant accused Phool Chandra under Section 411 IPC and sentenced him two years rigorous imprisonment. The trial court acquitted Phool Chandra from the charge under Sections 395 and 412 IPC. The trial court also acquitted appellant accused under Section 25 of the Arms Act. There is no criminal appeal filed by the State or informant against acquittal of appellant-accused u/s 395 IPC and 25 Arms Act. Thus, the trial court's order acquitting the accused u/s 395 I.P.C. and 25 Arms Act has become final.

3. Briefly stated the facts of the prosecution case are that in the night of 15/16.12.1998, accused Deshraj Singh, Thakur, Shiv Kumar Yadav and Lakhanlal Lohar along with two or three other persons entered in the house of informant, Murlidhar through a wooden ladder. Due to the noise of knocking, the informant, Murlidhar awoke and saw that about 5 or 6 persons including the above accused were carrying household material after committing the theft. The informant raised alarm then his neighbours, Rajwa, Banshi and Faujilal came on the spot, who saw the accused carrying the household materials. The witnesses chased them but the accused could not be apprehended. The accused committed theft of the clothes which were being sold by the informant. Later on, the informant prepared a written report and went to the police station on 16.12.1988, where he lodged the F.I.R. at 9.30 a.m. The case was registered as Case Crime No. 91 of 1988 u/s 457/380 I.P.C. and investigation was started.

4. On 26.12.1988, Station Officer, S.I. Sukhvinder Singh along with some

constables was returning to the police station after taking a round of the area. When the police party reached at the curve of Lalpur, they saw a person. When the police party asked him, then he turned backside. Suspecting the miscreant, the police surrounded and apprehended him. On enquiry, he told his name, Phool Chandra and a search was made. Then one country-made pistol, along with two live cartridges were recovered from his possession. He was having a bag in which two cotton sarees, two quilt cover and one piece of cloth were recovered. During interrogation, the accused admitted that he was also amongst the dacoits who committed dacoity at the house of Murlidhar in the night of 15.12.1988. The recovered material was kept under separate sealed cover. The recovery memo was prepared and the accused was also kept Bapurdah. The recovered material and the accused were brought at the police station where the recovered material was deposited in the Malkhana and the accused was kept in the lock up. The F.I.R. was lodged and a case was registered against accused, Phool Chandra under Section 25 of the Arms Act at Crime No. 94/88. The investigation of this case was also started with Crime No. 91 of 1988. During investigation, identification of the recovered looted property was conducted. During the investigation, the case was converted into u/s 395/397 and 412 I.P.C. After completing the investigation, charge-sheet was submitted on 01.03.1989 u/s 395/397/412 I.P.C. against all the accused. A separate charge-sheet u/s 25 of Arms Act against accused, Phool Chandra was also submitted on 19.2.1989. During investigation, the accused were arrested. Thereafter, the accused were committed to the Court of Sessions to face trial.

5. On 21.11.1990, the trial court framed charge under Section 395 IPC against co-accused Deshraj Singh, Shiv Kumar Yadav and Lakhanlal. The trial court also framed charge against appellant accused Phool Chandra under Section 395, 412 IPC and Section 25 of the Arms Act. The appellant accused denied the charges and pleaded not guilty.

6. In order to prove the charges framed against the accused, the prosecution examined P.W.1 Raj Wajdwa, P.W.2 Bhaiyaddin, P.W.3 Murlidhar, P.W.4 Constable Ramesh Chandra, P.W.5 Constable Chakki Lal, P.W.6 Suraj Bhan Srivastava, Executive Magistrate and P.W.7 S.I. Sukhvinder Singh. The prosecution also produced written report, chik report, copy of G.D., site plan, recovery memo of country-made pistol, cartridges and looted property, which were recovered from the possession of accused, Phool Chandra, chik report of crime no. 94/1988 u/s 25 of the Arms Act, copy of G.D., site plan and charge-sheet in documentary evidence. The prosecution also produced sanction of the District Magistrate, Fatehpur, for prosecution of accused Phool Chandra u/s 25 of Arms Act.

7. The statement of accused, Phool Chandra, was recorded u/s 313 Cr.P.C. in which he denied the allegations and stated that he has been falsely implicated in this case by the police due to enmity. Accused, Phool Chandra denied recovery of country-made pistol and cartridges and looted property from his possession and stated that he was arrested from his house and falsely implicated by the police. No defence evidence was produced by the accused appellant Phool Chandra.

8. The chik F.I.R. of this case was prepared by P.W.4 Constable Ramesh Chandra Singh. He proved the chik report (Ext.Ka.2) and stated that on 16.12.1988, he was posted at Police Station- Jafarganj. He prepared chik report on the basis of written report produced by the informant. He also made entries in the G.D., the copy of which is (Ext.Ka.3).

9. In cross-examination, P.W.4 Constable Ramesh Chandra Singh stated that in his opinion, prima facie case was made u/s 457/380 I.P.C., therefore, the case was registered u/s 380/457 I.P.C. The information was transmitted to the Superior Officers.

10. The investigation of this case was started by S.I. Bazilal Yadav. P.W.7 Station Officer, Sukhvinder Singh was also with him when S.I. Bazilal Yadav visited the place of occurrence and prepared site plan. He also inspected the lantern of Murlidhar and prepared its supurdaginama (Ext.Ka.6). This witness also inspected the torches of Rajwa and Faujilal and prepared their supurdaginama which is (Ext.Ka.7). During investigation, it was found that the case falls u/s 395/397 I.P.C., therefore, on the oral direction of the Circle Officer, the case was converted u/s 395/397 I.P.C. and investigation was transferred to P.W.7 S.I. Sukhvinder Singh. Remaining part of investigation was conducted by him.

11. PW 7 S.I. Sukhvinder Singh stated in his evidence that during investigation on 26.12.1988, he along with other constables was returning to the police station. When he reached at the curve near Lalpur Katheriya, they saw one person coming on the road. When that person was asked, he took turn and started to run. He was chased and surrounded at a distance of 20 paces and was arrested at about 5.10 a.m. On enquiry, he told his name Phool Chandra and on search, one country-made pistol, 12 bore, two live cartridges were recovered from the possession of this accused. The accused was also having a bag from which two cotton saris, two quilt cover and one piece of cloth were recovered. All these materials were kept under separate sealed cover and recovery memo (Ext.Ka.8) was prepared which was signed by the witnesses. This witness also proved site-plan (Ext.Ka.9). PW 7 Sukhvinder Singh deposed in his evidence the accused and the recovered materials were brought at the police station, where the chik report was prepared by P.W.5 Constable Chakki Lal on the basis of recovery memo. The witness also proved chik report (Ext.Ka.10) prepared in the hand-writing and signature of P.W.5 Constable Chakki Lal. PW 7 S.I. Sukhvinder Singh proved entries in the G.D. of criminal case (Ext.Ka.11) made by Constable Chhaki Lal. He deposed that he recorded the statements of the witnesses. He stated that during investigation, test identification of the looted property was conducted. After receiving the result of identification, he submitted charge-sheet (Ext.Ka.12).

12. PW 7 Sukhvinder Singh also proved the site-plan (Ext.Ka.13) which was prepared by S.I. Bazilal Yadav. The investigation of the case u/s 25 of the Arms Act was completed by S.I. Chunnalal Gautam who also prepared site-plan and submitted charge-sheet. S.I. Chunna Lal Gautam was not examined by the prosecution. His signature and hand-writing were proved by PW 7 Sukhvinder Singh. The site-plan is (Ext.Ka.14) and the charge-sheet is (Ext.Ka.15). PW 7 Sukhvinder Singh has deposed that on 16.12.1988, the case was registered in his presence u/s

457/380 I.P.C. and the investigation was entrusted to S.I. Bazilal Yadav. On 18.12.1988, Circle Officer, Jafarganj made surprise inspection of the police station who gave directions that the above case be converted into u/s 395/397 I.P.C. On his direction, the case was converted u/s 395/397 I.P.C. and P.W.7 S.I. Sukhvinder Singh, Station Officer himself took the investigation of this case in his hand. At that time, accused Phool Chandra was not involved in Crime No. 91/1988 but during investigation, it was found that he was having the looted property, therefore, a case was registered against him u/s 412 I.P.C.

13. PW 7 S.I. Sukhvinder Singh has proved the bag containing two cotton sarees, two quilt-covers and one piece of cloth (Material Exts. 1 to 5) allegedly recovered from the possession of appellant accused, Phool Chandra.

14. P.W.6 Suraj Bhan Srivastava proved the identification memo (Ext.Ka.5) which was prepared by him regarding the identification of looted property. He stated that looted property was kept for identification along with some similar articles.

15. I have heard arguments of the learned counsel for appellant, learned A.G.A. for the State and perused the entire evidence on record.

16. Learned counsel for the appellant, Phool Chandra, has argued that prosecution has failed to prove that stolen articles were recovered from his possession. The prosecution has also failed to prove that appellant accused Phool Chandra kept the goods in his possession knowing that they were stolen property.

17. Per contra, learned AGA appearing for the State has argued that co-accused Deshraj Singh, Shiv Kumar Yadav and Lakhan Lal have been convicted by the trial court in charge under Section 380 and 457 IPC. He also argued that the recovery of stolen articles from the possession of appellant accused Phool Chandra having been duly proved he has been rightly convicted under Section 411 IPC.

18. The word "stolen property" has been defined in Section 410 IPC which is as follows :-

"410. Stolen Property. Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designed as "stolen property",whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property."

19. The offence under Section 411 has been defined as follows:-

"411. Dishonestly receiving stolen property. Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

20. In **Mir Naqvi Askari Vs. CBI 2 (2009) 15 SCC 643**, the Apex Court has

held about the offence under Section 411 as follows :-

"The person must have the knowledge that it is a stolen property. This section as also the succeeding sections are directed not against the principal offender, e.g., a thief, robber or misappropriator but against the class of persons who trade in stolen articles and are receivers of stolen property. Principal offenders are therefore, outside the scope of this section. Accordingly the conviction of the principal offender is also not a prerequisite to the conviction of the receiver of stolen property under this section."

21. In **Trimbak Vs. State of Madhya Pradesh, AIR 1954 SC 39,** the Apex Court (per Justice Mehr Chand Mahajan) has held that in order to bring home the guilt under Section 411 IPC, the prosecution must prove :

"5. (1) that the stolen property was in the possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it, and (3) that the accused had knowledge that the property was stolen property..."

22. P.W.5 Constable Chakki Lal deposed on oath that on 26.12.1988 at 5.10 a.m., he was taking area round with Station Officer, Sri Sukhvinder Singh along with other constables. When the police party was returning to the police station and reached at the curve of Lalpur Katheria, the police party saw a person coming from the side of the Rind River. Seeing that person, Station Officer asked him then he started to run towards backside. He was chased and apprehended by the police party at about 5.10 a.m. On enquiry, he told his name Phool Chandra. On search, one country-made pistol and two cartridges were recovered from his possession. He was having a bag from which two cotton saries, two quilt covers and one piece of cloth was recovered. The recovered material were kept under separate sealed covers and the recovery memo was prepared on the spot on the dictation of S.I. Sukhvinder Singh and the signatures of the witnesses were obtained. One sealed bundle was opened in which two cotton saris, two quilt covers and one piece of cloth were found which were recovered from the possession of accused, Phool Chandra. These articles are (material Exts.1 to 5). The accused along with the recovered materials was brought at the police station, where the case was registered against him. P.W.5 Constable Chakki Lal was not cross-examined by the defence side.

23. The arrest of appellant accused Phool Chandra and recovery of stolen quilt-cover, sarees and cloth has also been proved by the evidence of P.W.7 S.I. Sukhvinder Singh who had arrested the appellant accused Phool Chandra and recovered aforesaid articles from his possession. He has proved the recovery memo relating to appellant's arrest and the recovery memo of stolen property (Ext.Ka-4). He has also proved the articles i.e. two quilt cover, two cotton sarees and one another cloth which have been recovered from the possession of the appellant accused (Material Ext.1 to 5). P.W.7 Sukhvinder Singh has also proved by his evidence the arrest of the appellant accused Phool Chandra who was carrying a bag containing the aforesaid articles. P.W.3 Murlidhar, informant has identified the aforesaid articles (Material Exts. 1 to 5) as stolen from his house. In the cross-

examination of P.W.3 Murlidhar, P.W.5 Chhaki Lal and P.W.7 Sukhvinder Singh nothing emerges which may raise doubt about their evidence regarding recovery of aforesaid stolen goods from the possession of appellant accused Phool Chandra.

24. The evidence of PW 5 Chhakki Lal regarding the recovery of aforesaid stolen articles from the possession of appellant accused Phool Chandra has not been challenged on behalf of the appellant accused in his cross-examination. His evidence has been corroborated by the evidence of P.W.7 S.I. Sukhvinder Singh. The informant Murlidhar was a hawker who used to carry clothes and sell them on streets. The articles recovered from the possession of appellant accused were new clothes. The appellant accused has not claimed ownership of those articles.

25. These articles were recognized by informant Murlidhar, Sukh Nandan and Kallu who is brother of informant Murlidhar in test identification proceeding conducted by Identification Magistrate, PW 6 Suraj Bhan Srivastava, therefore the trial court has rightly convicted the appellant accused Phool Chandra for charge under Section 411 IPC.

26. From the above discussion of law and evidence, it is concluded that the prosecution has proved beyond reasonable doubt that a bag containing two quilt-covers, two sarees and one cloth (material Ext. 1 to 5) was recovered from the possession of appellant accused Phool Chandra. He had possession of these materials exhibits knowing that they were stolen property. The appeal against conviction of appellant accused under Section 411 IPC is without merit and liable to be dismissed.

27. Learned counsel for the appellant has argued that the appellant accused is a poor person. The alleged recovery of stolen property from the appellant has taken place about thirty five years ago. The appellant accused has no criminal antecedents in his credit. Subsequent to the present criminal case, the appellant accused has no other criminal case registered against him. The appellant may be given benefit of the Probation of Offenders Act, 1958 and be released on probation.

28. Learned AGA has opposed the appellant accused being given benefit of the Probation of Offenders Act, 1958 but he could not deny that the appellant accused has no criminal antecedents and after present criminal case, no other criminal case was registered against him.

29. **Section 4 of the Probation of Offenders Act, 1958 reads as follows :**

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

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

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

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

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

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

30. A similar provision finds place in the **Code of Criminal Procedure. Section 360 Cr.P.C. provides :**

"360. Order to release on probation of good conduct or after admonition.

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty- one years of age or any woman is- convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub- section (2).

(2) Where proceedings are submitted to a Magistrate of the first class

as provided by sub- section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders."

31. These statutory provisions very emphatically lay down the reformatory and correctional object of sentencing and obligates the trial court as well as appellate courts to give benefit of probation in fit cases as provided under law. Unfortunately, this branch of law has not been much utilized by the courts. It becomes more

relevant and important in our system of administration of justice where trial is often concluded after a long time and by the time decision assumes finality, the very purpose of sentencing looses its efficacy as with the passage of time the penological and social priorities change and there remains no need to inflict punishment of imprisonment, particularly when the offence involved is not serious and there is no criminal antecedent of the accused persons. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

32. In the case of **Subhash Chand and others vs. State of U.P., 2015 Lawsuit (Alld) 1343,** this court has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:

"It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellate courts. The Registrar General of this Court is directed to circulate copy of this Judgment to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgment. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

33. In addition to the above judgment of this Court, this Court finds that the Hon'ble Apex Court in the case of **State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659,** giving the benefit of Probation of Offenders Act, 1958 to the accused has observed as below:

"The learned counsel appearing for the accused submitted that the incident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The incident is not such as

to direct the accused to undergo sentence of imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them to execute a bond of one year for good behaviour."

34. Similarly, in **Jagat Pal Singh & others Vs. State of Haryana, AIR 2000 SC 3622,** the Hon'ble Apex Court has given the benefit of probation while upholding the conviction of accused persons under Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

35. In the light of above discussion, I find no illegality, irregularity or impropriety nor any jurisdictional error in the impugned judgment and order of the court below. The conviction recorded by the trial court under Section 411 I.P.C. is upheld and is not required to be disturbed.

36. Considering the facts and circumstances of the present case as well as keeping in view the position of law as mentioned above and considering that the incident had taken place about 35 years back and considering the provisions of Section 4 & 5 of the Probation of Offenders Act, 1958 it appears justified that the appellants accused Phool Chandra be released under Section 4 (1) of the Act on probation for a period of one year on furnishing a personal bond of Rs.20,000/- (Rupees twenty thousand) and two sureties each of the like amount. During this period, he shall maintain good conduct and keep peace and on breach of this condition, he shall appear before the Court to receive punishment.

37. The criminal appeal is partly allowed as mentioned above.

38. Let a certified copy of this order along with record be sent to the court concerned for compliance.

(2023) 4 ILRA 966
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.04.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Criminal Appeal No. 4548 of 2015

Dev Saran & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Rajesh Kumar Mishra

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 149 & 302 - The Code of Criminal Procedure, 1973 – Sections 313 – Trail Court convicted – Imprisonment for life - Appeal against conviction - As per FIR - Deceased was married to the son of appellant, there was family dispute - On the date of incident, deceased had gone to police station to report a complaint – On her returned back, father-in-law, mother-in-law, sister-in-law and brother-in-law caught hold her, she was set ablaze by brother-in-law - Deceased was married about 10 years ago - Husband of deceased was not present at the time of incident - There was quarrel between the family regarding partition, she was physically beaten - After ten days of incident, a dying declaration was recorded on 20.5.2012 - On 20.6.2012 FIR was lodged – Charges framed - Held, the death caused by accused was not premeditated, accused had no intention to cause death of

deceased - Injuries were sufficient in ordinary course of nature to have caused death – Hence, death was due to septicemia – The offence is not u/s 302/149, I.P.C. but is culpable homicide not amounting to murder u/s 304(I) I.P.C. – Sentence, fine is reduced – Directions accordingly (Para 2, 3, 4, 20, 24)

Appeal is partly allowed. (E-13)

List of Cases cited:

1. Khokan@ Khokhan Vishwas Vs St. of Chattisgarh, 2021 LawSuit (SC) 80

2. Banarsi Dass & ors. Vs St. of Har.

3. Bhadragiri Venkata Ravi Vs Public Prosecutor High Court of A.P., Hyderabad, (2013) 0 Supreme (SC) 511

4. Surinder Kumar Vs St. of Har., 2011 LawSuit (SC) 1149

5. Arvind Singh Vs St. of Bihar, 2001 (3) Supreme 570

6. Kashmira Devi Vs St. of Uttarakhand & ors., (2020) 11 SCC 343

7. Smt. Rama Devi Vs St. of U.P., (2018) 102 ACrC 105

8. Misri Lal Vs St. of U. P., (2017) 7 ADJ 14

9. Sanjay & ors. Vs St. of U. P., (2016) 3 SCC 62

10. Manoj Kumar Vs St. of U.P., (2019) 1 ADJ 221

11. Tukaram and Ors Vs St. of Mah., reported in (2011) 4 SCC 250

12. B.N. Kavatakar & anr. Vs St. of Karn., reported in 1994 SUPP (1) SCC 304

13. Veeran & ors. Vs St. of M.P. Decided, (2011) 5 SCR 300

14. Gautam Manubhai Makwana Vs St. of Guj. (Criminal Appeal No.83 of 2008)

15. Anversinh Vs St. of Guj., (2021) 3 SCC 12

16. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529

17. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. This appeal challenges the judgment and order dated 3.9.2015 passed by Additional Sessions Judge, Court No.24, Shahjahanpur in Sessions Trial No. 13 of 2013 convicting accused-appellants under Sections 302/149 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life with fine of Rs.5,000/- and in case of default of payment of fine, further to undergo six months imprisonment.

2. Factual scenario as culled out from the record and the judgment of the Court below is that Neelu/ deceased was married to the son of Dev Saran and there was family dispute going on and on the date of incident, the deceased had gone to police station to report a complaint as soon as she returned back, the father-in-law, mother-in-law, sister-in-law and brother-in-law caught hold her and she was set ablez by Gautam (brother-in-law). The deceased was married about 10 years before the incident and according to the F.I.R. husband of the deceased was not present at the home. There was also quarrel between the family regarding partition and Gautam and Subhash used to physically beat her. Dev Saran, father-in-law took her to the hospital, where she was treated from 19.5.2012 and she breath her last on 28.5.2012. After ten days of the incident, a dying declaration was recorded on 20.5.2012 and after one month i.e. on

20.6.2012 a First Information Report was lodged.

3. Investigation was moved into motion. After recording statements of various persons, the investigating officer submitted the charge-sheet against accused-appellants. The learned Chief Judicial Magistrate before whom charge sheet was laid put the same before the learned Sessions Judge. The learned Sessions Judge, on hearing the learned Government Advocate and learned counsel for the accused, framed charges.

4. On being summoned, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 6 witnesses who are as follows:

1	Hari Om Mishra	PW1
2	Smt. Suman	PW2
3	Rohit	PW3
4	Dr. Naipal Singh	PW4
5	Sudhir Kumar Soni	PW5
6	Dhirendra Kumar Singh	PW6

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

1	F.I.R.	Ex.Ka.10
2	Written Report	Ex.Ka.1
3	Dying Declaration	Ex. Ka.7
4	Postmortem Report	Ex.Ka.2
5	Panchayatnama	Ex.Ka.3
6	Charge-sheet	Ex.Ka.9
7	Site plan with index	Ex.Ka.8

6. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants.

7. Heard learned counsel for accused-appellants, learned A.G.A. for the State and perused the record.

8. It is submitted by learned counsel for accused-appellants that the accused is in jail since long time. The incident occurred on 19.5.2012 at about 8:30 PM (night) and deceased died on 28.5.2012 i.e. after 12 days of the incident. The dying declaration was recorded on 20.5.2012 and it was stated that father-in-law namely, Dev Saran who had admitted the deceased to the hospital. The dying declaration was recorded by Tehsildar and no such dying declaration was given to doctor. Even if we go by the dying declaration, the husband was not present at home and brother-in-law, who is in jail had tried to abuse her. While going through the evidence of the witnesses, evidence of P.W.-1, who is father of the deceased has deposed on oath that when he reached at 8:30 PM his daughter conveyed brief fact to him and he has withstood the cross-examination of P.W.-2.

9. It is very clear that father-in-law did not give anything to the son-in-law of P.W.-1 i.e. husband of the deceased and there was always a dispute regarding room, which was being given to the deceased and her husband.

10. It is next submitted that F.I.R. is delayed and proper reasons were given as

that he was looking after his daughter, who had been set her ablezed, therefore he could not lodge F.I.R. The mother of the deceased also deposed that marriage of the deceased was taken place about 10 years before the incident and out of this wedlock there are two children aged about 3 years and four years. The medical evidence and the evidence of witnesses would go to show that it was a homicidal death.

11. Learned counsel for the appellants has vehemently submitted that dying declaration is not worth believing and it is an admitted position of fact that she died out of septicemia.

12. It is further submitted by learned counsel for the appellants that most of the witnesses have turned hostile despite that, learned Sessions Judge has convicted them under Section 302/149 of I.P.C. As far as conviction under Section 147 of IPC is concerned, he has completed the period of incarceration.

13. In support of the his submission, learned counsel for the appellant has relied on **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80, Banarsi Dass and Others v. State of Haryana, Bhadragiri Venkata Ravi v. Public Prosecutor High Court of A.P., Hyderabad, (2013) 0 Supreme (SC) 511, Surinder Kumar v. State of Haryana, 2011 LawSuit (SC) 1149, Arvind Singh v. State of Bihar, 2001 (3) Supreme 570, Kashmira Devi v. State of Uttarakhand and others, (2020) 11 SCC 343, Smt. Rama Devi v. State of U.P., (2018) 102 ACrC 105, Misri Lal v. State of Uttar Pradesh, (2017) 7 ADJ 14, Sanjay and others v. State of Uttar Pradesh, (2016) 3 SCC 62, Manoj Kumar v. State of U.P., (2019) 1 ADJ 221.** In alternative, it is submitted that at the most punishment can be under Section 304 II or Section 304 I of I.P.C. If the Court feels, as the accused have been in jail since long time, they may be granted fixed term punishment of incarceration.

14. Learned A.G.A. for the state has vehemently submitted that facts of this case will not permit the Court to convert the sentence to that under Section 304 Part I of I.P.C. as none of the judgments relied by the accused-appellant will apply to the facts of this case.

15. Learned Judge has categorically relied on the testimony of Dr. Nepal Singh and has opined that she died out of septicemia. There was dying declaration of the deceased where also she had categorically mentioned that the accused had tried to set her ablaze. As the period of incarceration Section 147 of I.P.C. is over, we are not delving into the same. As far as Section 302/149 of IPC is concerned, as per the finding of the learned Sessions Judge, incident happened out of quarrel and death has happened due to septicemia on which heavy reliance has been placed by learned Sessions Judge.

16. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant.

17. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302/149 of I.P.C. should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It

would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

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

18. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

19. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would be one punishable under Section 304 Part-I of the IPC.

20. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no

intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

21. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280,** the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she

along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

22. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle

of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

23. All others judgments which were pressed into service by the learned counsel for the appellants are not discussed as that would be repetition of what we have decided.

24. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellants would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302/149 of I.P.C. but is culpable homicide not amounting to murder falling under Section 304(I) I.P.C., sentence of all the accused appellants is reduced to the period they have already undergone. The fine is reduced to Rs.2,000/- each to be paid to the original complainant as compensation within eight weeks from today, failing which further incarceration of three months is ordered. The Jail authority would release the accused-appellants namely, Subhas and Gautam if not wanted in any other offence. The accused-appellants already on bail need not surrender but would deposit the fine within eight weeks from today.

25. Appeal is partly allowed. Record and proceedings be sent back to the Court below forthwith.

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

(2023) 4 ILRA 973
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Jail Appeal No. 147 of 2021

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

Counsel for the Appellant:
From Jail, Sri Deepesh Kumar Ojha (A.C.), Mrs. Seema Pandey

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

Criminal Law - Indian Penal Code, 1860 – Section 302 – The Code of Criminal Procedure, 1973 - Section 161 – Trial court convicted - Rigorous imprisonment – Appeal against conviction - As per FIR - On 03.10.2017 at about 3:00 p.m. complainant's wife (deceased) and his son (appellant) were in the house - Appellant was asking money from his mother, she said that she had no money for his 'Awaragardi' - On refusal, appellant started 'Maar-peet' with her due to which she died - Trial court framed charge – Held, PW-1 as only eye witness of the occurrence, in his examination-in-chief he supported prosecution version - Cross examination of PW-1 was recorded after 17 days, turned hostile - PW2, PW-3 and PW-4 are witnesses of inquest report, rest are formal witnesses - Testimony of hostile witness can't be rejected in toto only on basis of hostility but it may be accepted as far as it supports the case of prosecution - Although PW-1 has denied his presence at the place of occurrence in his cross examination and St.d that he did not see the occurrence, appellant is son of PW-1 and love and affection with the

same can be a reason to become hostile - Deceased sustained only a single blow on her head and weapon used in crime is 'Danda' - Appellant gave a single blow of 'Danda' to her – Hence, appellant had no intention to kill, but he had knowledge that by inflicting such injury death could be caused, trial court rightly convicted. (Para 1, 2, 3, 10, 11, 12, 16, 23)

Appeal is dismissed. (E-13)

List of Cases cited:

1. Krishna Chand Vs St. of Delhi reported in A.I.R. 2016 Supreme Court 298

2. Krishna Mochi Vs St. of Bihar reported in (2002) 6 SCC 81

3. St. of U.P. Vs Ramesh Mishra & anr.reported in A.I.R.1996 SC 2766

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

1. This criminal appeal has been filed by the appellant against the judgment and order of Additional Sessions Judge, Court No. 8, Bulandshahr passed on 17.10.20219 in Session Trial No. 257 of 2018 (State of U.P. Vs. Firoz) arising out of Case Crime No. 519 of 2017, under Section 302 I.P.C., Police Station- Aurangabad, District- Bulandshahr by which learned trial court convicted and sentenced the appellant for seven years rigorous imprisonment and Rs. 3000/- fine (Three months rigorous imprisonment in default of fine) under Section 304 Part (2) I.P.C.

2. The brief facts of the case are that the complainant Munna submitted written report at Police Station- Aurangabad, District- Bulandshahr on 03.10.2017 stating that on that day at about 3:00 p.m. his wife Akbari and his son Firoz were in the house. Firoz was asking money from his mother Akbari then Akbari said that she had no money for his *"Awaragardi"*. On refusal Firoz started *"Maar-peet"* with his mother Akbari due to which Akbari died. Her dead body is lying in the house.

3. On the basis of above report the Case Crime No. 519 of 2017 was registered at Police Station- Aurangabad, District- Bulandshahr under Section 302 I.P.C. After investigation, Investigating Officer submitted charge sheet under Section 302 I.P.C. Learned trial court framed charge under Section 302 I.P.C. against the appellant Firoz and he was put on trial. After trial learned trial court found offence under Section 304 Part (2) I.P.C. proved and appellant was convicted and sentenced under Section 304 Part (2) I.P.C. for seven year. Hence this appeal.

4. Heard Shri Deepesh Kumar Ojah learned Amicus Curiae for appellant and Shri Arun Kumar Singh learned A.G.A. for State and perused the record.

5. Learned counsel for appellant made submission that appellant has been falsely implicated in this case. All the witnesses in this case are hostile. It is further argued that PW-1 Munna was examined by trial court, he has turned hostile and did not support the prosecution case. During his cross examination, he has denied from this statement recorded by Investigating Officer under Section 161 Cr.P.C. It is also further argued that PW-1 Munna has also the informant of this case but he has said in his statement that he put his thumb impression on plain paper and one Khalid wrote the report on that paper because he is illiterate. No other witness of fact has been produced by prosecution. In this way there is no evidence against the appellant and trial court wrongly convicted him.

6. Learned counsel for appellant also said that it has come in the evidence of

PW-1 Munna that his wife was cutting vegetables by sitting under the handle of hand-pump. When she rose up, the handle hit on her head and she got fatal injury. It is also argued that Dr. K.K. Singh conducted the postmortem of deceased Akbari and prepared postmortem report. He has examined as PW-7. He has also given opinion in his cross examination that injury sustained by the deceased could be the result of hit the head by hard and blunt object such as the handle of hand-pump. With this argument learned counsel prayed for allowing the appeal and acquittal of appellant.

7. No other argument was advanced by appellant.

8. Learned A.G.A. submitted that PW-1 Munna is informant of this case, in his examination-in-chief he has proved the F.I.R. and in cross examination he has turned hostile out of love and affection of his son. It is further submitted that it is not worth believing that any lady will cut vegetables by sitting under the handle of hand-pump. She could sit near hand-pump but it was not natural to sit under the handle of hand-pump. It is the story fabricated by PW-1 to save his son. Learned A.G.A. further argued that appellant remained absconded for so many months after the occurrence. His conduct also shows that he is guilty of the offence and learned trial court has rightly convicted the appellant. Hence appeal be dismissed.

9. Prosecution case is that Munna, the informant, lodged first information report at police station stating that his son Firoz was asking money from his mother (wife of informant). On her refusal, Firoz started *''Maar-peet'* with her due to which she sustained fatal injuries and died. This written report was submitted by Munna which is Exhibit KA-1. During investigation it was found that deceased Akbari was hit by *''Danda'* which was recovered by Investigating Officer on the pointing out of Firoz from his house and recovery memo Exhibit KA-11 was prepared.

10. Prosecution produced informant Munna as PW-1 who is said to be only eye witness of the occurrence. In his examination-in-chief PW-1 Munna supported the prosecution version and exactly repeated the contents of first information report. He has proved the contents of first information report in his statement and admitted his thumb impression on that. His cross examination could not be recorded on the same day and it was deferred. Cross examination of PW-1 was recorded nearly after 17 days in which PW-1 turned hostile. In his cross examination he has said that at the time of said occurrence he was out of home and accused did not ask money from his mother in his presence nor he committed any *''Maar-peet'* with his mother. PW-1 has further said that at the time of occurrence his wife Akbari was cutting vegetables by sitting under the handle of hand-pump when she rose up handle of hand-pump hit on her head. On making cross examination by Additional District Government counsel, PW-1 said that Investigating Officer did not record his statement under Section 161 Cr.P.C. PW-1 has also stated that appellant was falsely implicated by scribe of F.I.R. Mohd. Khalid and other villagers due to any enmity.

11. There is no other eye witness in this case. Other witness as PW-2, PW-3 and PW-4 are witnesses of inquest report, rest of the witnesses are formal witnesses.

12. Learned counsel for appellant has mainly put his argument on the basis of hostility of informant PW-1 Munna. Learned trial court has very carefully and cautiously scrutinized the evidence of PW-1 because if witness has turned hostile, his testimony cannot be brushed side. It is settled law that the testimony of hostile witness cannot be rejected in toto only on the basis of hostility but it may be accepted as far as it supports the case of prosecution or defence. In ***Krishna Chand Vs. State of Delhi*** reported in ***A.I.R. 2016 Supreme Court 298,*** the Hon'ble Supreme Court has stated that the mere fact that witness is turned hostile by the party calling him and allowed to be cross examined does not make him unreliable witness so as to exclude his evidence from consideration altogether.

13. In ***Krishna Mochi Vs. State of Bihar*** reported in ***(2002) 6 SCC 81***, It was held that it is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons.

14. Hon'ble Apex Court has held in ***State of U.P. Vs. Ramesh Mishra and another*** reported in ***A.I.R.1996 SC 2766*** that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistence with the case of the prosecution or defence may be accepted.

15. Hence it is settled law regarding the evidenciary value of a hostile witness that reliance can be placed on the evidence of hostile witness, if court finds that it is not completely shaken. It is rule of caution that evidence of hostile witness should be closely scrutinized and it can be acted upon if some corroboration is also found because the courts cannot shut their eyes to the reality. Court shall not stand as a mute spectator if a witness becomes hostile and every effort should be made to bring home the truth.

16. Learned trial court, after careful scrutiny of the evidence of PW-1, has reached the conclusion that his testimony cannot be set aside as a whole. PW-1 Munna has fully supported the case of prosecution in his examination-in-chief. Although PW-1 Munna has denied his presence at the place of occurrence in his cross examination and has also stated that he did not see the occurrence but it has to be kept in mind that appellant is son of PW-1 and love and affection with the same can be a reason to become hostile along-with any other reason but after being declared hostile even in cross examination by Government Advocate, PW-1 Munna has admitted that appellant Firoz was asking money from his mother and he was desperate in asking for money.

17. As far as first information report is concerned, although in his cross examination PW-1 has stated that the scribe of F.I.R. Khalid got his thumb impression on a blank paper and he does not know what he had written on it later on. But this statement of PW-1 cannot be believed because in his examination-in-chief he has specifically stated that he had lodged first information report at Police Station-Aurangabad regarding the occurrence. Moreover as per examination-in-chief, written report paper no 4A/3 was shown to

the informant PW-1 and it was read over to him. Then he said that it is the same written report which he had submitted in police station. He has also admitted his thumb impression on it. Moreover PW-1 has further said that this report was written by Abdul Rashid on his dictation. In this way PW-1 has legally proved the submission of written report at police station and its contents also. Hence despite PW-1 being turned hostile, his testimony still supports the prosecution case.

18. PW-1Munna has twisted the manner of occurrence in cross examination and has stated that his wife deceased Akbari was cutting vegetables by sitting under the handle of hand-pump and when she rose up, her head hit the handle of hand-pump and she sustained fatal injuries but this cooked up story cannot be believed at all. Site plan was prepared by Investigating Officer on pointing out of PW-1 which is Exhibit KA-10. According to site plan Exhibit KA-10 occurrence took place in the courtyard of informant's house while hand-pump is shown to be located inside the bathroom so it cannot be believed that a lady will cut vegetable by sitting under the handle of hand-pump that too inside the bathroom.

19. Learned trial court has also opined regarding above version that this was not possible and this was not worth believing also. I am fully convinced with the opinion of learned trial court in this regard.

20. It is also very pertinent to note that occurrence took place at 3:00 p.m. on 03.10.2017 and first information report was lodged at 4:00 p.m. on the same day. It means that F.I.R. was lodged just after one hour of the occurrence. So there was no occasion or time with informant to falsely implicate the appellant. Learned counsel for appellant has argued that Dr. K. K. Singh PW-7 said in his statement that injuries sustained by deceased could be inflicted by hard and blunt object like handle of hand-pump. But the perusal of statement of PW-7 Dr. K. K. Singh shows that he has stated the injury could be sustained by hard and blunt object like handle of hand-pump but it does not mean that if a lady rises up and her head is hit in the handle of hand-pump, then she could sustain fatal injury. The purpose of making above statement by Dr. K. K. Singh was that injury could be sustained if handle of hand-pump is used as hard and blunt object by force. Hence, I find no force in above argument of learned counsel for appellant and learned trial court has rightly appreciated the evidence in this regard that fatal injury to deceased could not be the result of hitting the handle of hand-pump in her head in the way as told by PW-1 in his cross examination.

21. The testimony of PW-1 Munna supports and proves the prosecution version even if he has turned hostile but for seeking corroboration it is important to consider some circumstances which took place in this case. One important circumstance is that presence of appellant at the date, time and place of occurrence is not denied by informant even in his statement. He has also said asking of money by appellant from his mother in his statement. It is another very important circumstance against the appellant that he did not attend the funeral/cremation of his deceased mother. Appellant was arrested after more than four months of the occurrence because he was absconded after the occurrence. So not attending the cremation of his mother and remaining absconded for more than four months after occurrence indicates that

he was absconding to avoid his arrest. This circumstance also goes against the appellant.

22. The informant PW-1 has said that scribe of F.I.R. Mhd. Khalid took his thumb impression on a blank paper and later on had written report on it. As discussed above, the informant has fully proved the written report and moreover informant could not establish any enmity between the appellant and Mhd. Khalid due to which Khalid could implicate the appellant falsely. F.I.R. of this case was lodged very promptly. The *"Danda'* used in crime was recovered from the house of the appellant on his pointing out. The injury sustained by deceased Akbari was single injury on the right side of her head which was of sized 4cm x 3cm and it was contusion. Such type of injury was possible to be inflicted by *"Danda'*, recovered from appellant's house.

23. Perusal of judgment of trial court shows that learned trial court has scrutinized the testimony of PW-1 very closely and carefully and I am fully convinced with the conclusion of learned trial court holding appellant guilty. Learned trial court sought very relevant corroboration by circumstantial evidence also in scrutinizing evidence of PW-1. It is correct that deceased sustained only a single blow on her head and weapon used in the crime is *"Danda'*. It means appellant gave a single blow of *"Danda'* to his mother. Hence it can be opined that appellant had no intention to kill his mother but he had knowledge that by inflicting such injury death could be caused. Hence learned trial court has rightly convicted the appellant for the offence under Section 304 Part (2) of I.P.C. and sentenced him accordingly.

24. Hence, I find no merit in this appeal because learned trial court has rightly appreciated the evidence on record and rightly convicted and sentenced the appellant and appeal is liable to be dismissed.

25. Accordingly, this criminal appeal sans merit and is **dismissed**.

(2023) 4 ILRA 978
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.04.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 1141 of 2003

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

Counsel for the Appellant:
Mukul Rakesh, Sheo Prakash Singh

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 – Section 376 - Punishment for Rape – By impugned order, sentenced to rigorous imprisonment - The Code of Criminal Procedure, 1973 – Sections 164, 313 - Appeal against conviction - As per FIR – On 14.02.2002, daughter of informant aged about 13 years while returning home after cutting barseem, accused called her in khalihan on pretext of picking up a bundle of paddy - When her daughter reached there, accused forcibly raped her - Informant who was nearby digging carrot roots, he saw accused running away from khalihan - She told him that accused raped her – After investigation, chargesheet filed - Prosecution produced seven witnesses - Held, in the offence of rape, the St.ment of prosecutrix is utmost

important - The St.ment of prosecutrix should be of sterling quality - On such kind of shaky testimony of prosecutrix which is improbable and contradictory to St.ments of PW-1, PW-3 and PW-4 without there being any corroborative material, conviction on such type of sole testimony of prosecutrix cannot be sustained - The delay in lodging F.I.R., non-examination of scribe of F.I.R., in-consistent testimony of prosecutrix, associated circumstances and uncorroborated medical evidence cast doubt on testimony of victim - Since the evidence of prosecutrix PW-2, PW-1 are contradictory, the testimony of prosecutrix has also been contradicted by I.O. – Hence, trial court has convicted accused merely on conjectures, surmises and assumptions, the prosecution has failed to prove its case beyond reasonable doubt. (Para 2, 3, 5, 6, 36, 39, 40)

Appeal is allowed. (E-13)

List of Cases cited:

1. Mohd. Ali @ Guddu Vs St. of U. P. (2015) 7 SCC 272

2. Hem Raj Vs St. of Har., (2014) 2 SCC 395

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

1. Heard learned counsel for the appellant and learned A.G.A. for the State.

2. The appeal has been filed against the judgment and order dated 11 .07.2003 passed by the Additional Sessions Judge (Fast Track Court No. 2), Raibareli in S.T. No. 241/2002, case crime No. 68/2002, under Section 376 I.P.C., P.S. Bachhrawan, District Raibarelly "State Vs. Suneel Kumar", whereby the appellant has been convicted under Section 376 I.P.C. sentencing the appellant to undergo for a period of seven years of rigorous imprisonment with a fine of Rs. 1000/-, with default provisions.

3. As per the written report dated 14.02.2002 one Krishan son of Ram Prasad gave information to P.S. Bachhrawan, Raibareli that daughter of the informant aged about 13 years while returning home after cutting barseem, Suneel called her daughter in the khalihan on the pretext of picking up a bundle of paddy straw where lot of paddy was piled. When her daughter reached there, Suneel got hold of her and dragged between the piled paddy straw and forcibly raped her. To save herself, her daughter raised alarm, hearing which, the informant who was nearby digging carrot roots ran, then, he saw Suneel running away from khalihan. Upon reaching the spot, his daughter told him that she has been raped by Suneel.

4. It is further alleged in the written report that due to fear of the accused, he is giving report today on 13.02.2002. Consequently, chik FIR was registered which is exhibited as Ex. Ka-10. Written report is Ex. Ka-1. The investigating officer has prepared the site plan which is exhibited as Ex. Ka-4. The victim was subjected to medical examination which is exhibited as Ex. Ka-5. A supplementary medical report was also prepared which exhibited as Ex. Ka-9.

5. After completing the investigation, charge sheet has been filed. Committal order was passed on 06.06.2002 by the concerned Chief Judicial Magistrate, Raibareli and thereafter charges were framed by the Sessions Court on 19.07.2022 under Section 376 I.P.C.

6. The prosecution in support of its case has produced following seven witnesses:-

(1) PW-1 Krishna (father of the victim)

(2) PW-2 Anita (victim)

(3) PW-3 Doctor S.L. Sharma

(4) PW-4 Ajit Kumar Singh (Sub Inspector)

(5) PW-5 Param Hans (Retired Principal)

(6) PW-6 Doctor Kalpana Chandra

(7) PW-7 Ram Babu Gautam

7. The statement of the accused under Section 313 Cr.P.C. has been done on 05.03.2003 wherein he denied all the charges leveled against him.

8. PW-1 in his statement has submitted that the incident took place at 5:30 PM while he was digging carrot roots and after hearing the alarm, he ran towards khalihan where he saw accused Suneel running away; his daughter told him that Suneel has raped her; on the second day, he got the report written by known person which was read out to him and then he signed it. He has proved the written report.

9. He also stated that the victim studied in primary school of the village and the transfer certificate dated 20.05.2002 of the school has been filed by him during his examination-in-chief. In his cross-examination, he has stated that his son Ram Chandra had died either due to train accident or somebody killed him who went to Punjab with the uncle of the accused Suresh. He further stated that he met Suresh after four days of the death of his son and when he asked him regarding death of his son, he stated that he fell from the train and was cut by the train. He also stated that after the incident Suresh and others came in the village and went to their home, however, they did not tell anybody about the death of his son. They have not told truth to him.

10. He further stated that at the time of the incident happening with her daughter, he was 100-125 meters away and after hearing alarm of his daughter, he ran towards the place of occurrence and it took 20 minutes to reach at the place of occurrence. During the entire 20 minutes, he kept hearing the alarm of his daughter.

11. He further stated that although the house of the accused is in front of his house, however, they are not in talking terms. He also stated that while the medical of the victim was conducted she wore the same clothes which she wore at the time of incident.

12. PW-2 victim has stated that the occurrence is of 13.02.2002 at about 6 PM. At the time of incident she was in her khalihan and after cutting barsin she was called by the accused Suneel requesting for her help in picking up the piled paddy straw. Then he caught hold of her hand and threw her on the piled paddy straw and raped her. While committing rape, he was threatening the victim that if she raise alarm she will be killed. When the grip of Suneel on his mouth softened then she raised alarm. Upon alarm, her father came and at that time Suneel was running towards west of the village after wearing his cloths.

13. In the cross, she has stated that prior to the occurrence, no one has raped her, neither she is having physical relations with anybody prior to the incident; her father was 4-5 meters away from the place of occurrence; her family was not in talking terms with the family of the accused as they were not right people; she went to the

police station wearing same clothes which she wore at the time of rape; her clothes were taken by the police and were returned after one month.

14. She further stated that she did not know as to what was the height of the piled paddy straw upon which she was raped; she also did not know as to after how much time her father came after alarm was raised by her.

15. She also stated that after the incident she along with her father went home and on that night, neither the accused or his father came into her home. She denied the suggestion that due to enmity the accused has been falsely implicated.

16. PW-3 Dr. S.L. Sharma has stated that x-ray of the victim was conducted by the technician in his observation and supervision. On the basis of x-ray report he has prepared the report Ex. Ka-3 in which all the epiphysis of the elbow joint were fused, however, epiphysis of lower end of radius and ulna were not fused. PW-3 Dr. S.L. Sharma, has proved Ex.-Ka-3.

17. PW-4 S.I. Ajeet Kumar Singh has proved the site plan as Ex. Ka-4. He has stated that in his presence, the F.I.R. was registered, he took the statement of PW-1 and PW-2 and on the pointing out of both of them, he has inspected the site and thereafter he has arrested the accused. The statement of the prosecutrix under Section 164 Cr.P.C. was made on 14.03.2002 and after perusing the same and after recording the summary of her statement in the case diary and concluding the evidence, the charge sheet has been filed which is Ex. Ka-5.

18. PW-4 has stated that PW-1 has not told him in his statement under Section 161 Cr.P.C. that the cause of delay in lodging the F.I.R. is any kind of threat by the accused or his family members, rather PW-1 has told him that since it was late evening, therefore, for this reason he did not go to lodge the report. He has not taken the barseen which was being carried out by the victim while she was returning. He has also stated that he has inspected the place where the victim was raped and from where the victim was dragged towards the A point in the site plan. Distance between them is 20 paces away. While she was dragged to the place of rape, she has not raised alarm. He has also stated that he has not taken into the possession of the clothes worn by the prosecutrix while she was raped. He further stated that when she came with her father for lodging report, she has not shown the clothes to him. Pile of the paddy straw on which victim was raped was 8 feet in height and no document relating to the age of the victim was given by her or her family members.

19. PW-5 Param Hans is a retired Principal. He has prepared Transfer Certificate of Primary School Mannawan of the victim dated 20.03.2002 which has been brought by him at the time of his examination-in-chief.

20. PW-6 Dr. Kalpana Chandra has medically examined the victim on 14.02.2002. She has not found any injury on the external examination of the victim. In the internal examination, hymen was found absent. She has stated that no opinion of rape can be given and the victim was habitual of having sexual intercourse.

21. PW-7 is constable Ram Babu Gautam who has registered F.I.R. and has proved the same as Ex.Ka-2.

22. Learned counsel for the applicant submits that there is unexplained delay in lodging the F.I.R. There is admitted enmity between the family of the applicant and the victim. The statements of PW-1, PW-2 and PW-4 are contradictory. It has been further submitted that since the testimony of the victim is contradictory to the testimony of PW-1 and PW-4 and without there being any corroborative material, he could not have been convicted.

23. Per contra, learned A.G.A. has opposed the appeal submitting that the prosecution has been successful in proving the offence beyond reasonable doubt. It is further submitted that testimony of PW-2 alone is sufficient to convict the accused.

24. Perused the record.

25. Perusal of the statement of PW-1 shows that he has admitted the enmity with the uncle of the accused Suresh due to the death of the son of the complainant who went with Suresh for earning livelihood to Punjab. As per his statement, at the time of incident he was at the distance of 100-125 meters from the place of occurrence and he took 20 minutes to reach at the place of occurrence. He further stated that in his examination-in-chief, he saw the appellant running from khalihan when he reached at the place of occurrence. He has expressed ignorance to the fact that whether the clothes which were being worn by the prosecutrix have been taken by the doctor or not. He also state that transfer certificate has not been given to the I.O., his daughter has studied in primary school and has filed the transfer certificate on 20.03.2002 on the date on his examination. He has further stated that during entire 20 minutes he has heard his daughter weeping.

26. PW-2 in his chief has stated that while she was being raped she was threatened by the accused that if she raise alarm, she will be killed. She only cried when the grip of the accused became soft. While his father came at the place of occurrence, the accused has already ran away after wearing his clothes. She has further stated that prior to the incident, no one has raped her, neither she is in physical relationship with anybody. She has also stated that at the time of the occurrence, her father was 4-5 meter away. She was not having any talking terms with family of the accused. It has been further stated that blood stained Salwar was taken by the police after the medical examination and after one month they were returned to the victim. She was not aware about the height of the piled paddy straw on which she was raped. She was not aware as to after how much time her father came upon alarm being raised by her. She has also stated that after the incident she went with her father's home and stayed home in the night. On that night Suneel and his father did not came there. She has denied suggestion that due to enmity false implications of the accused has been done.

27. PW-4 in the cross has stated that PW-1 has not told him in his statement under Section 161 Cr.P.C. that cause of delay in lodging F.I.R. was threat extended by the accused or his family members, rather he was told that due to late evening, he did not register the report on the same day. He has also stated that the clothes of the prosecutrix have not been taken in his possession. The place of occurrence was eight feet in height where the prosecutrix

was raped. No certificate regarding the age of the prosecutrix was shown by the family members of the victim. Perusal of the statement of PW-1 shows that he is not the eye witness of the incident. There is no other independent witness. The medical report does not corroborates the prosecution version.

28. PW-6 Dr. Kalpana Chandra who has examined the victim has stated that no opinion can be given regarding rape as the victim was habitual of sexual intercourse. Although on the basis of sole testimony of the victim, the conviction can be sustained, however, it should be worthy of credence, thus, the statement of PW-2 have to be examined keeping in view the fact that there is no eye witness to the incident.

29. PW-1 has stated that after hearing alarm of his daughter he ran to the place of occurrence, he was 100-125 meters away and during the entire 20 minutes he kept on hearing alarm, whereas the victim stated that she raised alarm only when the grip of the Suneel on her mouth softened.

30. According to PW-2 her father was 4-5 meters away when she was raped, whereas according to PW-1 he was 100-125 paces away. The statement of PW-2 that police has taken her blood stained salwar in its possession has also been contradicted by the I.O.

31. From perusal of the statement of PW-2, although, she has stated that she is not aware as to what was the height of the place where she was raped, the I.O. has clearly stated that it was a pile of paddy straw of 8 feet in height. PW-1 in his statement admitted the enmity with the family of the accused due to the death of his son who went with the uncle Suresh of the accused to Punjab. PW-1 has not given any reason for the delay in lodging F.I.R. whereas PW-2 has clearly stated that after the incident PW-2 along with PW-1 came home and on that date no one from the accused, his father or from his family members came to her house.

32. I.O. PW-4 has stated that in the cross PW-1 has not told him about the delay in the F.I.R. is due to threat extended by the accused persons. He has contradicted the statement of PW-2 and has clearly stated that no clothes of the prosecutrix were seized. The statement of the prosecutrix also appears improbable as in the statement of PW-4, the height of the place is said to have been 8 feet, whereas PW-2 has shown ignorance regarding the height. Although PW-1 is not eye witness, but, he was present, who has last seen the accused running away from the place of occurrence immediately after the rape was committed.

33. As per the own statement of PW-1 and PW-2, the testimony of the prosecutrix is contradicted at several places particularly PW-1 and PW-4. The statement of the prosecutrix that she only cried when the grip of the appellant got loos upon her mouth; while committing rape, he extended threat to the victim that if she cries she will be killed. On the contrary PW-1 says that he heard the alarm for continuous 20 minutes. PW-2 has shown the presence of PW-1, 4-5 meters away from the place of occurrence when the rape was committed, whereas PW-1 has stated that he was 100-125 meters away when the rape was being committed and he took 20 minutes while running to cover that distance.

34. The testimony of the prosecutrix that her blood stained Salwar was seized by

the police has also been contradicted by the I.O. in his statement who has denied any such seizure. Again the ignorance shown by the prosecutrix that she is not aware as to what was the height of the place where she was raped, does not inspire confidence in face of the statement given by the PW-4 that the place of occurrence was 8 feet in height. It appears quite improbable to commit offence of rape by dragging victim upon a place which is 8 feet high and still the victim has not suffered any contusion or abrasion.

35. So far as the age of the prosecutrix as per the medical statement of PW-5, the victim could have been 18 years at the time of occurrence. This Court has taken notice as while giving statement of PW-1 examination-in-chief has brought transfer certificate dated 20.03.2002 and has filed it in the trial court. The trial court while convicting the accused has also placed reliance on this document which could not have been done as the same was not given to the investigation officer who was conducting the investigation. There is no compliance of Section 230 Cr.P.C. read with section 90 Cr.P.C. and therefore, the document could not have been relied upon by the trial court for coming to any finding.

36. On the whole, statement of the prosecutrix does not inspire confidence. In the offence of rape, the statement of the prosecutrix is utmost important. The statement of the prosecutrix should be of sterling quality which in the present case is absent. On such kind of shaky testimony of the prosecutrix which is improbable and contradictory to the statements of PW-1, PW-3 and PW-4 without there being any corroborative material or something short of corroboration, I am of the opinion that conviction on such type of sole testimony of the prosecutrix cannot be sustained.

37. 31. The Hon'ble Supreme Court in Mohd. Ali @ Guddu vs. State of Uttar Pradesh (2015) 7 SCC 272 has held as under:-

"Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned Trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be appropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had traveled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon."

38. In Hem Raj v. State of Haryana, (2014) 2 SCC 395 it has been held that :-

"10. Faced with such a situation, we were anxious to find out whether there can be any clinching medical evidence suggesting rape, but, unfortunately, the prosecuton has failed to examine Dr.Anjali Shah, who had examined the prosecutrix. The MLR was produced in the Court by P.W.6 J.B. Bhardwaj, Medical Record Technician. This is a serious lapse on the part of the prosecution. We are aware that lapses on the part of the prosecution should not lead to unmerited acquittals. This is, however subject to the rider that in such a situation the evidence on record must be clinching so that the lapses of the prosecution could be condoned. Such is not the case here. The MLR does suggest that the hymen of the prosecutrix was torn. It is also true that the prosecutrix has brought on record FSL report which shows that human semen was detected on the salwar of the prosecutrix and on the underwear of the accused. However, it is difficult to infer from this that the prosecutrix was raped by the appellant. The prosecutrix herself has vacillated on this aspect. It was pointed out that no injuries were found on the prosecutrix. We do not attach much importance to this aspect because presence of injures is not a must to prove commission of rape. But the prosecutrix's evidence is so infirm that it deserves to be rejected. Her brother has come out with a case that the appellant tried to rape the prosecutrix. He did not say that the appellant raped the prosecutrix. Taking an overall view of the matter, we find it difficult to sustain the prosecution case that the prosecutrix was raped by the appellant. This is a case where the appellant must be given benefit of doubt. "

39. The delay in loding the F.I.R., non-examination of scribe of the F.I.R., the in-consistent testimony of the prosecutrix, associated circumstances and uncorroborated medical evidence cast doubt on the testimony of the victim which failed to inspire confidence. The evidence of the prosecutrix is not of that quality on which the appellant can be convicted. Law in the regard has been settled.

40. In view of the settled law, since the evidence of the prosecutrix PW-2, PW-1 are contradictory, the testimony of the prosecutrix has also been contradicted by the I.O. she is not a credible witnesses, I find that the trial court has convicted the accused merely on conjectures and surmises and assumptions, the prosecution has failed to prove its case beyond reasonable doubt. The assumptions have not been corroborated in any reliable evidence medical does not support the case of prosecution relating to rape there is no other corroborative evidence, I am unable to agree the conclusion arrived at by the trial court. Accordingly, the judgment dated 11 .07.2003 passed by the Additional Sessions Judge (Fat Track Court No. 2), Raibareli, is set aside. The appellant is acquitted of all the charges levelled against him. The appellant is directed to be released forthwith if he is not required in any other case.

41. The appeal is accordingly allowed.

(2023) 4 ILRA 985
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 1406 of 1995

Gopal Das & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Rajeev Goswami

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 – Section 308 – Attempt to commit culpable homicide – The Code of Criminal Procedure, 1973 – Section 357 - By impugned order, trial court has convicted appellants - Three years rigorous imprisonment - On 31.03.1990 accused with his sons surrounded Chailbihari Sharma and beat him with sticks and water pipe causing injuries - Occurrence was witnessed by several persons of neighbourhood – Brother of injured also submitted written report - Prosecution examined PW1, PW2 as witnesses of fact - PW3, PW4, PW5, PW6 were examined as formal witnesses – Held, from oral and documentary evidence, it is concluded that on date of occurrence, appellants with intention of causing culpable homicide not amounting to murder, with knowledge of causing such injury to injured that if he died, appellants would be guilty, caused grievous injury which was dangerous to life - Trial Court has rightly convicted the appellant - Hence, incident has taken place about 33 years ago - Appellants are on bail for last 33 years - Sentence awarded is reduced to period already undergone, reasonable compensation is awarded to victim, ends of justice would be served. (Para 3, 4, 12, 28, 36)

Appeal is partly allowed. (E-13)

List of Cases cited:

1. Tukaram Gundu Naik Vs St. of Mah., (1994) 1 SCC 465

2. Suresh Sitaram Surve Vs St. of Mah., AIR 2003 SC 344

3. St. of M. P. Vs Vikram Das, (2019) 4 SCC 125

4. Manohar Singh Vs St. of Raj. & ors., (2015) 3 SCC 449

5. Roop Chand Vs St. (NCT) of Delhi, 2020 (3) ALT (Crl.) 331 (A.P.)

6. Omanakkuttan & ors. Vs St. of Kerala, 2021 (115) ACC 747

(Delivered by Hon'ble Surendra Singh-I, J.)

1. Heard Sri Rajeev Goswami, learned counsel for the appellants and Sri Sunil Kumar Tripathi, learned A.G.A. for the State

2. This criminal appeal has been filed against the judgement and order dated 29.08.1995 passed by VIIIth Additional Sessions Judge, Mathura, in Sessions Trial No. 12 of 1992, State of U.P. Vs. Gopal Dass and Others arising out of Case Crime No. 120 of 1990, Police Station- Vrindavan, District- Mathura.

3. By the impugned order, the trial court has convicted the appellants, Gopal Dass, Lala, Munna and Ravi u/s 308 I.P.C. and sentenced them to three years rigorous imprisonment. During pendency of the criminal appeal, appellant, Gopal Dass died and the criminal appeal qua appellant, Gopal Dass, was abated vide order dated 12.10.2022 of the Court. Thus, this appeal remains only qua appellant nos. 2, 3 and 4 namely, Lala, Munna and Ravi.

4. The prosecution case in brief is that on 31.03.1990 at 8.30 a.m., near Gopal Bhawan Bari Kunj in front of the house of Purushottam, accused Gopal Dass S/O Mihi Lal, Munna, Lala and Ravi, all sons of Gopal Dass, resident of Seva Kunj, Police Station- Vrindavan, District- Mathura, surrounded Chailbihari Sharma, and beat him with sticks and water pipe causing

injuries to him. At that time, informant, Saroj Sharma, wife of Chailbihari Sharma, was at her house. On getting this information, informant Saroj Sharma ran and reached to the place of occurrence. Her husband, Chailbihari Sharma, was lying unconscious on the road. She carried her husband on rickshaw to police station concerned. The occurrence was witnessed by several persons of the neighbourhood. On the basis of written report (Ext.Ka.1) given by informant, Saroj Sharma, N.C.R. (Ext.Ka.7) u/s 323 I.P.C. was registered in Police Station- Vrindavan on 31.03.1990 at 9.10 a.m. On 11.04.1990, Girdhari Lal Sharma, brother of injured Chailbihari, submitted a written report (Ext.Ka.2) in Police Station- Vrindavan, in which it was mentioned that on 31.03.1990 at 8.30 a.m., in Maan Gali, Seva Kunj, Vrindavan, accused-appellants, Gopal Dass, Munna, Lala and Ravi and non-accused, Chhotey beat his brother, Chailbihari Sharma with lathi and iron rod. The report regarding it was registered by his sister-in-law (bhabhi), Saroj Sharma, on the same day in police station concerned. Due to the injury caused by accused, the condition of his brother is serious from the date of occurrence. He was admitted in Methodist Hospital for treatment where it was found that there is fracture of bone in his body. The entry regarding registration of N.C.R was made in G.D. on 31.03.1990 on 10.10 a.m. Certified copy thereof is (Ext.Ka.8) on record.

5. On the basis of the written report (Ext.Ka.2) given by Girdhari Lal Sharma on 11.04.1990, N.C.R. was converted as Case Crime No. 120 of 1990 u/s 147, 308 I.P.C. Carbon copy of the G.D. regarding registration of the criminal case under the aforesaid sections is (Ext.Ka.9).

6. The injured Chailbihari Sharma was carried to State Contagious Disease Hospital, Mathura, where Medical Officer Dr. S.K. Jain had done the medical examination of the injuries of the injured Chailbihari Sharma, aged 38 years and prepared the injury report (Ext.Ka.3). At the time of occurrence, following injuries were found on the person of Chailbihari Sharma :-

(i) Lacerated wound 5 cm x 0.05 cm skin deep on right side of head 10 cm above the right ear. Margins were irregular. Blood was oozing.

(ii) Lacerated wound 7 cm x 1 cm skin deep on left side of head, 10 cm above the left ear. Margins were irregular. Blood was oozing.

(iii) Lacerated wound 3 cm x 0.5 cm skin deep 3 cm in the injury no. (ii). Margins were irregular. Blood was oozing.

(iv) Three contusions of size 9 cm x 3 cm which were overlapping over one another on the right side of shoulder. X-ray advised.

(v) Abrasion red in colour 7 cm x 3 cm on back of right forearm.

(vi) Abrasion 3 cm x 2 cm behind of right forearm, 5 cm below the injury no. (v).

7. In the opinion of the Medical Officer P.W.3 Dr. S.K. Jain, injury nos. (i) to (iv) were caused by blunt object. Injury nos. (v) and (vi) appears to be caused by friction. All the injuries were fresh at the time of examination. The injuries could be caused by iron rod or pipe. They could have been caused on 31.03.1990 at 8.30 a.m.

8. The Investigating Officer PW4 S.I. Hoti Lal Sharma has prepared the site plan (Ext.Ka.4). He took the blood-stained

clothes worn by injured Chailbihari Sharma. He took clothes which had become blood-stained after the occurrence in possession and prepared the memo thereof which is (Ext.Ka.5).

9. The injured Chailbihari Sharma was admitted in the Methodist Hospital, Mathura on 31.03.1990 where he had undergone medical treatment. The medical report and discharge summary of the hospital is (Ext.Ka.10). In the Methodist Hospital, Mathura, x-ray of his right shoulder, chest, head, rt. side chest, palm of hand was done. X-ray report (material Exts.1 to 4) is in the trial court file but it was not proved in the trial court. Injury summary and discharge report (Ext.Ka.10) was prepared by Dr. Anita Sundaram which was proved by P.W.6 Dr. D.W. Thomas.

10. After investigation, the Investigating Officer submitted charge-sheet (Ext.Ka.6) against the accused-appellants, Gopal Das, Munna, Lala and Ravi and non-convicted accused, Chhotey.

11. The case was committed by the Ist Additional Chief Judicial Magistrate to the court of Sessions. On 26.09.1992, the trial court framed charge u/s 147, 148 and 308 I.P.C. against accused-appellants, Gopal Das, Munna, Lala and Ravi and non-convicted/accused, Chhotey.

12. The prosecution in support of the charges, examined PW1 Smt. Saroj Sharma and PW2 Chailbihari Sharma as witnesses of fact whereas PW3 Dr. S.K. Jain, PW4 S.I. Hoti Lal Sharma, PW5 Banney Khan and PW6 Dr. D.W. Thomas, were examined as formal witnesses.

13. P.W.1 Smt. Saroj Sharma and P.W.2 Chailbihari Sharma gave evidence about the occurrence. P.W.1 Saroj Sharma proves written report (Ext.Ka.1). P.W.2 Chailbihari Sharma proves the written report dated 11.04.1990 submitted by his brother, Girdhari Lal Sharma in the concerned police station as (Ext.Ka.2).

14. P.W.3 Dr. S.K. Jain, who was posted at the time of the occurrence as Medical Officer, Government Contagious Disease Hospital, Mathura proves the medical report dated 31.03.1990 of injured Chailbihari Sharma as (Ext.Ka.3).

15. The Investigating Officer P.W.4 S.I. Hoti Lal Sharma proves the site plan (Ext.Ka.4). He also proves the recovery memo relating to taking the blood-stained clothes in possession of the injured (Ext.Ka.5). He also proves the charge-sheet (Ext.Ka.6) submitted by him in the case in the court after investigation. He further proved the N.C.R. No. 41 u/s 323 I.P.C. dated 31.03.1990 prepared by O/C Premi Singh. P.W.4 also proved the G.D. relating to institution of N.C.R. No. 41 u/s 323 dated 31.03.1990 time 9.10 a.m. in P.S.-Vrindavan as (Ext.Ka.10). He also proved the conversion of G.D. dated 12.04.2019 relating to N.C.R. No. 41 which has been converted as Case Crime No. 120 of 1990 u/s 123, 147 and 308 I.P.C. which is (Ext.Ka.9). P.W.4 also gave evidence regarding the investigation done by him.

16. P.W.5 Banney Khan, Record Keeper of Methodist Hospital, Mathura proved the medical report and the discharge summary of injured Chailbihari Sharma (Ext.Ka.10).

17. P.W.6 Dr. D.W. Thomas, proved the medical report and the discharge summary of injured Chailbihari Sharma (Ext.Ka.10) which was prepared by Dr.

Anita Sundaram who had worked with P.W.6 Dr. D.W. Thomas and has mentioned the following injuries :

(i) bone deep injury on the head;

(ii) fracture in the rib nos. 1, 2, 3, 4, 7 and 8 on the right side of chest

(iii) fracture in the right shoulder of the injured

(iv) fracture in the proximal phalynx bone of the index finger of right hand.

In the opinion of P.W.6 Dr. D.W. Thomas, injuries were fatal in nature. They could have been caused on 31.03.1990 at 8.30 a.m. X-ray plates were given to the injured Chailbihari Sharma which were produced at the time of examination of P.W.6 Dr. D.W. Thomas. He proves the x-ray plates of injured relating to index finger and right ribs and the wrapper of the x-ray plate as (material Exts. 1 to 4). Injuries mentioned in the discharge slip was prepared on the basis of injury report and x-ray report.

18. On 20.06.1995, the trial court recorded the statements u/s 313 Cr.P.C. of accused, Gopal, Munna, Lala, Chhotey and Ravi. They have denied the prosecution case. They have submitted that false prosecution papers were filed. They have also stated that injured Chailbihari Sharma had occupied the land of the accused persons. He falsely implicated the appellants. Chailbihari Sharma had received injuries in an accident. The accused examined D.W.1 Brij Gopal in his defence.

19. Heard learned counsel for the appellant, learned A.G.A. and perused the entire appellate as well as lower court record.

20. The definition of attempt to culpable homicide is given in Section 308 I.P.C. which is as follows :

308. Attempt to commit culpable homicide.-- Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

21. Before the accused can be held to be guilty u/s 308 I.P.C., it was necessary to arrive at a finding that the ingredients thereof namely, requisite intention or knowledge was existing.

22. In **Tukaram Gundu Naik Vs. State of Maharashtra, (1994) 1 SCC 465,** the Apex Court has held that when the accused can only be attributed knowledge that by inflicting such injuries, he was likely to cause death and attempt to commit such an offence would be one punishable u/s 308 I.P.C.

23. Learned counsel for the appellants has argued that P.W.1 Saroj Sharma is not an eye-witness. She came at the place of occurrence only after the incident. There is only one witness, P.W.2 Chailbihari Sharma, who is the injured. When only injured P.W.2 Chailbihari Sharma has given evidence regarding the occurrence, conviction cannot be made on the basis of evidence of single partisan witness.

24. Learned A.G.A. for the State has stated that the prosecution has proved the case beyond reasonable doubt on the basis of oral and documentary evidence. The Apex Court has held in **Suresh Sitaram Surve Vs. State of Maharashtra, AIR 2003 SC 344** that the evidence of an injured eye-witness cannot be discarded in toto on the ground of inimical disposition towards the accused particularly where his evidence when tested in the light of broad probabilities, it can be concluded that he was natural eye-witness and had no reason to concoct a case against the accused. He has further submitted that in case sentence is reduced to the period already undergone, the victim be paid compensation as provided under Section 357 Cr.P.C.

25. In the light of the above law propounded by the Apex Court, the appreciation of evidence of injured P.W.2 Chailbihari Sharma is to be done.

26. P.W.2 Chailbihari Sharma has proved by his evidence the date, time and place of occurrence. He has stated that on 31.03.1990 at 8.30 o'clock, he was going to P.S.- Vrindavan and when he was in front of the house of Purushottam in Seva Kunj, accused, Gopal and his sons, Munna, Chhotey, Lala and Ravi, with the intention of causing death, beat him with the pipe and danda. Gopal and Chhotey were armed with water pipe and others were having danda in their hands. He got his injuries medically examined first in Vrindavan and then in Methodist Hospital, Mathura. Due to the injuries received by him, he was admitted in Methodist Hospital, Mathura for 18-19 days. Due to the injuries received in the marpeet, he became unconscious. His ribs were fractured. This witness has been cross-examined in detail by the defence but his testimony regarding the date, time and place of occurrence, participation of accused in the offence and the injuries caused by them and the weapon of assault which they have used in causing injury and medical treatment of injured in the hospital first at Vrindavan and then at Methodist Hospital, Mathura, has not been shaken.

27. P.W.1 Saroj Sharma, wife of injured Chailbihari Sharma, who had reached the place of occurrence after the incident has stated in her evidence dated 08.03.1994 that about 4 years ago at 8.30 a.m. in the morning, accused Gopal, Munna, Lala, Ravi and Chhotey beat her husband with danda and water supply pipe in front of the house of Purushottam in Bari Kunj. His husband received grievous injuries on his body. The witness stated that her injured husband, who was present on the spot, informed her when she reached there. P.W.1 Smt. Saroj Sharma has stated that her husband had told her the names of the accused persons who had attacked him. The evidence of P.W.1 Smt. Saroj Sharma and P.W.2 Chailbihari Sharma has been corroborated by oral evidence of doctors, injury report, prosecution papers i.e. written report, chik F.I.R., medical examination report of victim, Chailbihari Sharma at Government Hospital, Vrindavan and Methodist Hospital, Mathura. The evidence of P.W.1 Smt. Saroj Sharma and P.W.2 Chailbihari Sharma are cogent, convincing and reliable. Nothing has emerged in their cross-examination which may raise doubt about the veracity of their evidence.

28. From the appreciation of oral and documentary evidence, it is concluded that on the date, time and place of occurrence, appellants, Munna, Lala and Ravi with the intention of causing culpable homicide not amounting to murder with the knowledge

of causing such injury to injured Chailbihari Sharma that if he died, the appellants would be guilty of culpable homicide not amounting to murder, caused grievous injury which was dangerous to life to the injured Chailbihari Sharma. The court has rightly convicted the appellant u/s 308 I.P.C. There is no force in the criminal appeal which is likely to be dismissed.

29. D.W.1 Brij Gopal has deposed in his evidence that there was dispute regarding the house between the parties. He has stated that Chailbihari Sharma had received injuries in the accident but due to the enmity regarding disputed house, he had falsely implicated the appellants in the case. D.W.1 Brij Gopal could not narrate the boundaries of the disputed house. D.W.1 Brij Gopal is not the eye witness of the alleged accident in which Chailbihari Sharma received injuries. Thus, his evidence that Chailbihari Sharma received injuries in some accident and he falsely implicated the accused of the offence, cannot be accepted.

30. From the perusal of the record of the trial court, it is evident that appellants, Ravi, Lala and Munna were taken into custody on 01.05.1990. They were granted bail vide order dated 04.05.1990 by the trial court. Their bail bonds were accepted on 05.05.1990. Therefore, the appellants had remained in jail for 5 days during investigation of the case.

31. Indian legislature has not given any sentencing policy, though Malimath Committee (2003) and Madhava Menon Committee (2008) has asserted the need of sentencing policy in India.

32. Principle of sentencing has been an issue of concern before the Supreme Court in many cases and tried to provide clarity on the issue. Apex Court has time and again cautioned against the cavalier manner considering the way sentencing is dealt by High Courts and Trial Courts.

"... It is established that sentencing is a socio-legal process, wherein a Judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner." (para 49 of **Accused 'X' vs. State of Maharastra (2019) 7 SCC 1)**

"12. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

13. Additionally, we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material support of amenity; (iii) extent of humiliation; and (iv) privacy breach."

(State of Madhya Pradesh vs. Udham and others (2019) 10 SCC 300)

33. It is also notable that *"... where minimum sentence if provided for, the Court cannot impose less than minimum sentence."* **(Para 8 of *State of Madhya Pradhesh vs. Vikram Das (2019) 4 SCC 125)***

34. Section 357 Cr.P.C. provides power to the Court to award compensation to victim, which is in addition and not ancillary to other sentences. While granting just and proper compensation Court ought to have consider capacity of the accused for such payment as well as relevant factors such as medical expenses, loss of earning, pain and sufferings etc.

35. Supreme Court has reiterated need for proper exercise of power of granting compensation under Section 357 Cr.P.C. in ***Manohar Singh Vs. State of Rajasthan and others : (2015) 3 SCC 449*** and in paras 11, 31 and 54 it is stated that:

"11....Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other. At times, evidence is not available in this regard. Some guess work in such a situation is inevitable. Compensation is payable under Section 357 and 357- A. While under section 357, financial capacity of the accused has to be kept in mind, Section 357-A under which compensation comes out of State funds, has to be invoked to make up the requirement of just compensation."

"31. The amount of compensation, observed this Court, was to be determined by the courts depending upon the facts and circumstances of each case, the nature of the crime, the justness of the claim and the capacity of the accused to pay."

"54. Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on the courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision."

36. Considering the facts and circumstances of the present case as well as keeping in view the position of law as mentioned above and considering that the incident has taken place on 31.03.1990 about 33 years ago and considering the judgment passed by Supreme Court in ***Roop Chand vs. State (NCT) of Delhi, 2020 (3) ALT (Crl.) 331 (A.P.)*** and ***Omanakkuttan and others vs. State of Kerala, 2021 (115) ACC 747,*** that the appellants are on bail for the last 33 years and they have not misused the liberty of bail during the said period, this Court is of the view that if the sentence awarded is reduced to the period already undergone

and a reasonable compensation is awarded to the victim, the ends of justice would be served.

37. In view of above, the appeal is partly allowed. In judgment and order dated 29.08.1995 passed by VIIIth Additional Sessions Judge, Mathura, in Sessions Trial No. 12 of 1992, State of U.P. Vs. Gopal Dass and Others, the sentence is hereby modified to the period already undergone by the appellants and the fine imposed is raised from Rs.2,000/- to Rs.15,000/- to be paid by each accused, 50% of which shall be paid to the injured, Chailbihari Sharma.

38. The appellants, Lala, Munna and Ravi, each shall deposit the aforesaid amount of fine within two months from the date of this judgement. The trial court shall pay 50% of the amount of fine deposited to the injured Chailbihari Sharma and in case of his death, to his successors after proper identification. In case the appellants do not deposit the fine within the aforesaid period, they will have to undergo the sentence awarded by the trial court.

39. Let a copy of the judgement along with the record of the case be sent to the court concerned for execution of punishment as modified by the order passed in this criminal appeal.

(2023) 4 ILRA 993
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.01.2023

BEFORE

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

Criminal Appeal No. 4611 of 2013

Raju ...Appellant (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rajendra Kr. Tripathi, Sri Anil Kumar Dubey, Sri Narendra Kumar, Sri Rabindra Bahadur Singh, Sri N.K. Singh

Counsel for the Opposite Party:
G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 302 & 201 - Murder – By impugned order, sentenced to rigorous imprisonment for life - The Code of Criminal Procedure, 1973 - Section 313 - Appeal against conviction - On 11.10.2012, informant (PW.1) was in his house along with his brother & anr.person, accused came over there, and asked his son to accompany him for sharpening edges of 'daranti' - Informant's son departed along with accused but he did not return whole night - The next day accused was enquired about whereabouts of deceased, he told that deceased and he himself consumed liquor and in order to commit theft of motorcycle, cajoled him and cut his neck and threw him away in the canal and concealed motorcycle in sugar-cane field - Charges against accused beyond all reasonable doubt – Validity – Held, the F.I.R. becomes doubtful regarding specific timing of lodging of report, and as to who dictated F.I.R. and person who wrote it - Foundation of prosecution case loses significance, thus rendering F.I.R. ante time – In the instant case based upon testimony and circumstance, prove that F.I.R. is ante time – Factual aspect is obvious as per testimony of P.W.-1 that F.I.R. was lodged after preparation of inquest report - Prior to lodging of report, the interference and indulgence of police personnel, investigating officer is apparent on record - All relevant aspects and fact of writing of FIR, timing of preparation of inquest report and factum of point of false implication of accused have not been properly appraised by lower

court vis-a-vis the testimony on record, facts and circumstances of case - Impugned order set aside. (Para 2, 3, 24, 36, 44, 45, 47)

Appeal is allowed. (E-13)

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

1. Heard Sri R.B. Singh and Sri N.K. Singh, learned counsel for the appellant, Sri A.N. Mullah, learned A.G.A. for the State and perused the material brought on record.

2. The instant appeal has been preferred against the judgement and order dated 20.08.2013 passed by the Additional Sessions Judge, Court No. 10, Bareilly, in Session Trial No. 1143 of 2012 (State of U.P. Vs. Raju), arising out of Case Crime No.1092 of 2012, under Sections - 302, 201 I.P.C., Police Station - Baheri, District - Bareilly whereby the appellant has been sentenced to undergo rigorous imprisonment for life under Section 302 I.P.C., coupled with fine Rs. 20,000/-, in default of payment of fine, one month additional simple imprisonment and three years rigorous imprisonment under Section - 201 I.P.C. coupled with fine Rs.5,000/-, in default of payment of fine, two months additional simple imprisonment. All the sentences were ordered to run concurrently.

Facts of this Appeal:-

3. Factual matrix of this case as reflected from the record proceeds on line that the informant of this case, Natthu Lal (P.W.-1), father of deceased- Yashpal lodged a written report at Police Station - Bahedi on 12.10.2012 at 01:10 p.m. against the appellant with description that the informant is resident of Village - Bhurha Bahadurpur within Police Station - Baheri Bareilly. While he was sitting in his house on 11.10.2012 along with his brother Prem Shankar and Rakesh son of Vindravan around 03:00 p.m., Raju son of Dori Lal Gangwar came over there, called his son Yashpal and asked to accompany him to Bhurhiya for sharpening edges of "daranti' (sickle). Informant's son took four "daranti' (sickle) with him and departed along with accused on motorcycle U.P. 25 AF 1284, but he did not return whole night. Search was made for the whereabouts of Yashpal but to no avail. The next day at 10:00 a.m., Raju was seen coming towards the village, when he was enquired about whereabouts of Yashpal, he adopted dilly dallying tactics and tried to avoid the query but upon pressure being exerted by the villagers, Raju told that Yashpal and he himself consumed liquor during night at Uganpur and in order to commit theft of motorcycle cajoled him somewhere in between Makroi and Dadyabojh and cut his neck with the "daranti' and threw him away in the canal and concealed the motorcycle in the sugar-cane field of Moti Ram.

4. Upon such disclosure, the informant along with others took the accused-appellant to the place where the dead body of Yashpal was lying. Consequently, a report was written and got lodged at the Police Station - Bahedi, the same is Ext. Ka-1. Relevant entries whereof were made in the concerned Check F.I.R. (Ext. Ka-6) at Case Crime No. 1092 of 2012, under Sections - 302, 201 I.P.C. at Police Station - Bahedi. On the basis of the same, case was registered against the accused-Raju at Serial No. 29 of the General Diary concerned of date 12.10.2012 at 01:10 p.m. at aforesaid police station. The copy of concerned G.D.

is Ext Ka-7. Both these papers have been proved by Constable Jhajhan Lal (P.W.-5). Consequently, the investigation ensued and the same was entrusted to S.H.O. Sunil Kumar Pachori (P.W.-6).

5. The Inspector Devendra Kumar Tyagi PW-4 prepared the inquest report under supervision of the investigating officer on 12.10.2012 and has facilitated for sending the dead body to the mortuary at Bareilly and has proved the inquest report (Ext. Ka-2). Bare perusal of the inquest report is indicative of fact that preparation of inquest report commenced at 02:05 p.m. on 12.10.2012 and completed at 04:00 p.m. on 12.10.2012.

6. The relevant papers were also prepared for sending the body for postmortem examination and the relevant papers have been proved by P.W.-6 as Ext. Ka-14, Ext. Ka-15, Ext. Ka-16, Ext. Ka-17 and Ext. Ka-18, the same are challan dead body, photonash/dead body, letter to C.M.O., letter to R.I. and specimen seal, respectively. As the investigation proceeded, the prosecution witness Dr. T.S. Arya conducted postmortem examination on the dead body of the accused on 13.10.2012 at 01:00 p.m. He has noted the following ante mortem injuries on the dead body of Yashpal son of Naththu Lal:-

1. Incised wound 9 cm x 2 cm x trachea deep, 6 cm below chin 9 cm below right ear, 7 cm below left ear, margin sharp and clean.

2. Multiple abrasion 6 cm x 1 cm on left side face in front of left ear.

7. Cause of death was stated to be shock and haemorrhage as a result of incised wound on the neck.

8. Duration was described 1-1/2 to 2 days. The postmortem examination report has been proved by the doctor witness as Ext. Ka-13.

9. Since the investigation was underway and the accused was in the custody of the police, he was taken to the place near side passage of the canal and a motor cycle Bajaj Platina black colour numbering U.P. 25 AF 1284 was recovered on the pointing of the accused from the sugar-cane field of Moti Ram, a recovery memo was prepared on the spot, which has been proved as Ext. Ka-3. Since the investigation proceeded further, the Investigating Officer recovered blood stained "daranti'/sickle on the pointing out of the accused from the left side passage of canal in the field of Gurmeet Singh from the bushes under blueberry tree, the same was taken into possession by the investigating officer and a memo of recovery of daranti/sickle was also prepared, which is Ext. Ka-4. Apart from that, the investigating officer arrived at the place of occurrence and collected simple soil and blood stained soil from the spot and kept it in two seperate containers and sealed it up and prepared a memo of the same, which memo is Ext. Ka-5. The investigating officer has prepared site-plan of the place of occurrence (Ext. Ka-8). Apart from that, the site plan of the place of recovery of "daranti' was also made which is Ext. Ka-9. Similarly, the site plan of the place of recovery of motor cycle has been proved as Ext. Ka-10 by the investigating officer.

10. It is relevant to mention that once again after preparation of the recovery memo of motor cycle (Ext. Ka-10), the investigating officer again proceeded to that spot and prepared site-plan of place of recovery of motor cycle as Ext. Ka-11. Therefore, two site-plans pertaining to the

same spot appear on record. The investigating officer also recorded statement of various witnesses. The daranti/sickle allegedly recovered at the pointing out of the accused was sent for 'chemical examination' along with letter. We neither come across any such report submitted by any chemical analyst of the forensic laboratory nor do any paper purporting to be a report, as such, as been brought and placed on record by the prosecution. After completing the investigation, the investigating officer filed the charge sheet (Ext. Ka-12) against the accused at aforesaid case crime number.

11. Pursuant thereto, proceedings of the case were committed to the court of Sessions from where it was transferred for conduction of the trial and disposal to the aforesaid trial court of Additional Sessions Judge, Court No.10, Bareilly who in turn heard both the sides on point of charge and was prima-facie satisfied with the case against the accused-appellant, consequently, he framed charges under Sections 302 and 201 I.P.C.

12. Charges were read over and explained to the accused-appellant in hindi, who abjured charges and opted for trial.

13. Consequently, the prosecution was required to adduce its testimony. The prosecution produced in all 8 witnesses. P.W.-1 is the informant- Natthu Lal. P.W.-2 Prem Shankar and P.W.-3 Nand Ram are the witnesses of fact. P.W.-4 is Inspector Devendra Kumar Tyagi, who prepared the inquest report under supervision of the investigating officer and has proved the same as Ext. Ka-2. He has also proved memo of simple mud and clay mud and has also proved recovery memo of "daranti'/sickle. Constable Clerk Jhajhan Lal (P.W.-5) has proved relevant entries of the contents of the written report (Ext. Ka-1) noted by him in the concerned check F.I.R. and the relevant entry made in the concerned general diary of date 12.10.2012. S.H.O. Sunil Kumar Pachori (P.W.-6) has conducted investigation into the matter and has narrated the entire length of his investigation and has proved apart from various papers filing of charge sheet against the accused. P.W.-7 Dr. T.S. Arya has conducted postmortem examination on the body of the deceased and has proved the same as Ext. Ka-13. P.W.-8 Pati Ram is the scribe of the written report.

14. Thereafter, evidence for the prosecution was closed and the statement of accused was recorded under Section - 313 Cr.P.C., wherein he has stated that on account of enmity, the village pradhan has falsely implicated him in this case and he is innocent. No evidence whatsoever was led by the defence.

15. The learned Additional Sessions Judge, Court No.10, Bareilly , after appraisal of facts and merit of the case and the evidence on record, vide his judgment and order of conviction dated 28.08.2013 imposed sentence under Sections - 302, 201 I.P.C. and sentenced the accused to rigorous imprisonment for life along with fine under Section - 302 I.P.C. and three years rigorous imprisonment along with fine under Section - 201 I.P.C. In case of default in payment of fine he was directed to suffer additional imprisoment, as above.

16. Consequently, this appeal.

Argument by the Defence :-

17. Contention by the learned counsel for the appellant proceeds on line that

appellant is an innocent young man and has been falsely implicated on account of village party bandi and due to mischief played by the Village Pradhan, who exploited the situation to his advantage in collusion with the police personnel of the concerned Police Station - Bahedi, District - Bareilly and got scribed a false report. He being Gram Pradhan of the village, the report was in fact written at the dictation of the police, which fact is admitted to the prosecution witnesses of fact. On such specific testimony emerging in cross examination of the informant-P.W.-1, the prosecution neither re-examined the witness, nor did it declare him hostile witness.

18. Above particular testimony being established and admitted position and part of testimony of P.W.-1 Natthu Lal- the star witness was-not appreciated, discussed and taken into consideration by the trial court. It being a case based upon circumstantial evidence, all links in the chain of circumstances are shattered and the chain cannot be said to be complete and conclusively established pointing to the guilt of the accused. On the contrary, facts and circumstances qua the testimony of the prosecution witnesses are pointing to the innocence of the accused.

19. Learned counsel for the appellant read out various parts of the testimony of P.W.-1, P.W.-2. P.W.-3 and P.W.-8 and claimed that the village pradhan being highly motivated and inimical, has master minded involvement of the accused in this case in collusion with the police, he had specific reason and cause to settle score against the accused because the accused had supported candidature of another person, who was contesting election of the village pradhan.

20. It is established law that in cases based upon circumstantial evidence, the various links in the chain of circumstances should be complete, consistent and not leaving any room for doubt or for creating any situation, which would work in favour of hypothesis of innocence of the accused. In this case, the various links in the chain of circumstances are wholly inconsistent and the chain of circumstances is not complete.

21. Learned counsel concluded by claiming that the testimony is full of embellishment and improvement. The F.I.R. is ante time and the very fact has been disclosed by none other than informant P.W.-1 himself and he has stated in so many words that the report was lodged after the inquest had been prepared by the police. It is noticeable that inquest report itself is reflective of fact that the preparation of inquest commenced at 02:05 p.m. on 12.10.2012 and completed at 04:00 p.m. That being the case, the F.I.R. was lodged after 04:00 p.m. after completion of the inquest report. Once the F.I.R. becomes ante time, the entire prosecution case becomes highly doubtful and the whole prosecution story falls flat and it would not inspire confidence.

Reply by the State :-

22. While, replying to the aforesaid contention, Sri A.N. Mulla, learned A.G.A. has submitted that insofar as the factum of last seen theory is concerned, the same has been properly and duly proved and established and on this point, the testimony of the prosecution witnesses of fact is unflinching. Insofar as the statement of P.W.-1 on point of scribing the report (Ext. Ka-1) is concerned, the same should be under circumstances taken as stray

statement, which does not fall in queue with the flow of testimony when read as a whole. The factum of recovery of weapon of assault has been duly and properly proved by the prosecution witnesses and there is no doubt regarding the recovery of weapon of assault.

23. The recovery of "daranti' / sickle was made at the pointing out of accused and the motorcycle bearing No. U.P. 25 AF 1214 was also recovered at the pointing out of the accused. Apart from that, the dead body was also recovered at the pointing out of the accused. The very motive for committing the offence was to the import that the accused was greedy for grabbing motorcycle of the deceased and for that specific reason he caused the occurrence by causing cut blow with daranti on the neck of the deceased Yashpal. The doctor who conducted postmortem examination on the body of Yashpal has noted the injury as incised wound 9 cm x 2 cm x trachea deep, 6 cm below chin 9 cm below right ear, 7 cm below left ear, margin sharp and clean on the neck of the deceased. Apart from that, the investigation has been fair. There is no reason as to why the police was interested in falsely involving the appellant and the I.O. had no bias against the accused. The report was properly lodged at 01:10 p.m. on 12.10.2012 and has been proved by P.W.-5 Constable Jhajhan Lal. To claim that the various links in the chain of circumstances are not complete is not proper, however, the evidence adduced by the prosecution shows otherwise. The prosecution has proved its case beyond reasonable doubt.

Moot point for determination of Appeal :-

24. In the light of rival submission and the claim raised, the following question crops up for our consideration, as to whether the prosecution has been able to prove satisfactorily the charges against the accused-appellants beyond all reasonable doubt ?

Discussion on merit of the case :-

25. We gather from the perusal of the contents of that F.I.R., the alleged departure of the deceased- Yashpal from his house in company with the accused and the consequent recovery of his dead body on the very next date (12.10.2012). It proceeds with allegation that on 11.10.2012, the informant Natthu Lal (P.W.-1) was sitting along with Prem Shankar and Rakesh son of Vrindavan at his home. It was around 03:00 p.m., when Raju son of Dori Lal Gangwar of his village came over there, called his son Yashpal and asked to accompany him to Bhurhiya (a place for marketing) for sharpening the edges of "daranti'/sickle. The informant's son (deceased-Yashpal) took with him four sickles/'daranti' and drove away along with the accused on his motorcycle U.P. 25 A.F. 1284, however his son did not return at the fall of night. The informant made search for his son, but to no avail.

26. On 12.10.2012, Raju (the accused) was seen coming towards the village, when he was intercepted and asked about whereabouts of his son, a number of villagers had gathered on the spot. They exerted pressure upon Raju, when Raju told them that he and Yashpal both consumed liquor at Uganpur in the night and he nurtured greed for motorcycle of Yashpal and wanted to grab it. Therefore, after cajoling Yashpal, he took him to some place in between 'Makroi' and 'Dadyabojh' and cut his (Yashpal) neck with

"daranti'/sickle and threw away him in the canal and concealed the motorcycle in the sugar-cane field of Moti Ram.

27. Upon such disclosure, the informant along with the accused and others went upto the spot as told by Raju, where the informant saw the dead body of his son lying by the side of canal. The F.I.R. proceeds on to say that the informant went to the police station leaving behind several persons on the spot and made request for report being lodged and action taken. Insofar as this description in the first information report (Ext. Ka-6) is concerned, the same primarily discloses two specific facts, one being that in the evening of 11.10.2012 at about 03:00 p.m., accused Raju accompanied the deceased-Yashpal on his motorcycle U.P. 25 AF 1284 but he did not return back home in the night. The very next day (i.e. 12.10.2012) upon disclosure being made regarding the occurrence that the dead body had been thrown away in the canal, the dead body was recovered by the side of the canal. This report was lodged at the police station at 01:10 p.m. on 12.10.2012, the same was registered at Case Crime No. 1092 of 2012, under Sections - 302, 201 I.P.C. at Police Station - Bahedi, District - Bareilly. The description so made in the F.I.R. requires our appraisal and scrutiny qua the testimony on record and the attendant facts and circumstances of the case.

28. Argument advanced by the defence is to the import that the entire case is false. The "pradhan' of the village, who incidentally is Pati Ram (P.W.-8) is the scribe of the report and he has managed the things by falsely involving the appellant in this case need be examined as such. Several arguments have been advanced and piece of evidence has been read out in support of the claim.

29. Now we may proceed with the testimony of prosecution witnesses of fact as has been produced by the prosecution and cross examined by the defence. The testimony of Natthu Lal (P.W.-1) is in tune with the description of the occurrence as contained in the F.I.R. in his examination-in-chief to the ambit that the accused came to his house on 11.10.2012, took away his son Yashpal with him on the motorcycle, but his son did not return back home in the night. On enquiry being made with Raju, he tried to avoid the query regarding whereabouts of informant's son, in this regard testimony of Natthu Lal is suggestive of fact that on the next morning at around 10:00 a.m., the informant along with others exerted pressure upon him, when the accused-Raju disclosed fact that after consuming liquor in the village Uganpur, the accused became greedy of the motorcycle of Yashpal, therefore, the accused cut his neck with daranti/sickle and threw away his body somewhere in between Daiyamorh and Makroi by the side of the canal and the motorcycle was concealed in the sugar-cane field of Moti Ram. Thereafter, the informant and the villagers arrived on the spot where the dead body was stated to have been thrown away by the accused.

30. The examination-in-chief of P.W.-1 (Natthu Lal) proceeds on to state that the informant went to the police station along with Raju and handed over the report after it was scribed by village pradhan Pati Ram son of Noni Ram. The testimony proceeds with description that the report was written at his dictation and he appended his signature on it after hearing contents of it

and has accordingly proved his signature on the report which is marked Ext. Ka-1. He has stated in the very last line of his examination-in-chief that from the police station he went to the postmortem house. In his cross examination, he has made certain disclosures, which adversely affect the prosecution case on point of lodging of the F.I.R. at 01:10 p.m. on 12.10.2012 at Police Station - Baheri. In his cross examination, on Page Nos. 21 and 22 of the paper book, he has testified to the ambit that he, after reaching to the spot (where dead body of Yashpal was lying), remained there till the inquest report was completed / prepared. However, he has stated that he went to the police station for information after the inquest had been completed. Further, his cross examination proceeds on to disclose fact that he had informed the police at that point of time. When the accused evaded reply to the query posed to him by the informant asking about the whereabouts of the deceased the police had arrived in the village prior to his departure from the village to the spot (where dead body of the deceased was lying). The cross examination proceeds on to state about the specific time that the police had arrived in the village around 10:30 a.m.

31. We notice from testimony of P.W.-1 that it was on 12.10.2012, in his cross examination that he went to the police station after the inquest report had been prepared. He further says that "Panchayatnama' was prepared after 12:00 noon. After the inquest report was prepared, he got the report written at the police station and went to the postmortem house from the police station. The dead body was first taken to the police station, when the report was lodged by the informant. Thereafter, the dead body was taken to the postmortem house. He has further stated that after the report had been lodged, the investigating officer did not make any inquiry about the incident from him. However, he enquired about the incident prior to the lodging of the report. He has stated categorically on page no. 22 of the paper book in his cross-examination that Daroga Ji had got prepared the written report (Exhibit Ka-1). "The report was written by Pradhan Ji of his village" and "Daroga Ji had dictated it to Pradhan Ji".

32. Bare perusal of the inquest report (Ext. Ka-2) is indicative of fact that preparation of inquest began at 02:05 p.m. on 12.10.2012 and was completed at 04:00 p.m., the same day. As per the description contained in the inquest report, it has been described in it that on 12.10.2012 after the information was received at Case Crime No. 1092 of 2012, the police party proceeded to the spot, the dead body was found lying in waters of canal. The head of the dead body was towards western side, whereas, the leg was facing towards eastern side. The dead body was taken out of canal waters and kept by the side of the canal and inquest was prepared. This description by itself is indicative of fact that the inquest was prepared by the side of canal after the dead body was recovered from the waters of canal and the inquest report was completed at 04:00 p.m. It is not the case of the prosecution that the inquest report was prepared either at the police station or at the hospital but it is proved that inquest was prepared and completed by the side of the canal. If the report was as claimed to have been lodged at 01:10 p.m. on 12.10.2012, then how is it possible to believe the testimony of Natthu Ram as emerging in his cross examination that the report was lodged after preparation of the inquest report. If the report had been lodged at 01:10 p.m. on 12.10.2012 at

Police Station - Baheri, then there was no point that the informant proceeded from the police station to the postmortem house, whereas, under natural circumstances, he would have proceeded to the spot where the proceeding was under way for preparation of the inquest report (which place is the patari side of the canal) along with the police party or singly, as the case may be, but it was not so, whereas, it is admitted position that the inquest report was prepared from 02:05 p.m. to 04:00 p.m. on 12.10.2012.

33. Another peculiar feature of the testimony of P.W.-1 is reflective of fact that the police had arrived in the village prior to the informant and others proceeding to the spot on 12.10.2012 at 10:30 a.m., whereas, the entire F.I.R. is woefully silent and does not make any whisper about that aspect. There appears concealment of vital facts of the incident by the prosecution. Facts alleged do not fall in line with the actual happening regarding the lodging of the report, arrival of the police in the village. More surprising is the fact that the report was got scribed on the dictation of Daroga Ji and it was scribed by Pati Ram, the village pradhan (P.W.-8). The testimony (of P.W.-1 Natthu Lal) is clinching on the point that "Daroga Ji dictated and Pradhan Ji wrote the report".

34. In the light of above, we also notice in the testimony of P.W.-8 Pati Ram, who has confirmed to the fact of report being written by him on the dictation of Natthu Lal on the "nahar patri' (side of canal) itself. Thus, testimony of P.W.-8 in his examination-in-chief generates lots of doubt and raises serious question on the reliability of both the witnesses say P.W.1 and P.W.-8. Both of them cannot be believed to be trustworthy witness on the point of lodging of the report and it being dictated and scribed as such.

35. We further notice that the Village Pradhan has also testified certain memo Ext. Ka-5, simple soil and mud clay, memo of recovery of motorcycle and memo of recovery of daranti/sickle (Ext. Ka-4). Even in his cross examination on Page No. 47 of the paper book, P.W.-8 has stated that he wrote the report on the dictation of Natthu Lal, whereas, the police arrived around 09:00 a.m. to 09:30 a.m. The inquest report was prepared before him around 09-10 a.m. This specific testimony by itself is reflective of fact that this witness is neither believable nor reliable, even on facts regarding the time when the inquest report was prepared, whereas, testimony of P.W.-1 regarding writing of the report on the dictation of "Daroga Ji' by Pati Ram (P.W.-8) makes the first information report ante time and outcome of involvement and deliberation of the police, in particular, the investigating officer.

36. It is settled principle of criminal jurisprudence that in case the F.I.R. becomes doubtful regarding specific timing of lodging of the report, and to fact as to who dictated the F.I.R. and the person who wrote it, then the very foundation of the prosecution case loses significance, thus rendering the F.I.R. ante time. Here it is a fit case based upon testimony and circumstance which exorbitantly prove fact that the F.I.R. is ante time, which factual aspect is obvious as per testimony of the informant-P.W.-1 itself that the F.I.R. was lodged after preparation of the inquest report which was completed at 04:00 p.m. on 12.10.2012.

37. We would like to discuss testimony of Constable clerk Jhajhan Lal

(P.W.-5), who claims to have noted down the contents of the written report (Ext. Ka-1) on the Check F.I.R. No.344 of 2012 at Case Crime No. 1092 of 2012, under Sections - 302, 201 I.P.C. and a case was registered at 01:10 p.m. at Serial No. 29 of the General Diary of Police Station - Bahedi and has proved the check F.I.R. and the concerned general diary entry Ext. Ka-6 and Ext. Ka-7, respectively, whereas he has stated in his cross examination that the written report was produced by the informant (P.W.-1), whereas the informant (P.W.-1) has stated in his cross examination that the report was written by P.W.-8 Pati Ram on the dictation of Daroga Ji and that took place after preparation of the inquest report (Ext. Ka-2). Thus, P.W.-5- is hiding the truth and he is not coming with true facts.

38. In view of above, it is obvious that the prosecution witnesses both P.W.-8 and P.W.-1 are not believable. They are not trustworthy and veracity of their version has been exposed in their cross examination. The circumstance also show, as per testimony of P.W.-1 on page no.21 of the paper book, that after the inquest report had been prepared, the report was got scribed at the police station, then he (P.W.-1) went to the postmortem house. This specific piece of testimony unravel the truth that the things have been tried to be managed, deliberated and fixed, for the reasons best known to the prosecution.

39. The testimony of P.W.-1 evinces fact to the import that after the inquiry was made from Raju on 12th October, 2012, about whereabouts of the deceased Raju went to his home. He states that Daroga Ji did not record his statement as such. He further states that the dead body of Yashpal was lying in the canal waters. The water was knee deep in the canal. However, this witness has categorically stated that Raju had no enmity with the deceased.

40. Insofar as the testimony of Nand Ram- P.W.-3 is concerned, it is in line with that of P.W.-2 Prem Shankar regarding the "last seen' and the preparation of the inquest report. However, in view of the testimony of P.W.-1, lot of suspicion works in the story of prosecution and gives rise to a number of possibilities. Now, insofar as the testimony of the investigating officer Sunil Kumar Pachori P.W.-6 is concerned, obviously he claims to have proceeded to the spot after the report had been lodged, whereas, his testimony is in material contrast to the fact of lodging of the first information report at the time (01:10 p.m. on 12.10.2012), as claimed by the prosecution. He claims that spot map was prepared by him which is Ext. Ka-8. The Place-A earmarked in the site plan by the investigating officer appears to be the canal. Thereafter, place-B is earmarked on the foot path / patri of the canal, where the dead body was allegedly lying and was taken out from the canal. Obviously, there was water in the canal and the body must have been lying in the canal for few hours in the night intervening 11/12.10.2012. However, he has proved recovery of "daranti'/sickle and preparation of its recovery memo (Ext. Ka-7) and preparation of site plan of the place of aforesaid recovery (Ext. Ka-9) and has also proved recovery of motorcycle from the sugar-cane field of Moti Ram and has proved the recovery memo and the site plan of the recovery of motorcycle, which is marked Ext. Ka-10.

41. However, it is noticeable that the "daranti' which was allegedly recovered at the instance of the accused by the

investigating officer has claimed to have been sent for forensic examination at Vidhi Vigyan Prayogshala, Lucknow on 31.10.2012 but no report worth its sort has been obtained and placed on record, so as to give credence to the fact that the recovered sickle was blood stained with human blood. Since the point has been pressed by the prosecution itself that the recovered "daranti'/sickle was sent for forensic examination, then it was obligatory on the part of the prosecution to have obtained the forensic examination report, regarding the blood stains found on the sickle and would have been brought before the trial court, but the same has not been done. Non production of the report would cast serious doubt upon the claim of the prosecution that any blood stained daranti/sickle was so recovered and sent for forensic examination, as such.

42. The investigating officer claims that the report was lodged at 01:10 p.m., which aspect has been rendered dubious by the testimony of P.W.-1 in his cross examiantion. The investigating officer has also stated that the written report had been got prepared and was produced at the police station. He also stated about the inquest report, which was prepared under his supervision by Devendra Kumar Tyagi-P.W.-4. He has been suggested that he has performed his duties at the police station itself and has not conducted fair investigation, which suggestion has been denied.

43. It is surprising that the doctor witness Dr. T.S. Arya P.W.-7 has stated innocuously in his cross examination that the investigating officer did not make any inquiry from him. In the very last line of his examination-in-chief, Dr. T.S. Arya (P.W.-7) has testified to the ambit that the injury (Injury No.1) cannot be caused with weapon daranti/sickle but it could be caused by sharp edged weapon. However, on this point, it was incumbent and obligatory on the part of the prosecution to have re-examined this witness and would have clarified the factual aspect about injury being caused by use of "daranti' or so but the same aspect has been let go by the prosecution for the reasons best known to it.

44. It is obvious that prior to the lodging of the report, the interference and indulgence of the police personnel and, in particular, the investigating officer of this case is apparent on record, deliberation of the investigating officer with the village Pradhan is innocuously established against the prosecution prior to the lodging of the F.I.R. that renders the first information report manipulated and deliberated upon by the police and it gives credence to fact that the F.I.R. has not been lodged at the time, when it is claimed to have been lodged by the informant. Instead, the testimony of P.W.-1 emerging in his cross examination renders the first information report ante time. The defence has also come out with the factum of enmity that accused has been roped- in, in this case at the instance of Village Pradhan, Pati Ram since the accused had supported the candidature of the person, who had contested election for Village Pradhan against Pati Ram. We may observe with convenience that the testimony of prosecution witnesses of fact as well as Constable Jhajhan Lal and the investigating officer P.W.-6 is apparently and inherently contradictory in material particulars and it does not inspire confidence. The testimony of prosecution witnesses of fact on the face does not inspire confidence, for the reason that the manipulation of the entire things has

emanated from the active participation of the police and in particular the investigating officer in collusion with the Village Pradhan of the village-Pati Ram-(P.W.-8). There is no denying fact that on account of supporting candidature of one Dharmendra Gangwar, who contested village pradhan election against the sitting Village Pradhan, Pati Ram was supported by the accused, therefore, Pati Ram had got a cause against the accused and the testimony of P.W.-1 itself is indicative of fact that the F.I.R. was dictated by Daroga Ji to Pati Ram at the police station that by itself is sufficient for creating lot of material loopholes and dent in the prosecution story, which for the aforesaid obvious reasons would create strong case of benefit of doubt in favour of accused.

45. Discussion made by us on all relevant aspects and in particular fact of writing of the first information report, timing of preparation of the inquest report and the factum of point of false implication of the accused have not been properly appreciated and appraised by the lower court vis-a-vis the testimony on record and the attendant facts and circumstances of this case. The material available on record tilts in favour of accused and advantage of the same should go to him.

46. For all the reasons stated above, the appellant is entitled to the benefit of doubt, accordingly he is entitled to acquittal.

47. Consequently, the judgement and order of conviction dated 20.08.2013, passed by the Additional Sessions Judge, Court No. 10, Bareilly, in Session Trial No. 1143 of 2012 (State of U.P. Vs. Raju), arising out of Case Crime No.1092 of 2012, under Sections - 302, 201 I.P.C., Police Station - Baheri, District - Bareilly, is hereby set aside.

48. The appeal is **allowed**.

49. In this case, the appellant is languishing in jail for over 10 years, if he is not wanted in connection with any other case he may be released forthwith.

50. Let a copy of this judgment/order be certified to the court concerned for necessary informant and follow up action.

(2023) 4 ILRA 1004
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.04.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ A No. 36 of 2021

Sushil Kumar & Ors. ...Petitioners
Versus
Legislative Council U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Shobhit Mohan Shukla

Counsel for the Respondents:
C.S.C., Akansha Dubey, Ashok Shukla, Gaurav Mehrotra, Lalit Shukla, Manoj Kumar Chaursiya

A. Service Law – Recruitment – Selection Process - U.P. Legislative Council Secretariat (Recruitment and Condition of Service) Rules, 1976 - Rules, 21, 22 & 23 of Rule-6 (i-D); Uttar Pradesh Direct Recruitment to Junior Level Posts (Discontinuation of Interview) Rules, 2017; Legislative Council Promulgated (Fourth Amendment) Rules, 2019.

The law is well settled that the Court should avoid fishing and roving enquiry in the matter on the basis of which a person can set-out his case. Allegations should not be vague and general and particulars of corrupt practice must be stated specifically. In an appropriate case, if the material is necessary, the Court can order for production of relevant documents, but before that, it would be the duty of the party, asking production of documents, to make-out a case that it would be necessary that certain documents are to be produced. (Para 23)

B. Scope of Judicial Review - Appointments for a post in a public body must be in a fair and reasonable term. Fairness and reasonableness must be ensured in entire process of selection. **The decision of recruiting body is amenable to judicial review, subject to settled principle that it should take the decision in accordance with law, and best suited to sanctity and integrity of the selection process. The selection process/exercise can stand vitiated itself where the irregularities in the process have taken place at systematic level. (Para 24)**

If the systematic irregularities or cross-over into the domain of fraud as a result of which the credibility and legitimacy of the process gets squarely affected then the entire selection requires to be quashed. However, if some of the participants in the selection process, who appeared at the examination or selection, themselves are guilty of irregularities, and there is possibility to segregate such persons, who are guilty of wrong-doing from others, then the entire selection is not to be cancelled. Such persons, who had indulged in wrong-doing, their cases should be excluded from the selection process. (Para 24)

C. Recruitment to public services must command public confidence. If there is a systematic failure to ensure the fairness, impartiality and sanctity of the examination then the examination is to be cancelled. Persons, who are recruited, are intended to perform public functions associated with the functioning of the Government. Where the entire process is found to be flawed, its cancellation may undoubtedly cause hardship to a few, who may not be specifically found to be involved in wrong-doing, however, to maintain public confidence in the selection process, to ensure its integrity, sanctity and credibility in the recruitment/selection process, in such a situation the entire selection process has to be cancelled. The petitioners have not been able to point out such a systematic failure or irregularities in the selection process. (Para 25)

D. Recruitment for a public post must be in free and reasonable terms. A fair and reasonable process of selection to posts, subject to the norm of equality of opportunity is mandate of Articles 14 and 16 of the Constitution of India. To maintain the public confidence in the recruitment process in the Legislative Assembly and Legislative Council in respect of Class-III posts, the recruitment should be in the hands of the specialized statutory recruitment body, and not in the hands of a selection committee or a private agency. Therefore, it is directed that in future all Class-III posts in Assembly and Council are to be filled up by the selection made by the UP Subordinate Services Selection Commission. In this respect, necessary amendment in the recruitment rules are to be carried out within a period of three months from today. (Para 26, 27)

Writ petition dismissed, so far as the prayer made for quashing of the selection pursuant to the impugned advertisement is concerned. ((E-4)

<u>Precedent followed</u>:

Sachin Kumar & ors. Vs Delhi Subordinate Service Selection Board (DSSB) & ors., (2021) 4 SCC 631 (Para 25)

Present petition seeks quashing of the entire process of selection pursuant to the Advertisement No. 01 of 2020 dated 17.07.2020 and Supplementary Advertisement dated 27.09.2020.

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

1. The present petition under Article 226 of the Constitution of India has been filed by the petitioners, who were appointed on contractual basis as per the scheme contained in the Government Order No.A-2/234/10-98-24(6)97 dated 22.05.1998 issued by the Department of Finance, Government of Uttar Pradesh, providing that appointment to fill up vacancies in Legislative Council Secretariat arising in Class-III and Class-IV posts would be made on temporary/daily-wage-basis for a maximum period of six months at a time, and the said Government Order specifically mentioned that employees, appointed on temporary and daily-wage-basis, shall not have any claim for regularization.

2. The petitioner nos. 1, 2 and 3 were given contractual appointments on the post of assistant review officer vide orders dated 20.11.2012, 11.01.2011 and 24.12.2014 respectively.

3. The service conditions of officers/employees of Legislative Council Secretariat are governed by the U.P. Legislative Council Secretariat (Recruitment and Condition of Service) Rules, 1976 (hereinafter referred to at the "Rules, 1976") framed under Article 187(B) of the Constitution of India. The Rules, 1976 have been amended vide 4th Amendment Rules, 2019 (hereinafter referred to as the "Rules, 2019") notified on 14.01.2020. One of the important and major changes in amended Rules is that the posts, which were earlier within the purview of U.P. Public Service Commission, have been taken out from the purview of the U.P. Public Service Commission, and the said posts have been brought within the purview of a selection committee to be constituted under the amended Rule-6 (i-D).

4. Vide Advertisement dated 17.09.2020 and supplementary advertisement dated 27.09.2020 Online applications were invited for holding recruitment for 99 vacancies of 11 cadres, including the posts of assistant review officer, review officer and additional private secretary.

5. The petitioners applied for 3 posts i.e. for the post of assistant review officer, review officer and additional private secretary. They were unsuccessful in the preliminary examination of the recruitment process.

6. In the present petition, the petitioners have sought quashing of the entire process of selection pursuant to the Advertisement No.01 of 2020 dated 17.07.2020 and Supplementary Advertisement dated 27.09.2020.

Further prayer has been made for issuance of a direction to the respondents to allow the petitioners to continue to work on their respective posts as per scheme of Government Order dated 22.05.1998.

7. In support of their prayers, the petitioners have made allegations of nepotism, favoritism, mala fide and violation of rules in the selection process. It is further alleged that earlier it was the U.P. Public Service Commission, which was making selection for the posts advertised, however, amendment in the Rules, 1976 were made, and in a collusive manner, selection has been entrusted to a private agency. It is further alleged that the paper was leaked on the day of the examination at Gorakhpur Center. Though the examination

at Gorakhpur Center was cancelled, but it is alleged that in the present era of technology, where semiconductors and electronic revolution has taken place, in a big way, leakage of paper at one center amounts to leakage of paper at all centers.

8. Learned counsel for the petitioners has also submitted that the conjoint reading of Rules, 21, 22 and 23 of Rule-6 (i-D) would establish that the Rule-22(2) is in derogation of the scheme of Rule-21 of Rule 6(i-D). Now, it is the selection committee, which is empowered, to hold written-examination and/or interview.

9. It is important to note here that Rule-22 (2) provides that the Chairman may authorize any external agency to conduct the whole selection process or part thereof, therefore, the submissions made on behalf of the petitioners that the entire selection from issuing advertisement to conducting written-examination and holding interview etc. is a job of selection committee referred to in Rule-6(i-D) does not appear to be correct in view of the scheme of the Rules. It has been submitted that in the present case only the written-examination has been conducted, and no interview was conducted by the selection committee before declaring the result of final selection.

10. Under Rule-21 written-examination and/or interview is prescribed and, therefore, the written-examination is to be mandatorily followed by the interview, and in case the selection is to take place only on the basis of interview, there will be no requirement of written-examination. However, since the written-examination was conducted, interview should have been conducted.

11. It may be said that the petitioners have lost sight of the Uttar Pradesh Direct Recruitment to Junior Level Posts (Discontinuation of Interview) Rules, 2017 whereby the interviews for appointment to the posts of Class-III and Class-IV posts have been discontinued, and the appointments are to be made only on the basis of written-examination.

12. It has been next submitted on behalf of the petitioners that without disclosing the marks obtained and publication of names of the successful candidates, the online forms were called for the main-examination. The selection comittee, however, relaxed the condition and uploaded the offline forms, which could have been downloaded, and filled at the time of main-examination. It is alleged that several candidates close to the present and the retired officers of Secretariat, were selected, and the candidates of personal choice of Principal Secretary of the Legislative Council Special Secretary, Legislative Council and Chairman, Legislative Council and its Members Secretary and other officers of the Legislative Council have been arrayed as respondents. It is alleged that the whole selection process was an eye-wash, and in violation of due process of law.

13. Further allegation of the petitioners is that two persons, namely, Manoj Kumar Sahani and Sunil Kumar Yadav, who were working on the contract basis, have been regularized/given substantive appointments prior to holding the selection against the statutory rules.

14. The main-examination was conducted and, result was declared on 08.01.2021 then the petitioners made allegation that one Pankaj Mishra, who was

working as officer-on-special-duty with the Chairman, Legislative Assembly, who does not have the requisite eligibility got selected as officer-on-special-duty (publication) against the rules.

15. The petitioners have filed an application for interim direction on 19.01.2023 accompanied by an affidavit alleging that TSR Data Processing Private Limited agency was given the work for conducting the examination for selection on Class-III and Class-IV posts in Uttar Pradesh Legislative Council. The said agency was near & dear to the then Chairman of the Legislative Council. One of the directors of the said agency, Smt. Bhavana Yadav has been selected and appointed through the impugned selection as review officer in the Legislative Council, and this fact would itself be sufficient to establish that the selection in question was nothing but a complete eye-wash, and a drawing-room-arrangement. A list of candidates has been drawn/mentioned in paragraph-4 of the affidavit filed in support of the application for interim direction to show that several candidates, who are relatives of the officers working in the Legislative Council, have been selected. It was alleged that one candidate, namely, Anirudh Yadav (Roll No.145198), who answered only 8 questions, was declared successful in written-examination, however, his name did not find place in the final select list.

16. Mr. Shobhit Mohan Shukla, learned counsel for the petitioners, in view of the submissions, has prayed that the entire selection may be cancelled.

17. On the other hand, Mr. Gaurav Mehrotra, learned counsel for the respondents, has submitted that only after being declared unsuccessful in the preliminary-extermination, result whereof was declared on 11.12.2020, the instant writ petition was filed by the petitioners. The selection for different posts advertised had already been concluded, and most of the selected candidates had joined on their respective posts, and they have been confirmed. The petitioners had applied only against 3 posts, out of 99 vacancies of 11 cadres, and they cannot be allowed to assail the entire advertisement. The petitioners have not challenged the vires of the Rules, 2019, but they have sought relief in accordance with unamended Rules, 1976, and such a prayer is not maintainable in the eyes of law. The age relaxation of 2 years to the maximum age-limit was prescribed under the advertisement in addition to the age- relaxation available to the candidates of reserved category through reservation, and further, employees appointed on contractual/daily-wage-basis were given weightage of 2 marks in the preliminary-examination, and 5 marks in main-examination. The petitioners, despite availing the age-relaxation and weightage of marks, could not become successful in the preliminary-examination and, therefore, they did not feature in the list of candidates, who were called for the main-examination. The petitioners, who applied only against three posts, cannot be allowed to challenge the entire selection process, which has been free & fair.

18. Learned counsel for the respondents, Mr. Gaurav Mehrotra has further submitted that several requests were sent to the U.P. Public Service Commission by the Legislative Council to undertake recruitment exercise for vacancies, however, the Public Service Commission could not undertake the recruitment exercise for filling up the posts and,

therefore, a conscious decision was taken in the year 2011 to make recruitment by the Council and Assembly themselves. In 2019, the Chairman of the Legislative Council promulgated (Fourth Amendment) Rules, 2019 by which the recruitment process for different secretariat staff of the Legislative Assembly and Council was taken out from the purview of the U.P. Public Service Commission, and this power is conferred under the Constitution itself.

19. On behalf of the respondents, learned counsel Mr. Gaurav Mehrotra has forcefully submitted that the list of candidates, who were said to be related to the officers and employees of the Legislative Council, is wholly incorrect, and the petitioners are trying to indulge into fishing and roving enquiry. No-one, who is in relation to the Secretary of the Legislative Council, has been selected. The allegations are completely vague. The burden of proving mala fide is on the person making allegations, and the burden is very heavy. There is every presumption in favour of administration that the power has been exercised bona fide and in good faith. Allegations of mala fide demand proof of high degree of credibility.

20. Mr. Gaurav Mehrotra, learned counsel for the respondents, has further submitted that similar challenge was made to the Advertisement No.1 of 2020 dated 07.12.2020 issued by the Secretariat of U.P. Legislative Assembly for interview, inter alia, to the post of assistant review officer etc, and this Court has dismissed the writ petition, holding that the Court cannot direct a fishing and roving enquiry on the basis of which a person can set-out his case.

21. Mr. Shobhit Mohan Shukla, learned counsel for the petitioners, in rejoinder, has submitted that if this Court does not agree with the submission made by him on behalf of the petitioners for quashing the entire selection, the petitioners may be allowed to work on contractual basis as there are posts, which are lying vacant, till regularly selected candidates come and join the posts.

22. I have considered the submissions advanced by the learned counsel for the parties.

23. This Court, while considering similar issue in respect of the selection and appointment pursuant to the Advertisement No.1 of 2020 dated 07.12.2020 issued by the Secretariat of Uttar Pradesh Legislative Assembly for recruitment, inter alia, to the post of assistant review officer, in paragraphs-24, 25 and 26 of the order dated 08.10.2021 passed in Writ Petition Service Single No.11896 of 2021 has held as under:-

"24. It is well settled legal position that the Court should not hold a fishing and roving enquiry on the basis of which a person can set-out his case. In an appropriate case, if the material is necessary, the Court can order for production of relevant documents, but before that, it would be the duty of the party, asking production of documents, to make-out a case that it would be necessary that certain documents are to be produced. The Supreme Court in the case of Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi, 1987 Supp SCC 93, which was an election matter, held that in respect of allegations of corrupt practice, which are in the nature of criminal charge, there should be no vagueness in the allegations. Allegations should not be vague and general and particulars of corrupt practice

must be stated specifically. The law is well settled that the Court should avoid fishing and roving enquiry in the matter.

25. The Supreme Court in a recent judgment in the case of Charansingh Vs. State of Maharashtra and others, (2021) 5 469 has held that roving and fishing enquiry is not permissible under the law. Paragraph-19 of Charansingh Vs. State of Maharashtra and others' case (supra), which is relevant, is extracted hereunder:-

"19. However, the next question posed for the consideration of this Court is, whether to what extent such an enquiry is permissible and what would be the scope and ambit of such an enquiry. By the impugned notice, impugned before the High Court, and during the course of the "open enquiry", the appellant has been called upon to give his statement and he has been called upon to carry along with the information on the points, which are referred to hereinabove for the purpose of recording his statement. The information sought on the aforesaid points is having a direct connection with the allegations made against the appellant, namely, accumulating assets disproportionate to his known sources of income. However, such a notice, while conducting the "open enquiry", shall be restricted to facilitate the appellant to clarify regarding his assets and known sources of income. The same cannot be said to be a fishing or roving enquiry. Such a statement cannot be said to be a statement under Section 160 and/or the statement to be recorded during the course of investigation as per the Code of Criminal Procedure. Such a statement even cannot be used against the appellant during the course of trial. Statement of the appellant and the information so received during the course of discrete enquiry shall be only for the purpose to satisfy and find out whether an offence under Section 13(1)(e) of the PC Act, 1988 is disclosed. Such a statement cannot be said to be confessional in character, and as and when and/or if such a statement is considered to be confessional, in that case only, it can be said to be a statement which is self-incriminatory, which can be said to be impermissible in law."

26. In view of the aforesaid discussions, I find that the petitioners have not been able to substantiate the allegations of corrupt practices, manipulations and illegal and arbitrary exercise of powers, while conducting the selection process for the post of ARO pursuant to the Advertisement and, therefore, this Court cannot permit the petitioners to open a fishing and roving inquiry of the selection held pursuant to the Advertisement when the petitioners could not secure marks above the cut-off-marks in their written examination."

24. The present case is identical one to the aforesaid case in respect of the recruitment to the Legislative Assembly and, therefore, it is squarely covered. However, it is required to note that appointments for a post in a public body must be in a fair and reasonable term. Fairness and reasonableness must be ensured in entire process of selection. The decision of recruiting body is amenable to judicial review, subject to settled principle that it should take the decision in accordance with law, and best suited to sanctity and integrity of the selection process. The selection process/exercise can stand vitiated itself where the irregularities in the process have taken place at systematic level. If the systematic

irregularities or cross-over into the domain of fraud as a result of which the credibility and legitimacy of the process gets squarely affected then the entire selection requires to be quashed. However, if some of the participants in the selection process, who appeared at the examination or selection, themselves are guilty of irregularities, and there is possibility to segregate such persons, who are guilty of wrong-doing from others, then the entire selection is not to be cancelled. Such persons, who had indulged in wrong-doing, their cases should be excluded from the selection process.

25. Recruitment to public services must command public confidence. Persons, who are recruited, are intended to perform public functions associated with the functioning of the Government. Where the entire process is found to be flawed, its cancellation may undoubtedly cause hardship to a few, who may not be specifically found to be involved in wrong-doing, however, to maintain public confidence in the selection process, to ensure its integrity, sanctity and credibility in the recruitment/selection process, in such a situation the entire selection process has to be cancelled. If there is a systematic failure to ensure the fairness, impartiality and sanctity of the examination then the examination is to be cancelled. The petitioners have not been able to point out such a systematic failure or irregularities in the selection process.

26. The Supreme Court, in the case reported in ***(2021) 4 SCC 631 (Sachin Kumar and others Vs. Delhi Subordinate Service Selection Board (DSSB) and others),*** has held that a fair and reasonable process of selection to posts, subject to the norm of equality of opportunity is mandate of Articles 14 and 16 of the Constitution of India. Recruitment for a public post must be in free and reasonable terms. Throughout the selection process it is duty of the public body to ensure fairness and reasonableness of the process. Paragraphs 65 and 66 of the said judgment, which would be apt to mention, are extracted herein below:-

"65. During the course of his submissions, Mr P.S. Patwalia has sought to provide explanations for each of the systemic irregularities pointed out by the first Committee, including the drastic reduction in the number of candidates who appeared for the Tier I examination, non-issuance of hard copies of admit cards, shortlisting of candidates belonging to a certain geographical area, lack of randomisation in the examination centres, among others. In response to this, the learned ASG has pointed out that while assessing whether the recruitment process has been compromised, the factors (or irregularities) must be looked at cumulatively to ascertain whether they are sufficiently grave to cancel the recruitment. We find ourselves in agreement with the learned ASG. So long as there is sufficient basis to contend that mass-scale irregularities have occurred, this Court need not indulge in a roving inquiry to rule out all possible explanations and alternative scenarios where such irregularities would be justified.

66. Recruitment to public services must command public confidence. Persons who are recruited are intended to fulfil public functions associated with the functioning of the Government. Where the entire process is found to be flawed, its cancellation may undoubtedly cause hardship to a few who may not specifically be found to be involved in wrongdoing. But

that is not sufficient to nullify the ultimate decision to cancel an examination where the nature of the wrongdoing cuts through the entire process so as to seriously impinge upon the legitimacy of the examinations which have been held for recruitment. Both the High Court and the Tribunal have, in our view, erred in laying exclusive focus on the report of the second Committee which was confined to the issue of impersonation. The report of the second Committee is only one facet of the matter. The Deputy Chief Minister was justified in going beyond it and ultimately recommending that the entire process should be cancelled on the basis of the findings which were arrived at in the report of the first Committee. Those findings do not stand obliterated nor has the Tribunal found any fault with those findings. In this view of the matter, both the judgments of the Tribunal and the High Court are unsustainable."

27. In view thereof, to maintain the public confidence in the recruitment process in the Legislative Assembly and Legislative Council in respect of Class-III posts, the recruitment should be in the hands of the specialized statutory recruitment body, and not in the hands of a selection committee or a private agency. Therefore, it is directed that in future all Class-III posts in Assembly and Council are to be filled up by the selection made by the Uttar Pradesh Subordinate Services Selection Commission. In this respect, necessary amendment in the recruitment rules are to be carried out within a period of three months from today.

28. The petitioners, who have been given appointment on contractual basis, should be allowed to work on contractual basis and paid remuneration accordingly, subject to their performing duties of the posts, if the posts are vacant on which they have been working, till regularly selected candidates come from Uttar Pradesh Subordinate Services Selection Commission and join the posts.

29. With the aforesaid observations/directions, this petition stands **dismissed,** so far as the prayer made for quashing of the selection pursuant to the impugned advertisement is concerned.

(2023) 4 ILRA 1012
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.04.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 371 of 2012

Shabir Ali ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Nripendra Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law – Suspension – Salary - U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Rule 4(3)(ka) - The deemed suspension of the petitioner can be continued, even after his release, by the appointing authority by passing an express order. It may or may not be revoked by the competent authority. In this case, a decision has been taken by the appointing authority vide order dated 05.01.2012. (Para 6)

Rule 4(4) of the Rules of 1999 provides that a government servant shall be deemed to have been placed or, as the case may be continued

to be placed under suspension by an order of the authority competent to suspend under these rules, w.e.f. the date of his conviction if in the event of a conviction for an offence he is sentenced to a term of imprisonment exceeding 48 hours and is not forthwith dismissed, removed consequent to such conviction. (Para 7)

Since the criminal trial is pending, the impugned order of suspension and the impugned order dated 05.01.2012 whereby his representation has been rejected cannot be faulted and the deemed suspension under legal fiction may be continued even after release of the petitioner. Final decision relating to suspension of the petitioner can only be taken after conclusion of trial as provided u/Rule 4(2) of Rules of 1999 and not prior to that. (Para 8)

By virtue of the interim order dated 23.01.2012, operation of impugned orders was stayed. Therefore, the petition is disposed of with a direction to the respondents to allow the petitioner to work and he shall be paid basic salary with other allowances as is being paid to him, at present. However, it shall be subject to final outcome of trial. (Para 9)

Writ petition disposed of. (E-4)

Precedent followed:

Chandra Shekhar Saxena Vs Director of Education (Basic), U.P. Lucknow, 1997 (15) LCD 323 (Para 5)

Present petition challenges order dated 05.01.2012 and order dated 10.03.2010 passed by Vishesh Sachiv Rajya Sampatti Adhikari, Rajya Samatti Anubhag-1, Lucknow.

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

1. Heard learned counsel for the petitioner and learned Additional Chief Standing Counsel for the State.

2. By means of this writ petition, the petitioner has prayed for a writ of certiorari quashing the order dated 5.1.2012 and order dated 10.3.2010 passed by Vishesh Sachiv Rajya Sampatti Adhikari, Rajya Samatti Anubhag-1, Lucknow.

A further writ of mandamus directing respondents to revoke suspension of the petitioner and pay him full salary as applicable every month, including arrears, if any has also been prayed.

3. Vide annexure-4, the petitioner was placed under suspension under Rule 4(3)(ka) of U.P. Government Servant (Discipline and Appeal) Rules, 1999 (for short, Rules of 1999) vide order dated 10.3.2010 passed by respondent No.2 on the ground that the petitioner was taken into custody from 18.2.2010. The petitioner filed a writ petition No.4869 (S/S) of 2011 Shabir Ali versus State of U.P. and others which was disposed of with a direction to the opposite parties to consider the petitioner's case and take a decision on his representation within a stipulated time. In compliance of the said order, vide order dated 5.1.2012, representation given by the petitioner has been rejected.

4. The petitioner's counsel submits that after his release from custody, he has joined the duties on 18.5.2011, however, the order of suspension has not been revoked although he has moved several representations. He further submits that the petitioner remained suspended from 18.2.2010 to 18.5.2011. He has not been paid arrears of salary during this period and other consequential benefits. Although the petitioner has been enlarged on bail, the respondents have not revoked the suspension order.

5. Learned Standing Counsel submits that the competent authority has

not found it appropriate to reinstate the petitioner from the date of suspension since his case is pending disposal before the Chief Judicial Magistrate, Lucknow. However, the petitioner is being paid the basic salary of Rs.31,500/- and admissible dearness allowance of Rs.11,970/-.

A first information report was registered against the petitioner as case crime No.660 of 2009 under sections 420, 467, 468, 471, 120-B, 34 I.P.C. A charge sheet has been filed on 9.4.2010. The trial is going on. It is submitted that any decision for revoking suspension order can only be taken after conclusion of trial. Law in this regard has been settled by the Full Bench judgment of this Court in [1997(15) LCD-323 Chandra Shekhar Saxena versus Director of Education (Basic), U.P. Lucknow and another. Relevant paragraphs 22 and 27 of the Full Bench judgment are extracted below :

"22. The provisions contained in Sub-rule (2) have also been assailed as unconstitutional on his ground that the same suffer from vide of arbitrariness. In our opinion, this criticism has also no substance. The deemed suspension of a Government servant by a legal fiction is a necessity as discussed above but it is not correct to say that the Government servant has been left remediless once a deemed suspension has come into existence. Sub-rule (6) (2)of Rule 49-A clearly provides that any suspension ordered or deemed to have been ordered or to have continued in force under this Rule shall continue to remain in force until it is modified or revoked by the authority specified in Sub-rule (1). Thus Government servant who has been deemed to be under suspension by an order of the appointing authority for the period he was under detention in custody, can approach the appointing authority and convince him for modifying or revoking the order and on such approach being made, the appointing authority may take into account all the facts and circumstances which led to his detention in custody and gave rise to the deemed suspension and then the appointing authority may pass appropriate order modifying or revoking the order of suspension. Thus, the Government servant is not remediless. On the basis of the language used in Sub-rule (5) (a), it has been argued that a deemed suspension once comes into existence, shall continue to remain in-force until it is modified or revoked by the appointing authority and the Government servant shall continue under suspension even after his release from the custody. In our opinion, under Sub-rule (5)(a) suspension deemed to have been ordered shall continue to remain in force does not mean that the actual suspension shall also continue after release from custody. However, the deemed suspension shall remain in force for other purposes which may include all the consequences which flow from on order of suspension of a Government servant. From the combined reading of Sub-rule (2) and Clauses (a) and (b) and sub-rule (6)(a) of Rule 40-A, the passible and reasonable conclusion is that deemed suspension shall be operative only for the period of custody and not beyond that. However, it shall remain in force for other purposes which flow from the order of suspention. In our opinion, such a harmonious interpretation can be safely given to the provisions contained in Sub-rule (5)(a) without doing any violence to the purpose and object and the legislative intent behind the aforesaid provisions.

27. We have considered all the cases cited by the learned counsel for

parties. However, we do not find anything on which basis the view we have expressed above may be doubted or shaken. Our conclusions and answer to the questions referred to us are as under:-

(A) Sub-Clause (a) of Sub-rule (2) of Rule 49-A of the Civil Services (Classification, Control and Appeal) Rules, 1930, as applicable in Uttar Pradesh, is not violative of Articles 14 and 21 of the Constitution of India as held in case of Jagjit Singh v. State of U.P., reported in (1996) 1 UPLBEC 405 and the judgment is here by over-ruled.

(B) The legal fiction envisaged under Sub-rule (2) (a) and (b) of Rule 49-A shall come into play and a deemed suspension by an order of the appointing authority shall came into existence if the Government servant is detained in custody for more than forty-eight hours even in absence of any order in writing passed by the appointing authority.

(C) The deemed suspension provided under Sub-rule (2) of Rule 49-A shall be confined to the period of detention in custody and not beyond that.

(D) The deemed suspension by an order of the appointing authority under the legal fiction provided in Sub-rule (2) may be continued after release by the appointing authority by passing an express order taking into account the guidelines provided in other sub-rule of Rule 49-A according to the facts and circumstances of the case.

(E) The deemed suspension under Sub-rule (2) of Rule 49-A may be modified or revoked by the appointing authority on a representation made by the Government servant which shall be considered and decided taking into consideration the guidelines provided in Sub-rules (1) and (1-A) of Rule 49-A."

6. In view of the judgment of Full Bench, it is clear that the deemed suspension of the petitioner can be continued, even after his release, by the appointing authority by passing an express order. It may or may not be revoked by the competent authority. In this case, a decision has been taken by the appointing authority vide order dated 5.1.2012.

7. Rule 4(4) of the Rules of 1999 provides that a government servant shall be deemed to have been placed or, as the case may be continued to be placed under suspension by an order of the authority competent to suspend under these rules, with effect from the date of his conviction if in the event of a conviction for an offence he is sentenced to a term of imprisonment exceeding 48 hours and is not forthwith dismissed, removed consequent to such conviction.

9. As per admitted case of the authorities, since the criminal trial relating to the aforesaid first information report No.660 of 2009(supra) is pending, therefore, the impugned order of suspension and the impugned order dated 5.1.2012 whereby his representation has been rejected cannot be faulted. Since the criminal trial is pending, the deemed suspension under legal fiction may be continued even after release of the petitioner. Final decision relating to suspension of the petitioner can only be taken after conclusion of trial as provided under sub rule (2) of rule 4 of Rules of 1999 and not prior to that. There is no illegality in the order impugned.

10. The court has noted that by virtue of the interim order dated 23.1.2012, operation of impugned orders contained in Annexures 1 and 4 was stayed. Therefore, the petition is disposed of with a direction to the respondents to allow the petitioner to work and he shall be paid basic salary with other allowances as is being paid to him, at present. However, it shall be subject to final outcome of trial.

(2023) 4 ILRA 1016
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.04.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ A No. 3197 of 2022

Dr. Arti Sanghi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Prafulla Tiwari, Lalta Prasad Misra

Counsel for the Respondents:
C.S.C., Raj Kumar Upadhyaya (R.K. Upadhyaya), Ravi Shanker Tewari

Service Law- Constitution of India, 1950 - Article 226 -The Uttar Pradesh Medical Teachers' Service Rules, 1990-Rule 4,5,6,20-Writ petition challenging the Advertisement issued by U.P.P.S.C Prayagraj, for filling up 130 posts of Lecturer in nine Government Homeopathic Medical Colleges in twelve different subjects/disciplines alleging it to be against the policy of reservation- It is for the employer to define the cadre taking into consideration the nature of service- Under the Statutory Rules, 1990 all the posts of Lecturers in all nine Government Homeopathic Medical Colleges constitute one cadre- The reservation has been provided in the requisition on vacancies subject wise/discipline wise- Definition of cadre in the Rules, 1990 does not violate any constitutional mandate, when all the colleges are under the unified supervision and control of the St. Government and the posts are transferable from one college to another. (Para 2, 3, 15, 22)

Petition dismissed. (E-15)

List of Cases cited:

1. Vivekanand Tiwari Vs U.O.I. 2017 SCC Online All 2729

2. U.O.I. Vs Pushpa Rani & ors. (2008) 9 SCC 242

3. Vijay Prakash Bharti Vs U.O.I. & ors. (2019) 12 SCC 410

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

1. Heard Shri Lalta Prasad Mishra, Advocate assisted by Shri Praful Tiwari, learned Counsel for the petitioner, Shri Sandeep Sharma, learned Standing Counsel for the State-respondents and Shri Ravi Shanker Tiwari, learned Counsel for Uttar Pradesh Public Service Commission.

2. The present petition under 226 of the Constitution of India has been filed, whereby the Advertisement No.02/2020-21 dated 24.09.2020 issued by Uttar Pradesh Public Service Commission (hereinafter referred to as "U.P.P.S.C.") Prayagraj, for filling up 130 posts of Lecturer in nine Government Homeopathic Medical Colleges in twelve different subjects/disciplines has been sought to be quashed.

3 . The controversy involved in this petition pertains to narrow compass i.e. whether the reservation is to be applied

department wise or subjectwise treating it as a unit, and whether clubbing of the posts of Lecturers of each subject/discipline of twelve subjects/disciplines sanctioned in nine Government Homeopathic Medical Colleges of Uttar Pradesh is against the statutory prescription and constitutional mandate or whether a college has to be taken as a unit for reservation or all the colleges cumulatively constitute a unit for application of policy of reservation.

4. The Uttar Pradesh Medical Teachers' Service Rules, 1990 (hereinafter referred to as "Rules, 1990") which regulate recruitment and conditions of services of teachers appointed in the Government Homeopathic Medical Colleges. Teachers' provide that service is a State service comprising of Group-A and Group-B posts. Rule 4 of the Rules, 1990 provides cadre of service, which would read as under:-

*" **4. Cadre of Service**-(1) The strength of the service and of each category of posts therein shall be such as may be determined by the Government from time to time.*

(2) The strength of the service and of each category of posts therein shall, until orders varyfing the same are passed under sub-rule (1), be as in the Appendix- "A' :

(a) Provided that the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post without thereby entitling any person to compensation;

(b) The Governor may create such additional permanent or temporary posts as he may consider proper. "

5. The Appendix-A of the Rules, 1990 would reveal that it is a single cadre post at state level and the strength of different posts has been mentioned. There is one permanent post and nine temporary posts of Principal and the cadre of Professor consists of two permanent posts, cadre of Reader is of two temporary posts whereas, cadre of Lecturer is of seven permanent posts and one hundred sixteen temporary posts i.e. total 123 posts. The source of recruitment to various category posts in the service is provided in Rule 5 of the Rules, 1990, which would read as under:-

" 5. Source of recruitment- Recruitment to the various categories of posts in the Service shall be made from the following sources:

(a) Principal by direct recruitment through the commission.

(b) Professor-(i) Fifty per cent by direct recruitment through the Commission.

(ii) Fifty per cent by promotion, through the Commission, from amongst substantively appointed Readers who have at-least ten years, of teaching experience including three year as Reader in the subject concerned.

(c) Reader-(i) Fifty per cent by direct recruitment through the Commission:

(ii) Fifty per cent by promotion through the Commission, from amongst substantively appointed Lecturers who have teaching experience of seven years including four years as Lecturers in the subject concerned.

(d) Lecturer-By direct recruitment through the Commission."

6. Rule 6 of the Rules, 1990 provides for reservation for the candidates belonging to the Schedule Castes/Schedule Tribes/Other Backward Categories, whereas, Rule 20 of the Rules, 1990 provides for provision for seniority of persons in any category of post is to be determined from the date of order of substantive appointment. There is no provision of collegewise seniority in the said Rules. The post of Lecturer is transferrable from one college to another.

7. National Homeopathic Council of India has framed the regulation which provides qualifications and eligibility conditions for different posts, which is appended as Appendix-2 to the Rules, 1990.

8. The State Government has sent a requisition for filling up the vacant post of Lecturer not as per collegewise but as per the cadre strength provided in the Rules, 1990, in each subject/discipline as per sanctioned strength of the subject/discipline. The requisition would suggest that for every subject/discipline, total posts vacant in all the nine Government Homeopathic Medical Colleges have been clubbed and the reservation has been provided in respect of each of twelve different subjects/disciplines, and the reservation has not been provided on the total posts, which are to be filled up but in each subjects/disciplines but the reservation has been provided on against the vacancies of each subject/discipline, clubbing all the vacant posts of all the nine Government Homeopathic Medical Colleges. As such, details of the posts in each subject/discipline in the requisition sent by the State Government for filling up the vacant posts and reservation has been provided in each subject by the State Government. The requisition has been annexed with counter affidavit filed on behalf of the State-respondents as Annexure No.CA-2.

9. Shri Lalta Prasad Mishra, learned Counsel for the petitioner has submitted that each medical college and each department in the Government Medical College is a unit in itself and there is no common cadre of Lecturer subjectwise, and, therefore, by combining vacant posts in each subject/discipline in all nine Government Homeopathic Medical Colleges is in violation of the statutory prescription and the judgment of this Court in the case of ***Vivekanand Tiwari vs. Union of India reported in 2017 SCC Online All 2729,*** which has been upheld by the Supreme Court vide order dated 22.01.2019 in ***S.L.P (Civil) Diary No.14318/2018.***

10. It has been further submitted that existence of common cadre of posts, and five or more posts in a cadre/sub cadre is a sine qua non applying for caste reservation in the service. However, in the present case total number of twelve subjects/disciplines are taught in each of the nine Government Homeopathic Medical Colleges, and there are at the most three sanctioned posts in each subject/discipline in a college, thereby, the caste reservation would not be applicable as subject/discipline of the particular college has to be treated as a unit for applying the reservation treating the said subject/discipline of the said college as a unit.

11. On the other hand, Shri Sandeep Sharma, learned Standing Counsel for the State-respondents and Shri Ravi

Shanker Tiwari, learned Counsel for the U.P.P.S.C have laid emphasis on the Rules, 1990 and have submitted that even under the said rules, cadre of Lecturers has been defined, which would mean that the cadre of post of Lecturer consist of all the posts in nine Government Homeopathic Medical Colleges and strength of the cadre is 123 posts a per the Appendix-A to the Rules, 1990. They have further, submitted that when the cadre is one and the State has applied reservation subjectwise, it is totally in accordance with the statutory prescription and the judgment of the this Court in the case of Vivekanand Tiwari (supra). An individual college cannot be taken as a unit for applying the provisions of reservation. The post of Lecturer is transferrable from one college to another and, therefore, in each subject/discipline the reservation has been applied which is perfectly in accordance with the Rules, 1990 and law laid down by the Supreme Court and this Court.

12. I have considered the submissions of Shri Lalta Prasad Mishra, Advocate assisted by Shri Praful Tiwari, learned Counsel for the petitioner, Shri Sandeep Sharma, learned Standing Counsel for the State-respondents and Shri Ravi Shanker Tiwari, learned Counsel for U.P.P.S.C.

13. A cadre means the strength of service or a part of service. The Supreme Court in the case ***of Union of India vs. Pushpa Rani and Others*** reported in ***(2008) 9 SCC 242*** has held that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. Judicial review comes into play only if State action is contrary to constitutional or statutory provisions or is patently arbitrary or vitiated by malafide. It has been further held that for the purposes of roaster, wider meaning has to be given so as to take within its fold posts sanctioned in different grades. While interpreting service rules of Railway, it has been held that even temporary, work charge, super numrie and shadow posts created in different grades can constitute part of the cadre and no fix meaning can not be ascribed to the term "cadre". In different service rules framed under Article 309 of the Constitution of India or rules framed in exercise of the powers of delegated legislation, the word "cadre" has been given different meaning. The post sanctioned in different grades in Railways constitute independent cadres. Paragraph 22, 23 and 27 of the said judgment which are relevant are extracted hereunder:-

"22. A conjoint reading of Para 103(7) of the Code, Para 103(iii) of the Railway Establishment Manual and Circular R.B.E. No. 113/97 makes it clear that in the Railways, the term "cadre" generally denotes the strength of a service or a part of a service sanctioned as a separate unit. However, for the purpose of roster, a wider meaning has been given to the said term so as to take within its fold the posts sanctioned in different grades. The reason for giving this enlarged meaning to the term "cadre" is that posts in the railway establishment are sanctioned with reference to grades. Even temporary, work-charged, supernumerary and shadow posts created in different grades can constitute part of the cadre.

23. In the service jurisprudence which has developed in our country, no fixed meaning has been ascribed to the term "cadre". In different service rules

framed under proviso to Article 309 of the Constitution as also rules framed in exercise of the powers of delegated legislation, the word "cadre" has been given different meaning.

.....

27. The argument of Shri Sushil Jain that Para 4(b) of Circular R.B.E. No. 113/97 dated 21-8-1997 is ultra vires the definition of the word "cadre" contained in Para 103(7) of the Code completely ignores the stark reality that in the railway establishment the posts are sanctioned with reference to grades which term means sub-division of a class, each bearing a different scale of pay. Therefore, the posts sanctioned in different grades would constitute independent cadres and we see no reason why a restricted meaning should be given to the term "cadre" for the purpose of implementing the roster."

14 . It is has been further held that to secure social, political and economic justice, the State is empowered to take non discriminatory and affirmative action in favour of downtrodden. The framers of the Constitution of India were conscious and aware of the inequalities and disparities in the social fabric of the country and therefore, they set goal of social, political and economic justice in the preamble of the Constitution of India and to achieve this goal they enacted Articles 14, 15 and 16 in the Constitution of India. Providing reservation of seats and post in the field of eduction and employment are reflective or affirmative action taken to achieve the goal of justice and equality. Paragraph 39 and 40 of the said judgment would read as under:-

"39.The framers of the Constitution were very much conscious and aware of the widespread inequalities and disparities in the social fabric of the country as also of the gulf between rich and poor and this is the reason why the goal of justice'social, political and economic was given the place of pre-eminence in the Preamble. The concept of equality enshrined in Part III and Part IV of the Constitution has two different dimensions. It embodies the principle of non-discrimination [Articles 14, 15(1), (2) and 16(2)]. At the same time it obligates the State to take affirmative action for ensuring that unequals (downtrodden, oppressed and have-nots) in the society are brought at a level where they can compete with others (haves of the society) [Articles 15(3), (4), (5), 16(4), (4-A), (4-B), 39, 39-A and 41].

40.The legislative and administrative measures taken by the State for providing reservation of seats and posts in the field of education and employment are reflective of the affirmative action taken for achieving the goal of real equality. However, implementation and execution of such actions have continuously faced roadblocks at several stages. Those who had been benefited by the existing system cried foul and created the bogey of violation of their legal and constitutional rights. Almost all the actions taken by the State and its agencies for ameliorating the conditions of have-nots of the society by providing reservation wer(2017) SCC Online All 2729 e subjected to periodical judicial scrutiny. By and large, the courts approved the affirmative actions of the State but on some occasions the policy of reservation or implementation thereof was found to be faulty and actions taken by the Government have been nullified or sliced by judicial intervention."

15. Thus, it is for the employer to define the cadre taking into consideration

the nature of service. Under the Statutory Rules, 1990, all the posts of Lecturers in all nine Government Homeopathic Medical Colleges constitute one cadre. The reservation has been provided in the requisition on vacancies subjectwise/disciplinewise. This definition of cadre in the Rules, 1990 does not violate any constitutional mandate, particularly, when all the colleges are under the unified supervision and control of the State Government and the posts are transferrable from one college to another.

16. The Court is required to see whether the requisition for filling up the vacant posts in all twelve different subjects/discipline and clubbing of all the vacant posts in each subject of all nine Government Homeopathic Medical Colleges in any manner violates the statutory prescription or constitutional provisions.

17. Shri Lalta Prasad Mishra, learned Counsel for the petitioner has not been able to point out that how the reservation subjectwise clubbing all the posts of that subject of all nine Government Homeopathic Medical Colleges is in violation of statutory prescription or the constitutional provisions.

18. The Division Bench of this Court, in its judgment in ***Vivekanand Tiwari (supra)*** has held that applying the reservation on teaching post treating the university as a "unit" for the different level of teachers and not the department/subject as a "unit" was wholly incorrect and such an advertisement issued by the Banaras Hindu University was quashed.

19. The Division Bench of this Court also took note instructions/guidelines of 2006 of the University Grants Commission for applying the reservation treating the University as a "unit" against the law. The different qualifications are prescribed for each department and subject as such, an Assistant Professor in subject A cannot make an application for direct appointment as Associate Professor or Professor in subject B, C or D but he can only apply for a post in subject A.

20. This Court, quashed Clause 6(c) and 8(a)(v) of the University Grants Commission's Guidelines of 2006, applying the reservation treating the University as a "Unit". Paragraph No.69 of the said judgment would read as under:-

"69. There is yet another reason why the request of University Counsel cannot be accepted. As we have held that the relevant clauses of the policy viz. 6(c) and 8(a)(v) of the UGC dated 25.08.2006 as also the letter of the UGC dated 19.02.2008 to be unsustainable the entire advertisement in question relating to teaching posts has to be quashed. Further as we have held that the advertisement published by the BHU was in violation of the settled law and it also being arbitrary, unreasonable, unworkable by applying the reservation on teaching posts treating the University as a ''Unit' for the different level of teachers and not the department/subject as a ''Unit we are of the view that the entire advertisement has to go. There can be no two yardstick to apply reservation in different departments. We are of the view that confining the relief only to the respective subjects/departments for which the petitioners are the applicants and allowing the posts in the remaining subjects/departments of the University to be filled up treating the University as a ''Unit' would create further complication and

would not only be impracticable, unworkable but also unfair and unreasonable. We are also directing the University to apply the reservation policy afresh in the light of the settled law. The University has to carry out fresh exercise of calculating the reservation for each department/subject. The relief, in our opinion, cannot be confined only to the department/subject in which the petitioners are the applicants."

21. The view taken in aforesaid judgment of the Division Bench of this Court, was affirmed in ***Vijay Prakash Bharti vs. Union of India and Others*** reported in ***(2019) 12 SCC 410.***

22. In view thereof, I find no substance and merit in the present petition, which is hereby **dismissed.**

(2023) 4 ILRA 1022
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.04.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 6787 of 2012

Indra Kumar Ex Constable ...Petitioner
Versus
U.O.I. ...Respondent

Counsel for the Petitioner:
Piyush Asthana, Abdul Samad, M.P. Raju, Maneesh Kumar Singh, Navita Sharma, Rajendra Singh

Counsel for the Respondent:
A.S.G., Ajay Kumar Singh, Raj Kumar Singh, Sandeep Sharma, Savitra Vardhan Singh

A. Service Law – Disciplinary proceedings - C.R.P.F. Rules, 1995 - Rule 27(A), Section 27 (ccc) - Central Civil Services (Classification, Control and Appeal) Rules, 1964 - Rule 10(2) - Whenever, a disciplinary authority is in disagreement with the recommendation of the Inquiry Officer and proposes to pass a punishment/major punishment, he is bound to assign the reasons for such disagreement and is also required to give a show cause notice to the petitioner indicating such reasons so that the delinquent employee can have a proper opportunity to defend himself. (Para 16)

The disciplinary authority while proceeding against the petitioner has considered the inquiry report however, has disagreed with such inquiry report and proceeded to pass major punishment of removal against the petitioner however, while disagreeing with the Inquiry Officer, the authority has not given a show cause notice to the petitioner which he was entitled under law. (Para 16)

B. C.R.P.F. Rules, 1995 - Section 27 (ccc) - When a member of the force has been tried and acquitted by a criminal court, he shall not be punished departmentally under this rule on the same charge or on the similar charge upon the evidence cited in the criminal case, whether actually led or not <u>except with the prior sanction of the Inspector General.</u>

The Inquiry Officer vide inquiry report dated 23.06.2011 has found charge No. 1 proved in view of the admission made by the petitioner however, charge No. 2 was not found by him to be proved.

In this case admittedly, the petitioner was being tried for more or less the same charges (i.e. charge No. 2) before the criminal court therefore, in view of the express provision of the Act, the disciplinary authority could not have proceeded against the petitioner except with the prior sanction of the Inspector General. (Para 16)

C. When there was an honourable acquittal of the employee during the pendency of the proceedings challenging

the dismissal, the same requires to be taken note of. (Para 17)

In present case, the petitioner was acquitted by the judgment and order dated 21.02.2012. A perusal of the said judgment shows that the acquittal order was passed on the ground that the prosecution has failed to prove its charge and thus, it is honorable acquittal, no benefit of doubt was given to the petitioner and therefore, the mandate u/s 27 (ccc) of the Rules, 1955 ought to have been followed by the authority while passing the removal order. (Para 17)

Writ petition allowed. The impugned orders are set aside. The matter is remanded back to the disciplinary authority. (E-4)

Precedent followed:

1. Ram Kishan Vs U.O.I. & ors., (1995) 6 SCC 157 (Para 9)

2. G.M. Tank Vs St. of Guj. & ors., (2006) 5 SCC 446 (Para 10)

3. U.O.I. & ors. Vs Ghulam Mohd. Bhat, Appeal (Civil) No. 4950 of 1999 (Para 13)

Present petition challenges orders dated 19.07.2012, 23.11.2011 and order dated 19.07.2011, passed by the opposite party No. 2, 3 & 4 respectively.

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

1. Heard Ms. Navita Sharma, learned counsel for the petitioner and Sri Raj Kumar Singh, learned counsel for the Union of India.

2. This petition has been filed by the petitioner seeking the following reliefs:-

"1. A writ, order or direction in the nature of Certiorari quashing the impugned order dated 19.07.2012 (Annexure No.1), impugned order dated 23.11.2011 (Annexure No.2) and impugned order dated 19.07.2011 (Annexure No.3) passed by the opposite party No.2, 3 & 4 respectively.

2. A writ, order or direction in the nature of Mandamus commanding the opposite parties to reinstate the petitioner in service w.e.f. 19.07.2011 with all consequential benefits.

3. Any other writ, order or direction which this Hon'ble Court deem fit, in the interest of justice may kindly be passed.

4. Award the cost of the case."

3. Brief facts of the case for adjudicating the controversy are that the petitioner joined C.R.P.F. on 20.09.2007 and reported F/117 Battalion in Central Reserve Police Force (in short, ?C.R.P.F?). He applied for 15 days casual leave w.e.f. 12.01.2011 to 01.02.2011 to his Commanding Officer on account of some serious illness of his mother and accordingly, the leave was sanctioned and he was dispatched to Jammu.

4. An information was received from S.H.O., Police Station, Rajbag, District-Sri Nagar vide letter dated 19.01.2011 that the petitioner was arrested/detained in the custody w.e.f. 19.01.2011 during his leave period in Police Station-Kothibag, District-Sri Nagar, which is a militant affected area of Sri Nagar, in connection with abduction and sexual harassment of a minor girl and consequently, the F.I.R. was lodged as F.I.R. No.06 of 2011 under Sections 363 and 376 of R.P.C. The petitioner was detained exceeding 48 hours in custody hence, he was placed under suspension vide order dated 27.01.2011 under Rule 27 (A) of C.R.P.F. Rules, 1995 read with sub-rule (2) of Rule 10 of the Central Civil Services

(Classification, Control and Appeal) Rules, 1964. The charge-sheet was filed in that case against the petitioner under Sections 363 and 376 R.P.C. on the ground of above offences, the disciplinary authority vide memo dated 14.03.2011 initiated disciplinary proceedings against the petitioner.

5. The Inquiry Officer was appointed who conducted the inquiry proceedings and found charge No.1 proved against the petitioner however, he exonerated the petitioner from charge No.2 and thereafter, the inquiry report was submitted. The disciplinary authority disagreed with the findings of the Inquiry Officer and has removed the petitioner from service w.e.f. 19.07.2011 by exercising powers under Rule 27 (A) of the C.R.P.F. Rules, 1955.

6. Aggrieved by the removal order passed by the disciplinary authority, the petitioner filed an appeal dated 16.09.2011 before the appellate authority i.e. D.I.G., C.R.P.F., Allahabad Range (U.P.) which was rejected by the appellate authority vide order dated 23.11.2011.

7. Aggrieved by the order of the appellate authority dated 23.11.2011, the petitioner submitted a revision petition dated 12.09.2012 however, before filing the revision petition, a letter written by the petitioner on 19.03.2012 sending a request to the opposite party No.2 to reinstate him in service which was treated as a revision and it was decided vide impugned order dated 19.07.2012.

8. The petitioner by way of this writ petition has challenged the impugned order dated 19.07.2012 passed by the revisional authority (Annexure No.1), impugned order dated 23.11.2011 i.e. the order passed by the appellate authority (Annexure No.2) and the impugned order dated 19.07.2011 order passed by the disciplinary authority (Annexure No.3).

9. Learned counsel for the petitioner submits that the disciplinary proceedings were initiated against the petitioner for two charges. The charge No.1 was that the leave has been taken by him on the basis of false grounds that his mother is ill and after taking leave the petitioner returned to Sri Nagar and stayed there. The charge No.2 against the petitioner is that in the Sri Nagar, he was arrested by the police along with minor girl and has committed rape upon her due to which F.I.R. under Section 363 and 376 R.P.C. was lodged against him. He next submitted that after the inquiry, the Inquiry Officer found charge No.1 proved and charge No.2 was not found proved and the trial was pending. He submitted that after the completion of the inquiry, the copy of the inquiry report was sent to the petitioner for giving reply to that inquiry report wherein the petitioner admitted the charge No.1 that he had taken leave on false grounds and asked for pardon and further the undertaking was given by the petitioner that in future he will not commit such mistake. However, when the inquiry report was sent to the disciplinary authority for action, the disciplinary authority while passing the impugned order of removal has treated the charge No.2 also proved and passed the order of removal. It is submitted that this is not permissible and if the disciplinary authority was not in agreement with the Inquiry Officer and his report then, this fact ought to have been communicated to the petitioner against whom the order of removal was proposed to be passed and the reasons for the disagreement were also required to be communicated to the

petitioner and a fresh show cause notice should have been issued indicating the disagreement by the disciplinary authority and the reasons for such disagreement and also after giving due opportunity of hearing to the petitioner, the order could have been passed. In support of his contention, learned counsel for the petitioner has relied on the judgment of *Ram Kishan vs. Union of India & Ors. reported in [(1995) 6 SCC 157].*

10. The next contention of learned counsel for petitioner is that Section 27 (ccc) of C.R.P.F. Rules, 1955 (hereinafter referred to as, ?the Rules, 1955) provides that if a person has been acquitted for an offence then on the same charge, the punishment cannot be given unless sanction is taken from the I.G. This means that till the conclusion of the trial the punishment order cannot be passed and therefore, the order of the disciplinary authority is bad in law to treat the charge No.2 proved while the Inquiry Officer was of the opinion that only charge No.1 was proved. The correct procedure would have been that either the whole inquiry should have been deferred till the decision in the trial or the inquiry for charge No.2 should have been initiated only after conclusion of the trial but neither of the two courses were followed by the disciplinary authority. It is next submitted that petitioner was honorably acquitted by the learned trial court under Sections 363 and 376 R.P.C. vide acquittal order dated 21.02.2012 in file No.57/B/153/S/17/receipt (Annexure No.6). In support of his contention, learned counsel for the petitioner has relied on the judgment of Hon?ble Supreme Court in the case *of G.M. Tank vs. State of Gujarat & Ors. reported in [(2006) 5 SCC 446]* emphasis is on para 7, 13, 14, 16, 22, 31 and 32. It is submitted on behalf of the petitioner that once the acquittal order was passed by the learned trial court, the order passed on the same charge under departmental inquiry was always open to the review and petitioner could have been reinstated. He submits that the petitioner is entitled for full back-wages from the date of acquittal. It is also submitted that the petitioner has been acquitted honorably, the trial court observed that prosecution has failed to prove its case. It is submitted that only those acquittals are not treated as honorable acquittal in which benefit of doubt is given to the accused here is not such a case. So far as charge No.1 is concerned, it is not disputed between the parties that charge No.1 was admitted by the petitioner. It is submitted by learned counsel for the petitioner that its a minor allegation and only minor punishment of stoppage of one or two increments etc. can be given and punishment of removal cannot be given for that charge.

11. *Per contra,* Sri Raj Kumar Singh, learned counsel for the respondents has opposed the submission. He submits that petitioner proceeded on casual leave on the false grounds with per-planed intention of coming back to Sri Nagar from Jammu and abducting the minor girl and stayed with her. Such kind of conduct is unbecoming of an Officer in the C.R.P.F. therefore, it is not a fit case where interference by this Court is warranted. He submits that departmental inquiry was conducted and sufficient opportunity was given to the petitioner to defend himself as there is no violation of principles of natural justice. He submits that application dated 19.03.2012 of the petitioner was treated as revision under Rule 29 (b) of C.R.P.F. Rules, 1955 and the same has been rejected vide order dated 19.07.2012. He submits that statutory revision dated 12.09.2012 was moved by

the petitioner beyond the limitation period prescribed under the Rules and therefore, the same was rejected on this ground. The Central Reserve Police Force Act, 1949 provides for the constitution and regulation of Arms Central Reserve Police Force. Section 27 of the Rules, 1955 provides the procedure for the award of punishments. Section 27 sub-section (c) of the Rules, 1955 provides the procedure for conducting a departmental inquiry which is extracted below:-

" (c) The procedure for conducting a departmental enquiry shall be as follows:-

(1) The substance of the accusation shall be reduced to the form of a written charge which should be as precise as possible. The charge shall be read out to the accused and a copy of it given to him at least 48 hrs. before the commencement of the enquiry.

(2) At the commencement of the enquiry the accused shall be asked to enter a plea of Guilty or Not Guilty after which evidence necessary to establish the charge shall be let in. The evidence shall be material to the charge and may either be oral or documentary, if oral:

(i) it shall be direct:

(ii) it shall be recorded by the Offcer conducting, the enquiry himself in the presence of the accused:

(iii) the accused shall be allowed to cross examine the witnesses.

(3) When documents are relied upon in support of the charge, they shall be put in evidence as exhibits and the accused shall, before he is called upon to make his defence be allowed to inspect such exhibits.

(4) The accused shall then be examined and his statement recorded by the officer conducting the enquiry. If the accused has pleaded guilty and does not challenge the evidence on record, the proceedings shall be closed for orders. If he pleads "Not guilty". he shall be required to file a written statement and a list of such witnesses as he may wish to cite in his defence within such period, which shall in any case be not less than a fortnight, as the officer conducting enquiry may deem reasonable in the circumstances of the case. If he declines to file a written statement, he shall again be examined by the officer conducting the enquiry on the expiry of the period allowed.

(5) If the accused refuses to cite any witnesses or to produce any evidence in his defence, the proceedings shall be closed for orders. If he produces any evidence the officer conducting the enquiry shall proceed to record the evidence. If the officer conducting the enquiry considers that the evidence of any witness or any document which the accused wants to produce in his defence is not material to the issues involved in the case he may refuse to call such witness or to allow such document to be produced in evidence, but in all such cases he must briefly record his reasons for considering the evidence inadmissible. When all relevant evidence has been brought on record, the proceedings shall be closed for orders.

(6) If the Commadant has himself held the enquiry, he shall record his findings and pass orders where he has power to do

so. If the enquiry has been held by any officer other than the Commandant, the officer conducting the enquiry shall forward his report together with the proceedings to the Commandant who shall record his findings and pass order where he has power to do so.

(7) Deleted vide GSR 75 dated 26.1.80."

12. Section 27 (ccc) of the Rules, 1955 provides that when a member of force has been tried and acquitted by a criminal court, he shall not be punished departmentally under this Rule on the same charge or on the similar charge. The aforesaid Section 27 (ccc) of the Rules, 1955 is also extracted below:-

" (ccc) When a member of the Force has been tried and acquitted by a criminal court, he shall not be punished departmentally under this rule on the same charge or on a similar charge upon the evidence cited in the criminal case, whether actually led or not except with the prior sanction of the Inspector General"

13. Learned counsel for Union of India has further submitted that unauthorized absence from the duty in disciplined post like C.R.P.F. entails major punishment hence, no lenient view is required to be adopted by the court. In support of his contention, he has relied on the judgment of Hon?ble Supreme Court in the case of **Union of India & Ors. vs. Ghulam Mohd. Bhat [Appeal (civil) No.4950 of 1999].**

14. Heard learned counsel for both the parties.

15. The two charges framed against the petitioner are extracted as under:-

"(1) यह कि बल संख्या 075184846 सि०/जीडी इन्द्र कुमार एफ/117 बटालियन ने केन्द्रीय रिजर्व पुलिस बल में सिपाही / जीडी के पद पर कार्यरत रहते हुए के.रि.पु.बल, अधिनियम 1949 की धारा- 11(1) के अधीन बल का सदस्य होने की हैसियत से आदेशों की و अवज्ञा/उपेक्षा/अनुशासनहीनता तथा अन्य कदाचार का व्यवहार किया है, जिसमें वह अपनी माता के सख्त बीमार होने के संबंध में झूठा प्रार्थना पत्र कमाडिंग आफीसर को प्रस्तुत कर 15 दिन स्वीकृत आकस्मिक अवकाश दिनांक. 12/1/2011 से 01/2/2011 (अनुमति दिनांक 14/01/11, 15/01/11, 16/01/11, 23/01/11, 26/01/11 एवं 30/01/11) तक स्वीकृत कराया तथा दिनांक 12/01/11 को डाउन कानवाय के माध्यम से श्रीनगर से जम्मू भेजे जाने के उपरांत वह बिना किसी सूचना के वापस श्रीनगर आकर लालचौक तथा उसके आस-पास के अति संवेदनशील जगह पर रहा। तथा उसे सिवल पुलिस द्वारा एक स्थानीय नाबालिग लड़की के साथ संदेहास्पद स्थिति में पकड़ कर पुलिस स्टेशन राजबाग श्रीनगर के सुपुर्द किया गया जहाँ उसे सिवल पुलिस द्वारा दिनांक 19/01/11 को 48 घंटे से अधिक समय तक पुलिस हिरासत में रखा गया। बल संख्याः 075184846 सिपाही/जीडी इन्द्र कुमार, का यह कदाचार बल के नियमों के विपरीत है तथा के०रि०पु०बल नियमवाली-1955 के नियम 27 के तहत दण्डनीय अपराध है।

(2) यह कि बल संख्या 075184846 सिपाही/जीडी इन्द्र कुमार एफ/117 बटालियन ने केन्द्रीय रिजर्व पुलिस बल में सिपाही/ जीडी के पद पर कार्यरत रहते हुए के०रि०पु०बल

अधिनियम-1949 की धारा 11(1) के अधीन बल का सदस्य होने की हैसियत से, आदेशों की अवज्ञा/उपेक्षा/अनुशासनहीनता तथा अन्य कदाचार का व्यवहार किया है, जिसमें वह 15 दिन आकसमिक अवकाश दिनांक 12/1/2011 से 01/2/2011 (अनुमति दिनांक 14/01/11, 15/01/11, 16/01/11, 23/01/11, 26/01/11 एवं 30/01/11) के दौरान बिना किसी पूर्व सूचना तथा सक्षम प्राधिकारी की अनुमति लाल चौक जैसे अतिसंवेदनशील इलाके में रहा था एक स्थानीय नाबालिग लड़की के साथ अवैध संबंध स्थापित किये जिसके संबंध में सिवल पुलिस द्वारा उक्त सिपाही के खिलाफ पुलिस स्टेशन राजबाग श्रीनगर में रणबीर पैनल कोड की धारा 363/376 प्राथमिक सूचना संख्या 6/2011 के अंतर्गत आपराधिक मामला दर्ज कर उसे दिनांक 19/1/11 को 48 घंटे से अधिक समय तक पुलिस हिरासत में रखा। बल संख्या 075184846 सिपाही/जीडी इन्द्र कुमार ने उक्त अवचार/कदाचार का कृत्य कर बल की छवि को धूमिल किया है जो बल के नियमों के विपरीत है तथा के०रि०पु०बल नियमावली 1955 के नियम 27 के तहत दण्डनीय अपराध है।"

16. A perusal of the first charge shows that the petitioner was charged for producing the false and wrong information to his Commanding Officer for sanctioning of his 15 days casual leave of his mother?s serious illness. The second charge was staying in a sensitive area of Sri Nagar during the leave period without the consent of his Officer commanding or the Commandant and defaming the image of the force by involving himself in undisciplined activity and establishing sexual relationship with a minor girl and thus, a misconduct was committed. The Inquiry Officer vide inquiry report dated 23.06.2011 has found charge No.1 proved in view of the admission made by the petitioner however, charge No.2 was not found by him to be proved. It is admitted between the parties that the disciplinary authority has concluded the disciplinary proceedings on the above charges during the trial of the petitioner in file No.57/B/153/S/17/receipt. A perusal of the Section 27 (ccc) of the Rules, 1955 makes it clear that when a member of the force has been tried and acquitted by a criminal court, he shall not be punished departmentally under this rule on the same charge or on the similar charge upon the evidence cited in the criminal case, whether actually led or not except with the prior sanction of the Inspector General. In this case admittedly, the petitioner was being tried for more or less the same charges that is charge No.2 before the criminal court therefore, in view of the express provision of the Act, the disciplinary authority could not have proceeded against the petitioner except with the prior sanction of the Inspector General. There is nothing on the record to indicate that any prior sanction with the Inspector General was obtained by the Department hence, this Court is of the view that the disciplinary authority has conducted the proceedings against the petitioner in flagrant violation of Section 27 (ccc) of the Rules, 1955. The contention of the petitioner that disciplinary authority while proceeding against the petitioner has considered the inquiry report however, has disagreed with such inquiry report and proceeded to pass major punishment of removal against the petitioner however, while disagreeing with the Inquiry Officer, the authority has not given a show cause notice to the petitioner which he was entitled under law and the law on this point

is settled that whenever, a disciplinary authority is in disagreement with the recommendation of the Inquiry Officer and proposes to pass a punishment/major punishment, he is bound to assign the reasons for such disagreement and is also required to give a show cause notice to the petitioner indicating such reasons so that the delinquent employee can have a proper opportunity to defend himself. In this case admittedly, this has not been done. The Hon?ble Supreme Court in the case of *Ram Kishan (supra*) in para 10 has held as under:-

"10. The next question is whether the show cause notice is valid in law. It is true, as rightly contended by the counsel for the appellant, that the show cause notice does not indicate the reasons on the basis of which the disciplinary authority proposed to disagree with the conclusions reached by the inquiry officer. The purpose of the show cause notice, in case of disagreement with the findings of the enquiry officer, is to enable the delinquent to show that the disciplinary authority is pursuaded not to disagree with the conclusions reached by the inquiry officer for the reasons given in the inquiry report or he may offer additional reasons in support of the finding by the inquiry officer. In that situation, unless the disciplinary authority gives specific reasons in the show cause on the basis of which the findings of the inquiry officer in that behalf is based, it would be difficult for the delinquent to satisfactorily give reasons to pursuade the disciplinary authority to agree with the conclusions reached by the inquiry officer. In the absence of any ground or reason in the show cause notice it amounts to an empty formality which would cause grave prejudice to the delinquent officer and would result in injustice to him. The mere fact that in the final order some reasons have been given to disagree with the conclusions reached by the disciplinary authority cannot cure the defect. But, on the facts in this case, the only charge which was found to have been accepted is that the appellant had used abusive language on the superior authority. Since the disciplinary authority has said that it has agreed partly to that charge, the provisional conclusion reached by the disciplinary authority in that behalf even in the show cause notice, cannot be said to be vague. Therefore, we do not find any justification to hold that the show cause notice is vitiated by an error of law, on the facts in this case."

17. In this case the petitioner was acquitted by the judgment and order dated 21.02.2012. A perusal of the said judgment shows that the acquittal order was passed on the ground that the prosecution has failed to prove its charge and thus, it is honorable acquittal, no benefit of doubt was given to the petitioner and therefore, the mandate under Section 27 (ccc) of the Rules, 1955 ought to have been followed by the authority while passing the removal order. Law in this regard has been settled by the Honble Supreme Court in the case of G.M. Tank (supra). The relevant paragraphs 7, 22 and 31 are extracted below:-

7. The Special Judge had honourably acquitted the appellant of the offence punishable under Section 5(1)(e) read with Section 5(2) of the Act by holding that the prosecution has failed to prove the charges levelled against the appellant and thus the appellant cannot be held to be guilty of the said offence. This acquittal is by way of complete exoneration and not by giving benefit of doubt which is evident from the

judgment of the Special Judge. The Division Bench, however, overlooked this fact and the additional fact that on the basis of very report submitted by Mr. V.B. Raval, the Special Judge had acquitted the appellant.

22. In the case of Capt. M. Paul Anthony vs. Bharat Gold Mines Ltd. & Anr.(supra), the question before this Court was as to whether the departmental proceedings and the proceedings in a criminal case launched on the basis of the same set of facts can be continued simultaneously. In Paragraph 34, this Court held as under :

"34. There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely "the raid conducted at the appellant's residence and recovery of incriminating articles therefrom". The findings recorded by the enquiry officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to the proved by police officers and panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the enquiry officer and the enquiry officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand."

31. In our opinion, such facts and evidence in the department as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though finding recorded in the domestic enquiry was found to be valid by the Courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in Paul Anthony's case (supra) will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed."

18. In view of above, petition succeeds and is allowed. The impugned orders are set aside. The matter is remanded back to the disciplinary authority to pass a fresh order from the stage, he has received a copy of the inquiry report after giving adequate opportunity of hearing to the petitioner by giving him a show cause notice along with the copy of the inquiry report within a period of three months from the date of receipt of a certified copy of this order.

(2023) 4 ILRA 1031
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 1599 of 1995

Ram Kishan @ Kishan Lal & Anr.
...Appellants (On Interim Bail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri V.S. Singh, Sri Ajay Sengar

Counsel for the Opposite Party:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 323/34 & 427/34 Probation of Offenders Act, 1958 – Sections 4 & 5 - The Code of Criminal Procedure, 1973 – Sections 313, 357, 360 – Rigorous imprisonment - Appeal against conviction - As per FIR - On 26.06.1990, appellants stopped the Bus, compelled the driver, conductor and passengers to alight from the bus - Appellants in furtherance of common intention with such knowledge caused injury to passenger, if death took place, they would be guilty of culpable homicide not amounting to murder – Appellants also voluntarily caused injury to driver - They pelted stones on the bus, resulting in breaking of windowpanes, causing damage of Rs. 15000/- Bus driver (PW-1) lodged the FIR – Injuries were simple in nature, caused by hard blunt object - Prosecution examined PW-1 to PW-4 as witnesses of fact, PW-5, PW-6 as formal witnesses - From the evidence of PW-4, it transpires that 4-5 days earlier to the occurrence, there was quarrel between PW-1 and accused persons, they wanted to travel by bus without purchasing a ticket - Nothing has emerged in cross examination of PW-4 which may raise doubt about veracity of St.ment - Evidence of PW-1, PW-2 and PW-4 proved prosecution case - Considering the evidence PW-5, defence fails to prove that PW-1 and PW-2 received injury due to assault of villagers - Hence, no illegality in impugned order, conviction is upheld - Directions accordingly. (Para 3, 4, 5, 10, 23, 25, 45)

Appeal is disposed of. (E-13)

List of Cases cited:

1. Leela Ram (dead) through Dull Chandra Vs St. of Har. & ors., (2000) SCC (Crl) 222

2. Krishna Mochi & ors. Vs St. of Bihar, (2002) SCC (Crl.) 1220

3. St. of M. P. Vs Vikram Das (2019) 4 SCC 125

4. Manohar Singh Vs St. of Raj. & ors. (2015) 3 SCC 449

5. Subhash Chand & ors. Vs St. of U.P., 2015 Lawsuit (Alld) 1343

6. St. of Maharashtra Vs Jagmohan Singh Kuldip Singh Anand & ors. (2004) 7 SCC 659

7. Jagat Pal Singh & ors. Vs St. of Har., AIR 2000 SC 3622

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Ajay Sengar, learned counsel for the appellants and Sri Sunil Kumar Tripathi, learned A.G.A. for the State.

2. This criminal appeal has been instituted against the judgement and order dated 15.09.1995 passed by Additional Sessions Judge, Lalitpur in Sessions Trial No. 64 of 1993, State of U.P. Vs. Ram Kishan and another, arising out of Case Crime No. 105 of 1909 u/s 308, 323 and 427 I.P.C., P.S.- Mahrauni, District-Lalitpur.

3. By the impugned order, the trial court has convicted the appellants, Ram Kishan and Gore Lal u/s 323 r/w 34 and 427 r/w 34 I.P.C. and sentenced them to one year rigorous imprisonment in both the sections. The trial court also directed that both the sentences shall run concurrently. The State has not filed any appeal against acquittal of the accused from the charge under Section 308 I.P.C. Thus, the judgment and order relating to acquittal of accused under Section 308 I.P.C. has become final.

4. Shorn of unnecessary details, the prosecution case in brief if that on 26.06.1990 at 4 pm near Chhayan Kumhairi Tiraha Road, Police Station Mahraun, the appellants-accused Ram Kishan and Gore Lal stopped the Bus No. U.T.P. 4113 and compelled the driver, conductor and passengers to alight from the bus then the appellants-accused in furtherance of common intention with such knowledge caused injury to Jamuna Prasad passenger of Bus No. U.T.P. 4113 that if his death took place, they would be guilty of culpable homicide not amounting to murder. The appellants-accused also voluntarily caused simple injury to Prem Narayan, the driver of the aforesaid Bus. They also pelted stones on the bus resulting in breaking of its 10 to 12 nos. of window panes causing damage of about Rs. 15000/- .

5. The first information report was lodged on the basis of written report (Ext.Ka.1) of bus driver, Prem Narayan on 26.06.1990 at 18.05 hours as Case Crime No. 105 of 1990 u/s 308, 323, 427 I.P.C. was registered in Police Station- Mahrauni, District- Lalitpur. The chik F.I.R. (Ext.Ka.5) and carbon copy of the G.D. (Ext.Ka.6) is on record.

6. On 26.06.1990 at 6.30 p.m., Dr. Pratap Singh, Medical Officer, Primary Health Centre, Mahrauni, examined Jamuna Prasad and prepared injury report (Ext.Ka.7). Following injuries were found on the person of injured Jamuna Prasad :-

(i) Lacerated wound 5 cm x 1 cm bone deep left side of head obliquely 11 cm above left ear. Fresh blood present.

(ii) Contused swelling 7 cm x 4 cm in front and outside of left forearm 9 cm above wrist joint

(iii) Contusion 15 cm x 2.5 cm left side of back 23 cm below the tip of shoulder.

Injury nos. (ii) and (iii) were simple in nature. They were fresh and caused by blunt object. Injury no. (i) was kept under observation and x-ray was advised.

7. On 26.06.1990 at 6.50 p.m., Dr. Pratap Singh, Medical Officer, Primary Health Centre, Mahrauni, examined Prem Narayan and prepared injury report (Ext.Ka.8). Following injuries were found on the person of injured Prem Narayan :-

(i) Contusion with swelling 15 cm x 4 cm on left side of left shoulder.

(ii) Contusion 8 cm x 2.5 cm on left side of the back 4 cm below injury no.(i).

(iii) Contusion 8 cm x 2.5 cm on right side of back.

All the injuries were simple in nature and caused by hard blunt object.

The formal proof of injury report was admitted by learned counsel for the applicant on which (Exts.Ka.7 and Ka.8) was inscribed.

8. The case was investigated by Investigating Officer PW5 A.S.I. Shiv Shanker Tiwari. He inspected the place of occurrence and on the pointing out of informant Prem Narayan and prepared its site plan (Ext.Ka.3). He arrested the accused persons on 03.07.1990 and interrogated them. He also recorded the statements of the witnesses and after completion of investigation, submitted charge-sheet (Ext.Ka.4) in the court.

9. On 13.08.1993, charge u/s 308 r/w 34, 323 r/w 34 and 427 r/w 34 I.P.C. was framed against accused-appellants, Ram Kishan and Gore Lal. They denied the charges and claimed trial.

10. The prosecution examined informant injured PW1 Prem Narayan, injured PW2 Jamuna Prasad, writer of the written report and owner of bus PW3 Satish Kumar Jain, eye witness and conductor of bus PW4 Kailash Narayan as witnesses of fact whereas Investigating Officer PW5 S.I. Shiv Shanker Tiwari, the then Constable Clerk at Police Station- Mahrauni PW6 Head Constable Karan Singh were examined as formal witnesses.

11. On 01.09.1995, the court recorded the statement u/s 313 Cr.P.C. of accused persons, Ram Kishan and Gore Lal. They denied the prosecution case that on the alleged date, time and place of occurrence, they stopped the Bus No. U.T.P. 4113, assaulted the driver Prem Narayan, conductor Kailash and passenger sitting therein, Jamuna Prasad with lathi, causing them fatal injuries and caused damage worth Rs.15,000/- to the bus by pelting stones and lathi, breaking its 10-12 window panes. They stated that the witnesses were giving false evidence.

12. Accused-appellants did not produce any witness in defence.

13. It has been argued on behalf of accused-appellants that without proper appreciation of evidence, the trial court illegally convicted them of the alleged offence and sentenced them vide impugned judgement and order. It has also been argued that the conviction and sentence is without merit. It has been prayed that the sentence awarded to them be set-aside.

14. Per contra, learned A.G.A. on behalf of the State has submitted that on the basis of oral and documentary evidence, the charge against the accused-appellants, Ram Kishan alias Kishan Lal and Gore Lal, has been proved beyond all reasonable doubt and the trial court has rightly convicted and sentenced the appellants.

15. According to the prosecution case occurrence took place on 26.06.1990 at 4 pm at Kumhairi Tiraha Road. The medical examination of injured Jamuna Prasad and Prem Narayan was done on 26.06.1990 at 6.30 pm and 6.50 pm. From their injury reports Exhibit Ka-7 and Exhibit Ka-8, it is clear that in the opinion of the Medical Officer, the injuries received by both the injured were fresh in nature. Accused have admitted the injury report of injured Jamuna Prasad and Prem Narayan. Therefore, it can be inferred that injured Jamuna Prasad and Prem Narayan may have received the injury on 26.06.1990 at 4 pm at the time of alleged occurrence.

16. P.W.-1 Prem Narayan, who was the driver of Bus No. U.T.P. 4113 has

stated in his evidence dated 18.07.1995 that the incident of Mar-peet had taken place about five years ago at 4 pm. At that time, he was the driver of bus No. U.T.P. 4113. He was driving the bus from village Kumhedi to Karitoran. Kailash was the conductor of the bus. He had left Kumhedi village at 3.20 pm. After driving 4-5 km when he reached Chhayan Kumhairi Tiraha, he met accused Ram Kishan and Gore Lal who was present in the Court. They got the bus stopped and asked them to come out of the bus. They stood before the bus. Accused Ram Kishan and Gore Lal had Lathi in their hands. PW-1 Prem Narayan stated that after coming down from the bus he sat on a nearby Pulia. The accused stuck a Lathi on his back. Passenger Jamuna Prasad came there to save him. On receiving the Lathi blow he became unconscious. At that time Kailash, conductor and Komal, cleaner were standing nearby. When he regained consciousness he returned Mahrauni by another bus. He informed the owner of the bus Seth Satish Jain about the incident. He had informed Seth Satish Jain that the passengers had informed him that Ram Kishan and Gore Lal had assaulted him. PW-1 admitted that he is literate and he had signed the report after reading it. The written report was written by Satish Jain. PW-1 stated that according to the opinion given by him, the owner Satish Jain prepared the written report. After reading the report he signed it. PW-1 proves written report Exhibit Ka-1.

17. In his cross examination by the prosecution, PW-1 Prem Narayan stated that after receiving injury he became unconscious and the window panes of the bus was broken by accused Ram Kishan and Gore Lal. Due to breaking of the wind shield, there was damage of about Rs. 8000/- to 9000/-. P.W.-1 further stated in his cross examination that he had informed the I.O. that about 4-5 days earlier to the incident accused Gore Lal and Ram Kishan had quarrelled with him when he asked them to purchase a ticket for journey on the bus. Due to this enmity the accused had committed Marpeet with him. P.W.-1 Prem Narayan stated in his cross examination that he routinely stops the bus at Chhayan bus stop. Quarrel was going on between the villagers of Chhayan village and the persons driving the bus. He admitted that when he alighted from the bus there was no stampede near the bus and the passengers were not running here and there. When he was sitting on the Pulia he received injuries on his back. PW-1 admitted that Satish Kumar Jain had shown him the written report and after reading it he found that it was correct and therefore he signed it.

18. Although PW-1 Prem Narayan has not clearly mentioned in his statement that accused Ram Kishan and Gore Lal beat him but he has stated that accused asked him to stop the bus and alight from the bus. They were carrying Lathi in their hands. He has also stated that when he was sitting on the Pulia, accused persons assaulted with Lathi on his back. From the statement of PW-1 it is clear that he is deliberately avoiding to mention the name of the accused although he has admitted the fact of accused beating him with Lathi on his back. He has admitted that he read the written report and after finding that it is correct he has signed it. Thus, he supports the prosecution case that on 26.06.1990 at 4 pm at Kumhedi Tiraha accused persons stopped the bus. They were having Lathi in their hands and beat P.W.-1 with Lathi on his back. PW-1 has also admitted that he had signed the written report which correctly mentions date, time, place of the

occurrence and participation of the accused Ram Kishan and Gore Lal in the incident of beating him and causing damage to the window panes of the bus.

19. The author of the written report, P.W-3 Satish Kumar Jain has stated in his evidence that on his arrival at Mahrauni, driver Prem Narayan informed him that quarrel took place at Chhayan Tiraha. He had mentioned all the facts in the written report as told by the driver Prem Narayan. The written report was read before Prem Narayan and after hearing it he signed it. The written report (Exhibit Ka-1) is in his writing and his signature is affixed therein. P.W.-3 Satish Kumar Jain stated in his cross examination that Prem Narayan had told him the names of the accused persons beating him. PW-3 has emphatically asserted that the written report was written as told by Prem Narayan. Nothing has been found in the cross examination of PW.-3 which may raise doubt about the veracity of his statement.

20. Passenger of bus No. U.T.P. 4113, P.W.-2 Jamuna Prasad deposed in his evidence that when the bus reached Chhayan Tiraha, two accused persons Gore Lal and Ram Kishan came there holding Lathi in their hands. P.W.-2 Jamuna Prasad identified accused Gore Lal and Ram Kishan who were present in the Court. He has stated that these accused persons caused the bus to stop and asked Prem Narayan to alight from the bus. When Prem Narayan alighted and was sitting on the Pulia they started beating him with Lathi. PW-2 stated that when he forbid the accused to beat Prem Narayan, accused assaulted him with Lathi. He received one Lathi blow on his head and one on his back. At that time Kailash and other passengers came there to save them. Accused persons broke the window panes of the bus. PW-2 Jamuna Prasad admitted that accused were earlier not known to him but at the time of incident he came to know about their names. Passengers were mentioning the name of the accused persons. At that time no bus of Jhansi Madanpur was standing there. He returned Mahrauni by another bus. He has no enmity with the accused persons. At Mahrauni bus station Prem Narayan met Satish Jain. From the evidence of PW-2 Jamuna Prasad, it is clear that when he reached there to protect Prem Narayan accused persons beat him with Lathi. The x-ray of the skull of Jamuna Prasad was done on 27.06.1990 in District Hospital Lalitpur but no fracture was found in it and the injury received by Jamuna Prasad was simple in nature. PW.-2 corroborates the prosecution case that accused Ram Kishan and Gore Lal beat him and broke the window panes of the bus.

21. In the cross examination of PW-2 by the defence nothing emerges which may raise doubt about the veracity of his statement. There is nothing found in his cross examination that due to enmity he is falsely implicating the accused persons.

22. The conductor of the bus, PW-4 Kailash has corroborated the evidence of PW-1 Prem Narayan and PW-2 Jamuna that when the bus reached Chhayan Tiraha near the Pulia at 4 pm accused Ram Kishan and Gore Lal stopped the bus and they were having Lathi in their hands. They caused the driver Prem Narayan to alight from the bus and started beating him with Lathi. When Jamuna Prasad reached there to save the driver, the accused persons also beat him with Lathi. The witness has stated in his evidence that in the incident Jamuna Prasad and Prem Narayan had received

injuries. After beating Prem Narayan and Jamuna Prasad accused broke the window panes of the bus and ran away from the place of occurrence. PW-4 has stated in his evidence that about 4-5 days earlier there was quarrel between Prem Narayan and the accused persons as the accused persons wanted to travel on the bus without purchasing a ticket. PW-4 Kailash had admitted that at that time a bus was standing at Dhaura Sagar Badavara road but there was no quarrel going on between the villagers of Chhayan and passenger of the bus. These villagers were not beating the persons sitting in the bus. PW-4 has categorically stated that there was no accident due to other bus and no child was killed in the accident. PW-4 has stated in his cross examination that Prem Narayan received Lathi blows on his back but he did not become unconscious due to the injuries. Jamuna Prasad received injury on his hand. Jamuna Prasad also did not become unconscious.

23. From the evidence of PW-4 Kailash, it transpires that 4-5 days earlier to the occurrence, there was quarrel between Prem Narayn and the accused persons as they wanted to travel by bus without purchasing a ticket. On the day of occurrence accused persons stopped the bus and asked the driver Prem Narayan to alight from bus and they beat him with Lathi and when Jamuna Prasad reached to save him, they assaulted him also with Lathi, causing head injury to him. Nothing has emerged in the cross examination of PW-4 Kailash which may raise doubt about veracity of the statement. Thus, the prosecution case is proved by the evidence of injured PW-1 Prem Narayan and PW-2 Jamuna Prasad and eye witness PW-4 Kailash. The oral evidence of PW-1 Prem Narayan, PW-2 Jamuna and PW-4 Kailash is corroborated by the documentary evidence, written report (Exhibit Ka-1), chik FIR (Exhibit Ka-5), injury report of Prem Narayan and Jamuna (Exhibit Ka-8 & Exhibit Ka-7), site plan (Exhibit Ka-3) and charge sheet (Exhibit Ka-4).

24. It has been argued by the learned counsel for the appellant that on the day and time of occurrence, there was a bus accident on the Sagar Madawara Road in which a child of Chhayan village had received injury, therefore, villagers of Chhayan village were beating the conductor and driver of that bus and during that period when Prem Narayn and Jamuna Prasad came there on the bus villagers also started beating them. The argument of learned counsel for the appellant is not supported with evidence available on the record. It is true that PWs Prem Narayan and Kailash has mentioned in their evidence that at some distance from there another bus was standing but they had specifically denied that the villagers were beating the drivers and conductors of the other bus. No suggestion has been made by the defence to PW-1 Prem Narayan and PW-4 Kailash that Prem Narayan and Jamuna Prasad were beaten by the villagers. It is clear from the evidence of the witnesses that there was no stampede near the bus and the passenger were not running here and there, although there was quarrel going on between the persons of bus of the Madanpur and the villagers. The defence had made suggestion to the Investigating Officer, P.W.-5 Shiv Shankar Tiwari that on the day of occurrence a child had received injury due to bus accident. After going through the G.D. of 26.06.1990 he replied that on that day in the GD there is no mention of any bus accident causing injury to a child. The I.O. denied that any

report was lodged regarding bus accident of a child.

25. Considering the evidence of the witnesses, specifically the Investigating Officer, PW-5, S.I. Shiv Shankar Tiwari, there is no force in the plea advanced on behalf of the defence that Prem Narayan and Jamuna Prasad received injury due to assault of the villagers.

26. Accused Ram Kishan has stated in his statement under Section 313 Cr.P.C. that he had litigation with PW-4 Kailash, therefore, he has given false evidence against him but no suggestion has been made in the cross examination of PW-4 regarding his litigation with accused Ram Kishan. Apart from this, accused Ram Kishan has not filed any documentary evidence in support of his above statements. Under these facts and circumstances, there is no force in his plea and it is not acceptable.

27. Learned counsel for the appellants has attracted the attention of this Court towards the deposition of the various witnesses and stated that there is contradiction in their deposition. From the perusal of the above mentioned statements, it is found that witnesses have deposed more than five years after the date of occurrence. Therefore, minor contradiction in the statement of the witnesses is natural. It does not demolish their evidence.

28. In **Leela Ram (dead) through Dull Chandra vs. State of Haryana and others, (2000) SCC (Crl) 222**, the Apex Court has held as under:

"...There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence...

...one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment -- sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their overanxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness...."

Similar law has been propounded by the Apex Court in **Krishna Mochi and others vs. State of Bihar, (2002) SCC (Crl.) 1220.**

29. Considering the facts and circumstances of the law in the light of the law propounded by the Apex Court, the plea advanced by learned counsel for the appellant is not enable and it is rejected.

30. From the discussion of the above evidence of the case, the Court is of the view that on 26.06.1990 at 4 pm at Chhayan Kumhedi Tiraha in P.S. Mahrauni appellant accused Ram Kishan and Gore Lal stopped the bus No. U.T.P. 4113, asked the driver Prem Narayan to alight from the

bus and beat him with Lathi and when passenger Jamuna Prasad came there to save him they beat him also with Lathi. The accused persons broke the wind shield of the bus causing damage of more than Rs. 50/- to the owner of the bus. Thus the prosecution has proved the charge under Sections 323/34 and 427/34 I.P.C. against the appellants-accused beyond reasonable doubt. The accused persons Ram Kishan and Gore Lal has been rightly convicted by the Trial Court under Sections 323/34 and 427/34 I.P.C.

31. The learned counsel for the appellants-accused had alternately pressed that appellants-accused be granted the benefit of probation. It has been argued that since the incident has taken place more than 32 years back on 26.06.1990, the appellants have suffered the expenses and hardships of trial for more than about 5 years and they have undergone the agony and uncertainty of the pending criminal appeal for more than 25 years and apart from this case there is no criminal antecedents against the appellants-accused, they may be treated leniently and instead of sending them to jail they may be released on probation.

32. It has also been submitted that it is obvious from the statement of PW-5 S.I. Shiv Shankar Tiwari that appellant accused were arrested on 03.07.1990 and from the bail bonds available on the trial court's record it is clear that their bail bonds were accepted on 11.07.1990, therefore, during investigation and trial they have remained in custody for eight days. Sending them again to jail after the gap of more than thirty two years shall not be justified.

33. The learned A.G.A. for the State has argued that due to enmity of not letting the appellants-accused travel on the bus without ticket on the day of occurrence, appellants-accused stopped the bus caused the driver to alight from the bus and beat him with Lathi and when Prem Narayan and passenger Jamuna Prasad reached there to save the driver they also beat him and caused damage to the wind shield of the bus. They should be punished severely so that it may be a lesson to those indulged in unlawful activities.

34. Indian legislature has not given any sentencing policy, though Malimath Committee (2003) and Madhava Menon Committee (2008) has asserted the need of sentencing policy in India.

35. Principle of sentencing has been an issue of concern before the Supreme Court in many cases and tried to provide clarity on the issue. Apex Court has time and again cautioned against the cavalier manner considering the way sentencing is dealt by High Courts and Trial Courts.

"... It is established that sentencing is a socio-legal process, wherein a Judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner." (para 49 of ***Accused 'X' vs. State of Maharastra (2019) 7 SCC 1)***

"12. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-

social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

*13. Additionally, we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material support of amenity; (iii) extent of humiliation; and (iv) privacy breach." (**State of Madhya Pradesh vs. Udham and others (2019) 10 SCC 300)"***

36. It is also notable that "... where minimum sentence if provided for, the Court cannot impose less than minimum sentence." (Para 8 of ***State of Madhya Pradhesh vs. Vikram Das (2019) 4 SCC 125)***

37. Section 357 Cr.P.C. provides power to the Court to award compensation to victim, which is in addition and not ancillary to other sentences. While granting just and proper compensation Court ought to have consider capacity of the accused for such payment as well as relevant factors such as medical expenses, loss of earning, pain and sufferings etc.

38. Supreme Court has reiterated need for proper exercise of power of granting compensation under Section 357 Cr.P.C. in ***Manohar Singh Vs. State of Rajasthan and others : (2015) 3 SCC 449*** and in paras 11, 31 and 54 it is stated that:

"11....Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other. At times, evidence is not available in this regard. Some guess work in such a situation is inevitable. Compensation is payable under Section 357 and 357- A. While under section 357, financial capacity of the accused has to be kept in mind, Section 357-A under which compensation comes out of State funds, has to be invoked to make up the requirement of just compensation."

"31. The amount of compensation, observed this Court, was to be determined by the courts depending upon the facts and circumstances of each case, the nature of the crime, the justness of the claim and the capacity of the accused to pay."

"54. Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact specific provisions relating to victim

compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on the courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision."

39. Section 4 of the Probation of Offenders Act, 1958 reads as follows :

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

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

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

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

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

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

40. A similar provision finds place in the Code of Criminal Procedure. Section 360 Cr.P.C. provides:

360. Order to release on probation of good conduct or after admonition.

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty- one years of age or any woman is- convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub- section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub- section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub- section inflict a greater punishment than might

have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub- section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

41. These statutory provisions very emphatically lay down the reformatory and correctional object of sentencing and obligates the trial court as well as appellate courts to give benefit of probation in fit cases as provided under law. Unfortunately, this branch of law has not been much utilized by the courts. It becomes more relevant and important in our system of administration of justice where trial is often concluded after a long time and by the time decision assumes finality, the very purpose of sentencing looses its efficacy as with the passage of time the penological and social priorities change and there remains no need to inflict punishment of imprisonment, particularly when the offence involved is not serious and there is no criminal antecedent of the accused persons. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

42. In the case of **Subhash Chand and others vs. State of U.P., 2015 Lawsuit (Alld) 1343,** this court has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:

"It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court

feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellate courts. The Registrar General of this Court is directed to circulate copy of this Judgment to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgment. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

43. In addition to the above judgment of this Court, this Court finds that the Hon'ble Apex Court in the case of **State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659**, giving the benefit of Probation of Offenders Act, 1958 to the accused has observed as below:

"The learned counsel appearing for the accused submitted that the incident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The incident is not such as to direct the accused to undergo sentence of imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them to execute a bond of one year for good behaviour."

44. Similarly, in **Jagat Pal Singh & others Vs. State of Haryana, AIR 2000 SC 3622**, the Hon'ble Apex Court has given the benefit of probation while upholding the conviction of accused persons under Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

45. In the light of above discussion, I find no illegality, irregularity or impropriety nor any jurisdictional error in the impugned judgment and order of the trial court. The conviction recorded by the court below under Sections 323/34 and 427/34 I.P.C. is upheld and is not required to be disturbed.

46. Considering the facts and circumstances of the present case as well as keeping in view the position of law as mentioned above and considering that the incident had taken place about 32 years back; the incident was occurred in spur of the moment; and considering the provisions of Section 4 & 5 of the Probation of Offenders Act, 1958 it appears justified that the appellants accused Ram Kishan and Gore Lal be released under Section 4 (1) of the Act on probation for a period of one

year on furnishing a personal bond of Rs.20,000/- (Rupees twenty thousand) and two sureties each of the like amount. During this period, they shall maintain good conduct and keep peace and on breach of this condition, they shall appear before the Court to receive punishment. It also appears justified that under Section 5 (1) (a) of the Act, each appellant is directed to deposit Rs. 4000/- as costs and compensation within a period of one month from the date of receipt of certified copy of this order as compensation out of which Rs. 2000/- shall be paid to each injured, namely Prem Narayan and Jamuna Prasad and Rs. 2000/- shall be paid to PW-3 Satish Kumar Jain, owner of the bus. In case of death of these injured, their legal representatives shall be entitled to receive their shares of compensation.

47. With aforesaid modification, the criminal appeal is disposed of accordingly.

48. Let a certified copy of this order along with record be sent to the court concerned for compliance. In case, probation bonds is not filed and compensation amount is not deposited by the appellants accused, they will have to undergo the sentence awarded by the trial court.

(2023) 4 ILRA 1044
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.04.2023

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Appeal No. 1918 of 2019

Suresh Trivedi ...Appellant
Versus
U.O.I. ...Opposite Party

Counsel for the Appellant:
Sri Pal Singh Yadav, Sri Chandra Shekhar Pandey, Sri Prathama Singh

Counsel for the Opposite Party:
Sri Digvijay Nath Dubey

Criminal Law - The Narcotic Drugs and Psychotropic Substances Act, 1985 – Sections 8 (c), 20(b)(ii)(C) & 25 – Constitution of India, 1950 - Article 21 - The Code of Criminal Procedure, 1973 – Section 313 – Rigorous imprisonment – Appeal against conviction – Issue for consideration - Appellant was not provided legal assistance during trial, the proceedings were done in absence of counsel for appellant, his pairokar left pairavi - PW3 was examined by amicus curiae of co-accused on 23.1.2019 – On 23.1.2019, co-accused was represented through amicus curiae - The order sheet indicates there was no counsel representing the case of appellant, proceeding of PW 3 was closed on oral St.ment of ADGC - Appellant is in jail since 18.08.2014 - Appellant has undergone minimum sentence in jail, without fair trial - He was not afforded amicus curiae to defend himself during evidence of PW3, proceeding u/s 313 Cr.P.C., thus trial is fatal, violative of Article 21 - Charges framed on 04.07.2019 second time u/s 25, not proved, no evidence was adduced and judgment was passed one day after i.e. 05.07.2019, trial appears to be vitiated - PW1, PW2 and PW3 supported the prosecution case - Sections 42, 50 of NDPS Act has been complied with - Conviction is upheld. (Para 11, 21, 25, 26, 28, 29,30)

Appeal is partly allowed. (E-13)

List of Cases cited:

1. Ramanand @ Nandlal Bharti Vs St. of U. P. reported in 2022 LiveLaw (SC) 843

2. Azeemul Hasan Vs U.O.I. AIROnline 2022 All 3821

3. Sridham Adhikari Vs U.O.I. AIROnline 2021 All 6814

4. Manoj Kumar Soni Vs U.O.I. AIROnline 2020 All 2434

5. Chandra Shekhar Prasad Sah Vs U.O.I. AIROnline 2022 All 1484

6. Rajendra Singh Vs St. of U.P. Lucknow & ors. 2017 (6) ALJ 482; (2017) 6 All WC 6151

7. Fuman Singh Vs U.O.I. AIROnline 2022 All 3819

8. Mukesh Kumar Vs U.O.I. AIROnline 2022 All 3820

9. Raj Kumar Savita Vs U.O.I.2021 (3) ALJ 748; AIROnline 2021 All 522

(Delivered by Hon'ble Brij Raj Singh, J.)

1. This criminal appeal has been filed under Section 374 (2) Cr.P.C. against the impugned judgment and order dated 05.07.2019 passed by VIth Additional District and Sessions Judge/Special Judge/Prevention of Corruption Act (U.P.S.E.B.) Lucknow in Criminal Case No.38 of 2015, Case Crime No.29 of 2014, under section 8 (c)/20(b)(ii)(C) of The Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "NDPS Act') whereby convicting and sentencing the appellant for 15 years rigorous imprisonment and fine of Rs.1,50,000/- and in default of payment of fine, six months additional simple imprisonment, under section 25 NDPS Act, Police Station DRI, Lucknow for 10 years simple imprisonment and fine of Rs.1,00,000/- and in default of payment of fine, additional simple imprisonment for four months. Both the sentences were directed to run concurrently and that the period of confinement in jail shall be remitted.

2. As per prosecution case, the complainant has stated that he received information on 17.08.2014, that a white Swift Dezire Car bearing No.UP78 BW 8210, is being used for smuggling of contraband charas of commercial quantity by concealing it in cavity of back seat of the car. After getting information, a team of Officers of Directorate of Revenue Intelligence (in short "DRI') comprising of Shri Sanjeev Katiyar, Dharmendra Kumar, Fahim Raja and Ajit Kumar were entrusted to apprehend the accused. Section 42 of NDPS Act was complied with and thereafter the aforesaid team proceeded to Shaheed Path on the Faizabad Road at 11:30 a.m. The team had also taken witnesses Pawan Singh, Radhey Lal. They were waiting for arrival of the aforesaid Swift Car and they saw that said car was coming to the place where they were standing. They surrounded the car and a person introduced himself as Driver of the car. The person sitting on the driving seat told that his name was Suresh Trivedi and other person told that his name was Lakshman Sharma. Thereafter, the information was given to the higher authorities of DRI. The car driver denied any contraband charas in the car and when some pressure was put, he told that there is cavity at the back seat of the car in which charas has been concealed. In compliance of Section 50 of NDPS Act, Sanjiv Katiyar, the informant had given notice to Suresh Trivedi and Lakshman Sharma and they were asked whether they wanted to be searched before the Gazetted Officer. Both the accused persons stated before them that they did not want to get themselves interrogated or searched by the Gazetted Officer. Both the accused were brought to the office of DRI 2/31 Vishal Khand, Gomti Nagar. The car was checked and cavity was found in the back seat of the car

in which 111 packs of charas was found in the polythene cover. The total weight of charas was 107 kg and about 25-25 samples of recovered charas were prepared and they were sealed on the spot and it was found that the market value of the recovered charas was 1,07,00,000 i.e. (Rupees One Crore Seven lacs.). The sample was sealed and signatures were made on the sealed cover. The recovery memo was prepared by Sanjiv Katiyar, the Information Officer on 17.08.2014 and the proceeding ended at 11 o'clock in the night of 17.08.2014. The independent witness also made their signature on the recovered memo. The statement of both the accused Suresh Chandra Trivedi and Lakshman Sharma were recorded on 18.08.2014 and by following section 43 of NDPS Act, they were arrested and were produced before the court on 18.08.2014. Thereafter, they were sent to jail by the Judicial order. The sample was sent for FSL examination to Delhi. The FSL report dated 08.10.2014 and 24.09.2014 indicates that the samples were of charas. After getting adequate evidence, both the accused Lakshman Sharma and present appellant were booked under section 8 (c)/20(b)(ii)(C)/25 NDPS Act, 1985 and case was registered at Police Station DRI, Lucknow.

3. The Investigating Officer filed complaint under section 8 (c)/20(b)(ii)(C)/25 NDPS Act, 1985 and on the basis of complaint, recovered contraband charas, the samples, the site plan, the statement of accused and medical report and the FSL report, the court framed the charges on 27.05.2016 against both the accused under the aforesaid sections. The accused appellant pleaded not guilty and requested for trial.

4. The prosecution had produced PW1 Sanjiv Katiyar, Information Officer of DRI; PW2 Dharmendra Kumar; PW3 Abhishek Chatterjee. Certain evidences from Exhibits Ka-1 to Exhibit ka-32 were also examined.

5. The appellant and co-accused Lakshman Sharma were confronted under Section 313 Cr.P.C. and they deposed before the Court that they were falsely implicated. Learned counsel submitted that the police had arrested the appellant and other co-accused from their house and they were falsely implicated by showing false recovery.

6. After hearing the arguments on 27.05.2016, it was found that charges were framed and there was some defect i.e. why again charges were framed on 04.07.2019 under Sections 8(c)/20(b)(ii)(c)/25 NDPS Act, 1985 and charges were framed separately. The accused pleaded not guilty and requested for trial and also denied the charges. The Special Prosecuting Officer submitted that no evidence was required and submitted that evidence adduced earlier, may be considered. After adducing evidence on record, the trial court passed judgment convicting and sentencing the appellant under the aforesaid sections, hence, the present appeal has been filed by the accused appellant.

7. PW1, Information Officer Sanjiv Katiyar, was examined before the Court and he deposed before the Court that on 17.08.2014, he was asked by DRI to reach office at 10:30 a.m. He reached office at 10:30 a.m. where Dharmendra, Fahim Raja, Ajit Kumar were present. It was told to him that information was received that white car was used for smuggling contraband charas which is coming from Barabanki to Lucknow and will go to Kanpur. On the written information, the team proceeded to Faizabad road at 11:30 through private vehicle. They also took two witnesses from

Husariya Chauraha, Gomti Nagar and after reaching to the place, they were waiting at 4 o'clock in the evening, they saw that a car was coming from Faizabad Road which was surrounded by them. The team members introduced themselves. The person sitting on driving seat told his name as Suresh Trivedi and at the side of the driver Lakshman Sharma co-accused was sitting. They were asked by the search team that they were keeping contraband charas in the car and they accepted the fact that they were in possession of charas in the car. Section 50 of NDPS Act was complied with. They submitted before them that they did not want to be searched before any Gazetted Officer and they may be searched by search team. Thereafter, both accused were brought to the office of DRI, House No.2/31 Vishal Khand, Gomti Nagar, Lucknow. The cavity was found in the back seat of the car in which 111 packs were found in the polythene. The samples were taken and prima facie; it was found that it was charas. 25-25 gms charas samples were taken and they were packed and sealed. The entire contraband charas was sealed in four bags and the bags were sealed on which signatures of the search team was made. Both accused told that they had gone to Nepal border through Barabanki where Ramesh loaded the charas which was to be delivered to Kanpur. As soon as they were about to reach on the road of Shaheed Path, they were arrested by the search team. The complainant PW1 further submitted before the Court that proceeding went on till 11:30 in the night of 17.08.2014. The statement of the accused were recorded and memo was prepared. The samples were taken and the contraband charas was also sealed. The accused were examined by the Doctor and thereafter they were remanded. PW2 Dharmendra Kumar, Information Officer and PW3 Abhishek Chaterjee were members of search team along with PW1. They have stated the same facts which have been stated by PW1 before the Court and they have supported the prosecution case as set up in the complaint.

8. PW3 has admitted in examination-in-chief that he was made Investigating Officer by the State vide order dated 25.08.2014 and he was also authorised to file complaint and all the three witnesses of fact deposed and tried to prove the case of prosecution.

9. In cross examination, PW1 Sanjiv Katiyar deposed that incident took place in August 2014 and he was unable to remember the date. He deposed that his statement was recorded after 3-4 months from the date of incident. He deposed that he reached to the place by Innova Car along with two independent witnesses, who were picked at Husariya Chauraha. He further stated that witnesses were not having vehicle. He further deposed that addresses of the witnesses were not verified. He stated that at 4:40 in the evening, the car was coming and it was stopped by the driver without any protest.

10. In cross examination, PW3 Abhishek Chaterjee, deposed that he was Investigating Officer and was not present at the time of arrest of the accused. He neither signed the recovery memo nor recovery memo was prepared before him and the recovered charas was also not sealed before him. He was also not involved in doing weight of the charas. He could not state the date of incident. He further deposed that he has not recorded the statement of the accused rather he had taken statement of the officials of the department. He further deposed that under section 67 of NDPS Act, notice was sent and but the same came back due to incomplete address.

11. While going through the record, a very wider issue has been raised by learned counsel for the appellant that the appellant was not provided legal assistance during trial and at many stages, the proceedings of trial were done in absence of the counsel for the appellant. He has submitted that pairokar of the appellant had left pairvi and prosecution led the witness PW3 on 18.12.2018 and rest of the examination-in-chief completed on 23.1.2019 and on the same day, cross examination on behalf of Lakshman Sharma conducted by amicus curiae and the next date fixed was on 29.01.2019 and date for cross examination of appellant was fixed on 11.02.2019. On 11.02.2019, PW3 was not present in the court and on the statement of learned counsel for the prosecution, the evidence of the prosecution was closed on 11.02.2019 and the order was passed that "prosecution witness closed." it has been submitted by learned counsel that without affording any opportunity to the appellant, learned trial court neither provided any counsel nor amicus curiae and order was passed for cross examination with PW3 thus, the trial is fatal. He further submitted that on 18.2.2019, without providing any amicus curiae to the appellant, statement under Section 313 Cr.P.C. was recorded and thereafter case was fixed on 03.07.2019 for alteration of charge. On 03.07.2019, the accused persons were not summoned from District Jail, Lucknow and next date was fixed on 04.07.2019 for alteration of charge and charges were altered on 04.07.2019. It has been submitted by learned counsel for the appellant that appellant is confined in jail since long time that is why his pairokar could not arrange the expenses and counsel could not be engaged after evidence of PW2 as such no counsel of appellant appeared on his behalf. In such circumstances, it was desirable to provide amicus curiae to the appellant under the provision of Section 39-A of the Constitution of India as well as Section 304 Cr.P.C. and Section 9 of the Legal Service Authority Act, 1987.

12. The argument was advanced by learned counsel for the appellant that the matter was heard before this Court. This Court vide order dated 27.01.2013 directed the counsel for the appellant to file affidavit indicating as to at what stage, there was no counsel for the appellant representing his case before the subordinate Court and ten days' time was granted to file affidavit and the learned counsel for the respondents was also directed to file reply of the affidavit.

13. In pursuance of the directions issued by this Court, the supplementary affidavit dated 28.01.2023 has been filed and the appellant has made specific averment in paras 2,3, 4, 5 and 6 in which certain dates have been mentioned and it has been pointed out that appellant was not provided any counsel/amicus curiae and the proceedings of the trial was conducted without providing legal assistance. Therefore, the entire trial is vitiated under Article 21 of the Constitution of India.

14. Learned counsel for the DRI has filed his reply on 16.02.2023 to the supplementary affidavit of the appellant. The said reply filed by DRI is relevant to be looked into and paras 3, 4 and 5 of the supplementary affidavit of appellant has been replied and DRI has not specifically denied the averment of supplementary affidavit and nowhere it is replied by DRI that appellant was provided counsel or legal assistance. Learned counsel for the appellant has also annexed the order sheet of various dates which indicate that accused have made their signatures and

learned counsel for DRI has made his signature but there is no counsel for appellant who has appeared. The order sheet dated 29.01.2019, 11.02.2019, 29.11.2018, 11.01.2019, 23.01.2019 24.06.2019, 03.07.2019 indicates that no counsel for accused appellant has represented his case.

15. Learned counsel for the appellant has relied upon the judgment of Hon'ble Supreme Court in case of Ramanand @ Nandlal Bharti v. State of Uttar Pradesh reported in 2022 LiveLaw (SC) 843 in Criminal Appeal No.64-65 of 2022 dated 13.10.2022.

"39A. Equal justice and free legal aid. --The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

121. Section 304 of the CrPC refers to legal aid to the accused at State expenses in certain cases which reads thus:

"304. Legal aid to accused at State expense in certain cases.--

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rule providing for--

(a) the mode of selecting pleaders for defence under sub section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification the provisions of subsections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session."

122. Under Section 9 of the Legal Services Authorities Act, 1987, the District Legal Services Authorities are constituted for every District in the State to exercise powers and perform functions conferred on, or assigned to, the District Authority under the said Act.

123. This Court in para 13 of the judgment reported in Kishore Chand v. State of Himachal Pradesh, (1991) 1 SCC 286, held thus:

nd free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the bar who has either a little experience or no experience is assigned to defend him. It is high time that senior counsel practising in the court concerned, volunteer to defend such indigent accused as a part of their professional duty. If these remedial steps are taken and an honest and objective

investigation is done, it will enhance a sense of confidence of the public in the investigating agency."

124. This Court, in the case of Zahira Habibullah Sheikh (5) and Another v. State of Gujarat and Others, reported in (2006) 3 SCC 374, has observed in paragraphs 30, 35, 38 and 39 as under:

"30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of the courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial: the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

x x x x

35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

x x x x

38. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty stage managed, tailored and partisan trial.

39. The fair trial for a criminal offence consists not only in technical

observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

16. However, important issue has been raised by the learned counsel for the appellant that the prosecution led the witness PW3 on 18.12.2018 and thereafter rest of examination in chief was completed on 23.01.2019 and on the same date, cross examination of Lakshman was conducted by amicus curiae and the next date was fixed was 29.01.2019 and thereafter next date for cross examination by the appellant was fixed on 11.02.2019 but PW3 was not present in the Court and on the submission of learned counsel for the prosecution, the evidence of prosecution was closed on 11.2.2019 and the order was passed that "prosecution witness closed" without affording any opportunity of cross examination to the appellant in absence of appellant's counsel.

17. Heard Shri Pal Singh Yadav, learned counsel for the appellant and Shri Digvijay Nath Dubey, learned counsel for DRI and perused the record.

18. Learned counsel for the appellant has submitted that two independent eye witnesses who were mentioned by the prosecution were not produced before the Court. He has submitted that all the three witnesses were departmental witnesses whereas two independent eye witnesses have been shown as independent witnesses but none of them have been examined before the Court thus, the prosecution case is highly doubtful and there is false implication. It has been further submitted by learned counsel for the appellant that Court had second time framed charges and the appellant was framed charges under Section 25 of NDPS Act on 04.07.2019. The appellant had pleaded not guilty against the charge framed second time under Section 25 of NDPS Act and requested for trial which is mentioned in the order dated 04.07.2019. It is submitted by learned counsel for the appellant that without adducing any evidence on record, final judgment was passed on 05.07.2019 just after one day which goes to show that the trial is unfair and there is complete violation of the Article 21 of the Constitution of India.

19. Learned counsel submitted that the prosecution led the witness PW3 on 18.12.2018 and cross examination on 23.1.2019 of Lakshman Sharma was conducted by amicus curiae and next date fixed was 29.01.2019 and again next date was fixed for cross examination on 11.02.2019 but PW3 was not present and on the request of learned counsel for the prosecution, evidence of the prosecution was closed on 11.2.2019 without affording any opportunity of cross examination to the appellant. The cross examination of the appellant was mandatory but neither amicus curiae was engaged nor any opportunity was provided to the appellant to cross examine PW3 and only on the statement of learned counsel for the prosecution, the evidence was closed. Thereafter, the case was fixed for 313 Cr.P.C. the statement was recorded but no amicus curiae was provided to the appellant. He has submitted that pairokar of the appellant had already left pairvi therefore, it was incumbent upon the trial court to provide amicus curiae but in absence thereof, case was fixed on 03.07.2019 for alteration of charge and the charges were framed in absence of appellant's counsel. The final judgment was passed on 05.07.2019 without providing

any counsel to the appellant. It has been submitted that trial is unfair and there is complete violation of Article 21 of the Constitution of India because the appellant was not provided opportunity through counsel to cross examine PW3 and the charges were altered under Section 25 of NDPS Act and thereafter, no evidence was led either by prosecution or any opportunity was provided to the appellant to lead the evidence. Learned counsel for the appellant has submitted that the statement of fact made by the appellant that he was not given amicus curiae has not been denied by the DRI while filing the reply of the affidavit filed by the appellant.

20. On the other hand, learned counsel for the DRI has submitted that 107 kgs of charas of commercial quantity amounting to Rs.One crore seven lac has been found from the possession of the appellant. He has submitted that three eye witnesses have accounted the case against the appellant and they have been examined before the court and they had deposed the prosecution case, which goes to show that the appellant was involved in smuggling of commercial quantity of charas. He has submitted that all the requisite procedure was followed and thereafter the appellant was arrested and the trial court conducted the trial and after adducing the evidence on record, the court has convicted appellant under section 8 (c)/20(b)(ii)(C) and Section 25 NDPS Act, 1965. The judgment is justified and passed after adducing the evidence of record and no interference is called for. Learned counsel for DRI has relied upon catena of judgments which are as follows: -

(i) Azeemul Hasan v. Union of India AIROnline 2022 All 3821 ;

(ii) Sridham Adhikari v. Union of India AIROnline 2021 All 6814;

(iii) Manoj Kumar Soni v. Union of India AIROnline 2020 All 2434 ;

(iv) Chandra Shekhar Prasad Sah v. Union of India AIROnline 2022 All 1484 ;

(v) Rajendra Singh v. State of U.P. Lucknow and others 2017 (6) ALJ 482; (2017) 6 All WC 6151

(vi) Fuman Singh v. Union of India AIROnline 2022 All 3819 ;

(vii) Mukesh Kumar v. Union of India AIROnline 2022 All 3820 ;

(viii) Raj Kumar Savita v. Union of India 2021 (3) ALJ 748; AIROnline 2021 All 522.

21. After hearing learned counsel for both parties, it is apparent that PW3 was examined by amicus curiae of Lakshman Sharma co-accused on 23.1.2019. The proceeding dated 23.01.2019 itself indicates that Lakshman Sharma co-accused was represented through amicus curiae. The order sheet indicates that on 11.02.2019, the case was called out and on the oral statement of learned counsel for the prosecution, case was fixed for statement under Section 313 Cr.P.C. The entire order sheet dated 18.12.2018, 11.1.2019, 23.1.2019, 29.01.2019, 11.02.2019 clearly indicates that there was no counsel representing the case of the appellant and the proceeding of PW 3 was closed on the oral statement of ADGC without affording opportunity by providing any counsel to the appellant to cross examine PW3.

22. Learned counsel for DRI has filed counter affidavit dated 16.2.2023 in response to the supplementary affidavit dated 28.1.2023 of the appellant and in paras 3, 4 and 5 clearly indicates that he was not provided amicus curiae to represent his case because his pairokar has left pairvi. The said paras 3, 4 and 5 of the affidavit is replied by the DRI vide affidavit dated 16.2.2023 and in paras 2,3 and 4 of the affidavit, there is no denial that the appellant was provided *amicus curiae* to represent his case.

23. The Supreme Court has dealt the issue of *amicus curiae* of under trial regarding the representation of case through counsel. The case of Ramanand @ Nand Lal Bharti (Supra). It is thus clear that trial has become fatal and in absence of counsel, the proceedings were completed and appellant was not afforded amicus curiae therefore, trial at the time of adducing evidence of PW3 and the second framing charge which was done on 04.07.2019 and even Section 313 Cr.P.C. proceeding was recorded in absence of appellant's counsel. Article 21 of the Constitution of India is completely violated and trial was conducted without affording opportunity to lead the evidence through counsel.

24. The record reveals that on 04.07.2019 the charges were framed second time under Section 25 of NDPS Act. The charges were read and the accused pleaded not guilty and requested for trial. However, order dated 04.07.2019 further indicates that on the statement of counsel for prosecution evidence was closed and the judgment was passed on 05.07.2019 just after one day without leading the evidence after framing of charges, second time. The order dated 04.07.2019 available on record is quoted below :-

न्यायालय–षष्टम अपर जिला जज/विशेष न्यायाधीश/
पी0सी0एक्ट, (यूपीएसईबी) लखनऊ।
कि0 केस नं0 38/2015
डीआरआई प्रति सुरेश त्रिवेदी आदि

04.07.2019

वाद पेश हुआ। पत्रावली निर्णय हेतु नियत है। अभियुक्तगण सुरेश त्रिवेदी एवं लक्ष्मन शर्मा मय विद्वान अधिवक्ता उपस्थित है। विशेष लोक अभियोजक भी उपस्थित है।

मामले में निर्णय तैयार करते समय, पत्रावली के अवलोकन से स्पष्ट हुआ कि दिनांक 27.05.2016 को मेरे विद्वान पूर्वाधिकारी द्वारा अभियुक्तगण सुरेश त्रिवेदी एवं लक्ष्मन शर्मा के विरूद्ध एक ही शीर्ष में अपराध अन्तर्गत धारा–8(सी)/20(बी)(पप) (सी)/25 एनडीपीएसएक्ट के अधीन आरोप विरचित कर दिया गया है जब कि उक्त अपराध में धारा–20 व 25 दण्डात्मक उपबन्ध से संबंधित धारायें है जिसमें विधि अनुसार पृथक शीर्ष में आरोप विरचित किया जाना चाहिये था, इसलिये निर्णय से पूर्व उपरोक्त विरचित आरोप में संशोधन करते हुये, उपरोक्त दोनो धाराओं में पृथक– पृथक शीर्ष में आरोप विरचित किया जाना न्यायोचित प्रतीत होता है।

तदनुसार अभियुक्तगण सुरेश त्रिवेदी एवं लक्ष्मन शर्मा के विरूद्ध उपरोक्त आरोप अन्तर्गत धारा–8(सी)/20(बी)(पप)(सी) एवं धारा–25 एनडीपीएसएक्ट के अधीन पृथक–पृथक शीर्ष में आरोप विरचित किया गया। अभियुक्तगण को उक्त आरोप पढ़कर सुनाया व समझाया गया। अभियुक्तगण ने उपरोक्त आरोप से इंकार किया तथा विचारण की मांग की।

विशेष लोक अभियोजक द्वारा पूर्व में ही अभियोजन द्वारा प्रस्तुत साक्ष्य को पढ़े जाने व अन्य कोई साक्ष्य न दिये जाने का तर्क देते हुये, तदनुसार आदेश पत्र पर पृष्ठांकन किया गया है। अभियुक्तगण की ओर से भी किसी साक्षी से

प्रतिपरीक्षा करने हेतु पुनः आहूत किये जाने का अनुरोध नही किया गया है।

तदोपरान्त उभयपक्षों की बहस सुनी गयी। पत्रावली दिनांक 05.07.19 को निर्णय हेतु पेश हो।

ह0 अपठनीय
04.07.19
(डी0एन0 सिंह)
षष्टम अपर जिला जज/
विशेष न्यायाधीश/पी0सी0एक्ट,
(यूपीएसईबी) लखनऊ।

25. The other fact is also very relevant to mention here that the appellant had been arrested on 17.08.2014 and he was sent to jail on 18.08.2014. The appellant is in jail since 18.08.2014 till date and appellant had completed eight years, eight months in jail. The minimum punishment provided under section 8(c)/20(b)(ii)(C)and Section 25 NDPS Act is ten years and maximum punishment is 20 years. It is relevant to mention here that appellant has undergone almost minimum sentence in jail that too without fair trial.

26. After discussing above factual aspect, the findings of the Court are :-

(i) the appellant was not afforded amicus curiae to defend himself during evidence of PW3 and proceeding under Section 313 Cr.P.C. thus trial is fatal and is violative of Article 21 of the Constitution of India.

(ii) the charges framed on 04.07.2019 second time, under section 25 of NDPS Act, was not proved as no evidence was adduced on record and the judgment was passed just one day after i.e. 05.07.2019 thus trial appears to be vitiated.

27. In view of the aforesaid discussion, it appears that trial was badly conducted and is in violation of Article 21 of the Constitution of India and the appellant is undergoing in jail continuously since 18.08.2014 till date and has completed eight years, eight months in jail. Thus, almost minimum sentence of ten years as provided in the relevant provisions of NDPS Act is about to be completed and it would not be a fit case to remand the case to trial Court.

28. So far as prosecution case is concerned, the witness of fact PW1 Sanjeev Katiyar, PW2 Dharmendra and PW3 Abhishek Chatterjee had supported the prosecution case. Their statement before the Court has been recorded and after cross examination, it is found that they have supported the prosecution case. Sections 42, 50 of NDPS Act has been complied with. The examination of prosecution witnesses before the court indicates that their version before the court is the same which has been stated by them during investigation.

29. In view of the aforesaid discussion, it would not be appropriate to remand the matter for fresh trial because more than 8 1/2 years have passed and the appellant is in jail. I am of the view that the maximum punishment of 15 years awarded by court below is liable to be reduced to the minimum sentence i.e up to 10 years.

30. The appeal is **partly allowed**. The conviction is upheld. However, sentence is reduced up to ten years with fine of Rs. One lac under Section 8(c)/20(b)(ii)(C) and in case of default of fine, further six months simple imprisonment will be undergone by the appellant and Rs.One lac fine under section 25 of NDPS Act and in case of

default, four months simple imprisonment shall be undergone by the appellant.

31. The appellant will be set free after completing ten years of sentence, if he is not warranted in any other criminal case.

32. Office is directed to send a copy of this judgment forthwith along with lower court record to the trial Court concerned for necessary compliance.

(2023) 4 ILRA 1055
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.01.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 3773 of 2019
With
Criminal Appeal No. 2914 of 2019

Kishan Veer Singh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Apul Misra

Counsel for the Respondents:
Sri H.M.B. Sinha, AGA

Criminal Law - Indian Penal Code, 1860 – Sections 96, 97, 99, 101, 102, 302/34 & 323/34, - Punishment for murder - Arms Act, 1959 – Section 25 - The Code of Criminal Procedure, 1973 – Sections 161 & 313 –Evidence Act, 1872 – Sections 106, 113B, 134 - Appeal against conviction - Place of occurrence was on door of house of informant, no evidence contrary has been adduced by defence side - As per prosecution, when grass was cut from sugar cane field of Natthu, the accused persons reached informant's house, when informant's son protested, offence was committed - In cross-examination, P.W.1 admittted of no enemity between him and accused persons - Accused persons seen his son plucking the sugar cane, no altercation took place at that time - Affirmed by P.W.6 - No contradiction in ocular evidence adduced by prosecution, deceased sustained firearm injury, resulted into his death and corroborated by medical evidence - Injuries caused to P.W.2, guarantee of his presence at the scene of crime – No contradictions in testimony of P.W.2 - Ocular evidence of two witnesses, corroborate with each other, in light of credible evidence, prosecution was not under obligation to adduce any witness as independent witness – Doctor opined date and time of occurrence, medical evidence corroborates injuries to accused persons - Informant side used private defence, when one fire was shot over deceased, inflicted simple injuries to accused persons – P.W.2 sustained simple injuries, exercise of private defence was never exceeded by informant side - Informant side, entitled for protection u/s 96 IPC - F.I.R., lodged with utmost promptness, no delay in lodging, eliminates chance of false implication - Directions accordingly (Para 25, 26, 27, 34, 42, 44, 46, 51 - 57, 62, 63, 66)

Appeals are dismissed. (E-13)

List of Cases cited:

1. Bikau Pandey Vs St. of Bihar (2003) 12 SCC 616

2. Anil Rai Vs St. of Bihar (2001) 7 SCC 318

3. Deepak Verma Vs St. of H. P. (2011) 10 SCC 129

4. St. of U.P. Vs Chhotey Lal, A.I.R. 2011 SC 697

5. St. of U.P. Vs Krishna Master, 2010 (5) ALJ 423 (SC)

6. Gangadhar Behera & ors. v. St. of Orrisa, (2002) 8 SCC 381

7. St. of Andhra Pradesh Vs S. Rayappa & ors. (2006) 4 SCC 512

8. Shivalingappa Kallayanappa & ors. Vs St. of Karn., 1994 Supp. (3) SCC 235

9. St. of U.P. Vs Kishan Chandra & ors., (2004) 7 SCC 629

10. Chacko Vs St. of Kerala, (2004) 12 SCC 269

11. Jayabalan Vs U.T. of Pondicherry, (2010) 1 SCC 199

12. Ram Bharosey Vs St. of U.P., A.I.R. 2010 SC 917

13. Mehraj Singh Vs St. of U.P., (1994) 5 SCC 188

14. Thulia Kali Vs St. of T. N. reported in (1972) 3 SCC 393

15. Kishan Singh through LRs Vs Gurpal Singh & ors. reported in (2010) 8 SCC 775

16. Sewa Ram & anr. Vs St. of U.P., A.I.R. 2008 SC 682

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

1. Heard Sri Apul Misra, learned counsel for the appellants and Sri H.M.B. Sinha, learned A.G.A. for the State.

2. These Criminal Appeals have been preferred by appellants - Kishan Veer Singh, Natthu Singh and Bachchan Singh against the judgment and order dated 28.3.2019 passed by Additional Sessions Judge / Special Judge (E.C. Act), Budaun in Sessions Trial No.103 of 2003 (State Vs. Kishan Veer Singh and Others) arising out of Case Crime No.190 of 2002 and Sessions Trial No.809 of 2003 (State Vs. Kishan Veer) arising out of Case Crime No.200 of 2002, Police Station Faizganj Behta, District Budaun, whereby the appellant Kishan Veer was convicted and sentenced to undergo imprisonment for life under Section 302 IPC with a fine of Rs.10,000/-, in default thereof, to further undergo six months additional simple imprisonment and appellants Bachchan Singh and Natthu Singh to undergo imprisonment for life under Section 302/34 IPC with a fine of Rs.10,000/- each, in default thereof, to further undergo six months additional simple imprisonment. Further, appellants Kishan Veer Singh, Bachchan Singh and Natthu Singh were convicted and sentenced to undergo four months rigorous imprisonment under Section 323/34 IPC with a fine of Rs.1000/- each, in default thereof, to further undergo one month additional simple imprisonment.

3. The prosecution case, as culled out from the FIR, is that on 25.7.2002, Dinesh s/o informant Bhoop Singh s/o Kallu Singh Yadav had cut some grass from the sugar cane field of Bhoop Singh s/o Gumani, which was taken for agricultural work by Natthu Singh s/o Brijpal Singh, which caused annoyance to the accused persons and at about 6:00 P.M. on that very day, accused persons Kishan Veer, Bachchan and Natthu Singh came over the house of the informant using abusive language. When Girish, son of the informant asked them not to abuse, they assaulted him with lathi and danda. When Bhurey s/o Punni came for rescue, he was also beaten by the accused persons. At about 7:15 P.M., accused Kishan Veer opened fire by his desi Pistol, which inflicted upon the back of Girish resulting into his instantaneous death. The occurrence was witnessed by Mahindra and Harpal. On the written tehrir of informant Bhoop Singh, F.I.R. was lodged on 25.7.2002 at 22:25 P.M. and registration G.D. was prepared. The inquest

of the deceased was performed on 26.7.2002 at 12:30 in the night at the house of the informant and the autopsy was conducted by Dr. V.P. Bhardwaj on 26.7.2002 at 4:00 P.M. and postmortem was prepared.

4. In the autopsy of the deceased, following injuries were found:

1. One firearm wound of entry 4 cm. x 4 cm. on right shoulder. Blackening was present. On dissection, shoulder blade and 2nd , 3rd, 4th ribs were found fractured.

Nerves, vessel, muscles, chest wall were found lacerated, right lung from back side was found badly lacerated. One litre blood in anterior aspect of right side chest cavity and 288 pellets recovered from the wound.

It was opined by the Doctor that the death was caused due to shock and hemorrhage as a result of ante-mortem firearm injury, which was sufficient to cause his death. It was also opined that the death of the deceased might have been occurred on 25.7.2002 at 7:15 P.M.

5. Injured Bhurey was medically examined on 25.7.2002 at 10:53 P.M. by Doctor Shivaram Singh and following injury was found over his body:

1. A lacerated wound of 2 cm. X 0.5 cm. x muscle deep 8 cm. above the wrist joint and the injury was found in the 1/3rd part of the upper part of left hand.

The injury was simple and fresh. It might have been caused by some hard and blunt object. The medical examination was conducted on 25.7.2002 at 19:53 PM.

6. The proceedings of investigation were conducted by the Investigating Officer S.O. Man Singh Yadav and S.O. Rajbir Sharma. During investigation, statement of the witnesses were recorded and site plan was prepared. Murder weapon desi Pistol was also retrieved on the pointing out of accused Kishan Veer and recovery memo and site plan of the place of recovery were also prepared.

7. After completion of the investigation, charge-sheet was filed in the Court against accused Kishan Veer Singh, Bachchan and Natthu Singh under Sections 302, 323, 504 IPC.

8. The investigation of the case under Section 25 Arms Act was handed over to S.I. Gangaram Som of Police Station Faizganj, who after performing the investigation of the case, prepared the site plan and submitted the charge-sheet against accused Kishan Veer Singh under Section 25 Arms Act.

9. The matter, being exclusively triable by the Sessions Court, was committed to the Court of Sessions for trial.

10. Charges under Sections 302, 323/34 of IPC were framed against accused Kishan Veer Singh and under Sections 302/34, 323/34 of IPC against accused Bachchan and Natthu Singh. Charge under Section 25 Arms Act was also framed against accused Kishan Veer Singh. The accused persons pleaded not guilty and claimed to be tried.

11. To bring home the charges against the accused, the prosecution produced in all ten witnesses in oral evidence and they are (P.W.1) Bhoop Singh,

informant/eyewitness, (P.W.2) Bhurey, eyewitness/injured, (P.W.3) Dr. V.B. Bhardwaj, (P.W.4) scribe of FIR constable clerk Ram Pal Singh, (P.W.5) S.O. Rajbir Sharma, second Investigating Officer, (P.W.6) S.O. Man Singh Yadav, first Investigating Officer, (P.W.7) S.I. Gangaram, Investigating Officer of the case under Arms Act, (P.W.8) Dr. Shivram Singh, (P.W.9) Chandrasen Gangawar, witness of recovery of murder weapon and (P.W.10) Sumer Singh, witness of recovery of murder weapon.

12. In documentary evidence, Written Report Ex.Ka.-1, Postmortem Report Ex.Ka.-2, Chik F.I.R. of crime no.190 of 2002 Ex.Ka.-3, Registration G.D. Ex.Ka.-4, Chik F.I.R. of crime no.200 of 2002 Ex.Ka.-5, Seizure Memo of weapon Ex.Ka.-6, Site Plan of crime no.200 of 2002 Ex.Ka.-7, Charge-sheet of crime no.190 of 2002 Ex.Ka.-8, Chik F.I.R. of crime no.200 of 2002 Ex.Ka.-9, Registration G.D. Ex.Ka.-10, Inquest Ex.Ka.-11, Photo Nash Ex.Ka.-12, Challan Nash Ex.Ka.-13, Report to R.I. Ex.Ka.-14, Report to C.M.O. Ex.Ka.-15, Sample Seal Ex.Ka.-16, Site Plan of crime no.190 of 2002 Ex.Ka.-17, Fard of blood stained soil and plain soil Ex.Ka.-18, Site Plan of crime no.200 of 2002 Ex.Ka.-19, Charge-sheet relating to crime no.200 of 2002 Ex.Ka.-20, Medical Report of injured Bhurey Ex.Ka.-21, Medical Report of accused Bachchan Ex.Ka.-22 and Medical Report of accused Natthu Ex.Ka.-23 have been produced.

13. Material Ex.-1 Tamancha and Material Ex.-2 Cartridge have also been produced.

14. The incriminating evidence and circumstances were put to the accused persons and their statements under Section 313 CR.P.C. were recorded. A plea of false implication due to enmity was claimed and it was also specifically stated that at the time of the occurrence, deceased Girish and Dinesh were cutting sugarcane of the accused persons and when protested by the accused persons, Dinesh angrily opened fire, which was inflicted over the body of the deceased Girish. No other person was present at the time of the occurrence.

15. D.W.1 Avnish Singh, Deputy Jailor and D.W.2 Pharmacist Krishna Murari were examined as defence witnesses.

16. While going through the oral evidence available on record, we find, in brief, the following narrations in the testimonies of the witnesses :

P.W.1 Bhoop Singh is the informant and eyewitness to the case and he is also the father of the deceased. Supporting the prosecution version, in his examination in chief, he has stated that the occurrence happened about 13 months back when his son Dinesh had cut some grass from the field of Bhoop Singh, which was taken on rent by accused Natthu. Accused Kishan Veer, Natthu and Bachchan were annoyed at this and at 7:00 P.M., on that very day, they came to his house and started abusing his son Girish and on his protest, they began to beat him by lathi and danda. Accused Kishan Veer opened fire by his desi Pistol, which inflicted his son and he fell down in the Verandah (Aangan) inside the house. The occurrence was witnessed by Bhurey, Mahindra, Harpal, Dinesh, etc. and when Bhurey tried to intervene, he was also assaulted by lathi and danda by accused Bachchan. The informant side also used force by lathi in defence, which inflicted injuries to the

accused persons Natthu and Bachchan Singh and then they fled away. The report was written by Harish Chandra Gupta on the dictation of the informant, which was given to the police station. PW1 has proved the written report as Ext.Ka.-1.

P.W.2 Bhurey is the injured witness who, supporting the prosecution case, has deposed that in the said incident, Girish sustained firearm injury shot by accused Kishan Veer. He himself has sustained injuries of lathi while intervening. He has made a categorical statement that accused Kishan Veer was having desi Pistol, whereas accused persons Bachchan and Natthu had taken lathi and danda. He has also made a specific statement that to defend themselves, they had also used lathi and danda over the accused persons.

P.W.3 Dr. V.P. Bhardwaj has performed the postmortem of the deceased and he has proved the autopsy report as Ext.Ka.-2.

P.W.4 Constable Clerk R.P. Singh is the scribe of the FIR, who has proved chik FIR and registration G.D. as Ex.Ka.-3 and Ex.Ka.-4 respectively and has also affirmed this fact that the FIR was lodged on the basis of the written report given by informant Bhoop Singh at the police station. He has also proved the letter for medical examination of the injured Bhurey as Ex.Ka.-5.

P.W.5 Rajvir Sharma is the second Investigating Officer of the case, who was handed over the investigation on 31.7.2002. In his deposition, he has proved the proceedings of the investigation and the material fact of recovery of murder weapon on the pointing out of the accused Kishan Veer. He has also proved recovery memo, site plan and charge-sheet as Ex.Ka.6, Ka.-7 and Ka.-8 respectively.

P.W.6 S.O. Man Singh Yadav is the first Investigating Officer of the case, who also performed the inquest of the deceased and prepared and proved the inquest report and relevant papers for postmortem as Ext.Ka.-11 to Ext.Ka.-15 and sent the dead body for postmortem under the specimen seal Ext.Ka.-16. Topography of the place of occurrence was mentioned in the site plan Ext.Ka.-17 and memo of taking of blood stained and plain soil was also proved as Ext.Ka.-18.

P.W.7 S.I. Ganga Ram is the Investigating Officer of the case relating to Arms Act. He has performed the proceedings of the investigation, prepared the map of the place of recovery of murder weapon desi Pistol as Ext.Ka.-19 and also stated that matter ended into charge sheet and proved the charge sheet as Ext.Ka.-20.

P.W.8 Dr. Shiv Ram Singh has medically examined accused Bachchan Singh and Natthu on 26.7.2002, who were taken to him by the police and proved the injury reports as Ext.Ka.-22 and Ext.Ka.-23.

P.W.9 Constable Chandrasen Gangwar is the witness of the recovery of murder weapon. Corroborating the prosecution version, he has deposed that one desi Pistol 12 bore was retrieved on the pointing out of the accused Kishan Veer from the sugar cane field of Bhoop Singh, which was concealed in the root of the Neem Tree existing there along with one khokha of 12 bore. He has affirmed the

memo of recovery Ext.Ka.-6 and has also proved the desi Pistol and cartridge as Material Ex.-1 & 2.

P.W.10 Sumer Singh is the public witness of the recovery of murder weapon Desi pistol, who has also supported the factum of recovery of murder weapon on the pointing out of accused Kishanvir and has identified his signature over the memo of recovery as Ext.Ka.-6.

C.W.1 Steno Ravi Prakash Sharma has affirmed this fact before the Court that on the dictation of the Presiding Officer concerned, he had noted down the charge under Section 323/34 IPC and also typed the same against all the accused persons.

D.W.1 Deputy Jailor Avnish Singh has been produced by the defence, who has deposed on the basis of under trial register relating to District Jail, Budaun and stated that on 26.7.2002, accused persons Natthu son of Brij Pal and Bachchan son of Natthu were admitted in the District Jail after their being medically examined at C.H.C. , Bisauli.

D.W.2 Krishan Murari Singh, Pharmacist, posted in District Jail, Budaun appeared before the court alongwith the injury register relating to under trial and convicted accused persons and on the basis thereof, he has stated that injured accused persons Bachchan and Natthu had been examined on 27.7.2002 by the then Medical Officer and they have been medically examined in C.H.C., Bisauli. Attested photo stat copy of this register has been filed by this witness before the court.

17. It is settled law that in a criminal trial, the burden of proof always lies upon the prosecution and the prosecution is under obligation to prove its case beyond all reasonable doubts unless under some circumstances, the onus shifts upon the defence e.g. with the aid of Section 113 B of the Evidence Act, which consists of the provision regarding presumption as to dowry death or Section 106 of the Indian Evidence Act where the burden of proof of the fact, which is specially within the knowledge of any person, lies upon him or in any like circumstances. So far as the present case is concerned, the factual scenario avows that the burden of proof is upon the prosecution.

18. The impugned judgment and order has been assailed by the learned counsel for the appellants on various grounds :

At the very outset, it has been argued that the place of occurrence in this case is uncertain and in the factual matrix of the case, no occurrence happened at the house of the informant, rather it happened in the sugar cane field of accused Natthu. It has been vehemently argued that the accused persons had no motive to do away with the deceased and as a matter of fact, the deceased died due to firearm injury inflicted by Dinesh son of the informant himself. The said Dinesh opened fire upon accused Kishan Veer with intention to kill him, but he anyhow managed to save himself and the firearm injury inflicted upon Girish, which was proved fatal for him and resulted into his instantaneous death in the sugar cane field. It was also impressed upon that the incident occurred in the dark night at about 9:00 P.M. and not at 7:00 P.M. in the evening. The prosecution has miserably failed to explain the injuries occurred upon accused Natthu Singh and Bachchan Singh, who were assaulted by the informant side. The manner of assault is improbable. The total

prosecution story is concocted and false and the factum of retrieving the alleged murder weapon at the pointing out of accused Kishan Veer is a false story. There is no FSL report on record to connect the alleged weapon, desi Pistol with the offence charged. No independent witness to the occurrence was produced, whereas the prosecution claims that the occurrence was witnessed by some villagers also. The ocular evidence is not reliable and trustworthy. There are several loop holes in the prosecution story and the prosecution is never entitled to take benefit of the weaknesses of defence version. The learned trial court has discarded the value of the defence evidence adduced by the accused persons. On some other grounds, the impugned judgment has been assailed by the learned counsel for the appellants apart from the above specific grounds.

19. Per contra, learned A.G.A. has argued that the impugned judgment and order is a genuine one, passed on the basis of reasonable and proper scrutiny of the evidence on record. The points raised by the appellants are baseless. The offence committed by the appellants is very grievous in nature, which has been proved by reasonable and cogent ocular evidence corroborated by the medical evidence as well. The appeal has no force and is liable to be dismissed.

20. The place of occurrence is always a significant factor in preparing the foundation of the prosecution case and it can be held without any hesitation that if the place of occurrence is found fluctuating, it always adversely affects the truthfulness of the prosecution story. In the case in hand, the prosecution has come with a specific case that the occurrence happened at the door of the informant's house, whereas contrary to it, the accused persons, in their written statement under Section 313 (5) Cr.P.C. have mentioned that the occurrence happened in the sugar cane field of accused Nathu.

21. P.W.1 Bhoop Singh, informant and eyewitness to the incident, has made a categorical statement that at the time of the occurrence, Kishan Veer, Natthu and Bachchan Singh came over his house where his son Girish was standing and the occurrence happened at the same place. Accused Kishan Veer opened fire upon Girish, which inflicted upon his body and he fell down in the verandah (aangan) of the house from the entry door of his house. In the cross-examination, he has specifically stated that when sugar cane was plucked by his son, no marpeet took place and even his son Dinesh did not tell him about any quarrel at the time of plucking the sugar cane. Further, he has stated that he did not see any blood at the place of occurrence neither on the front of the door nor inside the house. His son was shot, over the door of his house. He has further stated that the accused persons also sustained injuries and bleeding took place, but no blood dropped over the ground. The right hand of injured Bhurey was also full of blood, but it was soaked in his clothes and hand.

22. P.W.2 Bhurey, the injured has also stated that all the three accused came to the door of Girish and the occurrence took place at the same place. When firearm injury was inflicted upon the body of Girish, he fell inside his bakhri. In his cross examination, he states that both the parties were bleeding on account of injuries inflicted by lathis. Girish, Dinesh, Harpal, Bhoop Singh and he himself received lathi injuries and the blood oozed out and all this

happened at the door of the house of Bhoop Singh.

23. P.W.6, who is the first investigating officer of the case and has prepared the site plan Ex.Ka.-17 on the pointing out of the informant, has taken the blood stained and plain soil from the place of occurrence. On being suggested by the defence, he has categorically affirmed that the place of occurrence was at the house of the informant, as shown in the site plan, and not in the sugarcane field.

24. The topography of the place of occurrence finds place in the Site Plan Ex.Ka.-17, wherein it has been explicitly shown that the occurrence happened at the door of the house of the informant Bhoop Singh and after receiving firearm injury, the deceased fell down in his house at place "A'. The place, wherefrom the witnesses saw the occurrence and tried to rescue as well as the place of entry and exit of the accused persons has also been shown in Ex.Ka.-17. P.W.1, who has been cross-examined on the point of topography of the place of occurrence, makes the statement similar to that shown in the Site Plan Ex.Ka.-17 and there is no contradiction between the two. If we examine the defence version that the occurrence took place in the sugar cane field of accused Natthu, we find that no evidence in support of the aforesaid contention has been adduced by the defence, which falsifies the defence contention. It is quite possible that under the impact of the fatal incident, the informant (P.W.1) was unable to see any blood over the place of occurrence, but the investigating officer (P.W.6) has made a categorical statement that blood stained soil was taken by him from the place of occurrence and he also proves the memo thereof as Ex.Ka.-18. None of the prosecution witnesses says that the occurrence took place in the sugar cane field and the fact, which emerges out from the analysis of the evidence on record, is that prior to the present occurrence, the sugar cane was plucked from the field of accused Natthu, but no such occurrence took place there.

25. On the basis of the aforesaid discussion, we find that evidence on record elucidates that the place of occurrence was on the door of the house of the informant Bhoop Singh and no evidence contrary to that has been adduced by the defence side.

26. Motive, as we gather from umpteen of cases, takes a back seat in a case of direct ocular evidence and the reason behind it is that it is always in the mind of the accused as to why he is committing any offence and the prosecution in so many cases is unable to explain the mental state behind the offence committed. Thus, motive is never a sine qua non for the commission of a crime. However, in the factual scenario of this case, the motive has been assigned in the F.I.R. itself. The prosecution comes forward with the specific story that when grass was cut from the sugar cane field of Natthu, the accused persons came over the house of the informant using abusive language and when his son Girish protested to that, the offence was committed. P.W.1, who is the father of the deceased, has made similar statement in his deposition. In his cross-examination, P.W.1 admits that there is no enemity between him and the accused persons. Kishan Veer, Bachchan and Natthu had seen his son plucking the sugar cane, but no altercation took place at that time.

27. P.W.6, the investigating officer, in his examination, has affirmed this fact that

the dispute arose between the parties over the issue of cutting the grass by Dinesh, the brother of the deceased, which supports the prosecution version. In this way the prosecution has also proved the motive of the case, as mentioned in the FIR. This fact also gets support from the defence version also when the accused persons in their statement under Section 313 Cr.P.C have clearly stated that the dispute arose when Girish and Dinesh were cutting sugar cane from the field of the accused persons.

28. The trial Court has discussed the various aspects of motive and enmity existing between the parties in the present case. Reliance has been placed upon **Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616** by the learned State counsel, wherein it has been held that when the direct evidence establishes the crime, motive is of no significance and pales into insignificance.

29. In **Anil Rai Vs. State of Bihar (2001) 7 SCC 318** it has been held that enmity is a double edged weapon, which can be a motive for the crime as also the ground for false implication of the accused persons.

30. There are catena of decisions on the point that in a case based upon the eye witness account, the motive loses its significance. In **Deepak Verma Vs. State of Himachal Pradesh (2011) 10 SCC 129**, it has been held as under.

"".....Proof of motive is not a sine qua non before a person can be held guilty of commission of crime. Motive being a matter of mind, is more often than not difficult to establish through evidence."

31. It is desirable for the prosecution to ascertain whether the medical evidence is in corroboration with the ocular evidence or not. P.W.1 and P.W.2 both state in clear terms that the accused Kishan Veer opened fire upon the deceased, which inflicted upon his back and was proved fatal to him and he died when after receiving the gunshot injury, he ran into the house and fell in the verandah (aangan) there.

32. P.W.1 and P.W.2 make the similar statement in respect of the fire made by accused Kishan Veer and its injury inflicted upon the deceased. P.W.2 also states that he too received injuries from lathi, which accused Bachchan and Natthu were having. P.W.1, at the same time, states that when the accused persons came there, they started beating his son Girish by lathi and danda and then accused Kishan Veer opened fire upon him. Further, he states that when his son was attacked by lathi, he tried to save himself in the shade of the wall and the lathi blows were inflicted upon the wall. However, P.W.7, the investigating officer, has denied that witness Bhoop Singh had made any such statement to him. P.W.1 also states that the fire was made at a distance of one step. P.W.6, the investigating officer, has stated that in the photo nash of the deceased, it has been shown that the firearm injury was inflicted over the back of right shoulder of the deceased. However, he states that he has not mentioned the distance where from the deceased was fired.

33. This statement cannot be taken as adverse to the prosecution case as P.W.1 has made a categorical statement that the fire was made from a distance of one step. It is noteworthy that the deceased has not received any lathi injury, but only one firearm injury, which was caused by accused Kishan Veer. Although the other two co-accused persons were having lathis

and the same position we find in respect of statement of P.W.1 where he has been contradicted with his statement under section 161 Cr.P.C. and we also note that the aforesaid contradiction also does not falsify the prosecution case.

34. In the aforesaid context, the medical evidence, if examined, says that the deceased sustained only one injury and that was the firearm entry wound over his right shoulder wherein blackening was present and the ribs were fractured and a total of 288 pellets were recovered from the wound. While proving the autopsy report as Ex.Ka.-2, the Doctor (P.W.3) states that the death is caused due to shock and haemorrhage as a result of antemortem firearm injury. It is pertinent to mention here that finding of blackening over the wound is a proof of the fact that the fire was shot from a close range. P.W.3 says that the blackening might have caused if the fire was made from a distance of one or two feet. This opinion is corroborated by the testimony of P.W.1, who says that fire was made from a distance of one step. It is true that P.W.3 states that no injury of lathi or danda was found over the body of the deceased and the learned counsel for the appellants highlighting this point has argued that according to the prosecution evidence, the deceased had also sustained injuries of lathi and danda, but the medical evidence speaks contrary to it, but we find no material contradiction in this respect. P.W.1 has stated that the deceased was attacked with lathi also and anyhow he managed to save him from the lathi blows by hiding himself in a shade of a wall, which was higher than his height. It is true that P.W.2 states that the deceased Girish also sustained injuries by lathi, but specific statement is found in his deposition that the deceased was fired by accused Kishan Veer and died. The statement of P.W.2 regarding lathi blows over the deceased may simply be taken as an exaggerated statement, which is negligible because the rustic witnesses have a normal tendency to exaggerate the situation, but that does not make their whole testimony as unreliable. There is no contradiction in the ocular evidence adduced by the prosecution that the deceased sustained firearm injury, which resulted into his death and the medical evidence corroborates the same.

35. The theory promulgated in respect of appreciation of evidence of rustic eyewitness and illiterate villager witness in **State of U.P. Vs. Chhotey Lal, A.I.R. 2011 Supreme Court 697 and State of U.P. Vs. Krishna Master, 2010 (5) ALJ 423** (Supreme Court) very well applies in the facts of this case, which means to say that in case of rustic eyewitness, the Court should always keep in mind his rural background and the scenario in which the incident had happened and should not appreciate the evidence from rational angle and discredit his otherwise, truthful version on technical grounds. It should also be taken into account that where the rustic eyewitness of murder was subjected to the grueling cross-examination for many days, inconsistencies are bound to occur in his evidence and they should not be blown out of proportion. The Court should also consider this aspect that such rustic eyewitness cannot be expected to such precision the exact distance / direction from which he had witnessed the incident and the description of incident happened in a few minutes and his evidence cannot be rejected.

36. P.W.2, in this case, has not been cross-examined in one day and has been called on subsequent dates also as appears

from the record of the case. It deems proper to us that the ocular version of eyewitnesses in this case should be taken in light of the aforesaid legal theory.

37. Apart from this, we can safely rely upon the Apex Court judgment in **Gangadhar Behera and Others v. State of Orrisa, (2002) 8 SCC 381** wherein it has been held as under.

"Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno, falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See Nisar Ali v. State of U.P. [AIR 1957 SC 366 : 1957 Cri LJ 550].

38. P.W.2 Bhurey, is the injured witness. He has also been medically examined by P.W.8 on 26.7.2002. He, in his deposition, states that when he was trying to defend himself, he also sustained lathi injuries and bleeded and accused Bachchan and Natthu were having lathi and danda. P.W.1 corroborates this fact that in the incident, Bhurey received lathi injuries and his right hand was bleeding. P.W.8 proves the injury report of injured Bhurey as Ex.Ka.-21. He has found a lacerated wound of 2 cm. x 5 cm. x muscle deep 8 cm. above the wrist joint and the injury was found in the 1/3rd part of the upper part of left hand. The injury was simple and fresh. It might have been caused by some hard and blunt object. The medical examination was conducted on 25.7.2002 at 19:53 PM.

It is pertinent to mention here that the injured Bhurey has been medically examined at C.H.C., Bisauli on the basis of letter of injury (chitthi majroobi) dated 25.7.2002, Ex.Ka.-5 prepared by P.W.4 at the time of lodging of the F.I.R.

39. A scrutiny of the aforesaid evidence takes us to the logical conclusion that the prosecution case is fully supported by the medical evidence.

40. The prosecution often has to face a challenge as to the non production of independent witnesses regarding any criminal activity. Answering to the appellants' plea in this regard, the learned A.G.A. has vehemently stated that though several persons of the village were present at the time of occurrence, the prosecution was not under obligation to produce all of them. In the F.I.R. itself, it has been mentioned that at the time of the occurrence, the villagers Bhurey, Mahindra and Harpal reached there and exhorted the accused persons. It was stated by P.W.1 and P.W.2 that during the course of occurrence, P.W.2 also got injury by use of lathi. P.W.1, in his cross-examination, admits that all the witnesses belong to his family and caste. Witness Harpal is the real brother of Mahindra and Bhurey happens to be the member of his family. To put a glance over the charge Ex.Ka.-20, we find that many witnesses have been named as ocular witnesses of the incident e.g. Surnam, Dinesh, Mahesh, Harpal, Bhurey, Smt. Sridevi, Brahmdevi, Sukhdei etc. Out of the aforesaid witnesses, one injured

Bhurey has been examined as P.W.2 apart from the informant P.W.1 Bhoop Singh.

41. The contention arose by the learned counsel for the appellants find its answer in **State of Andhra Pradesh Vs. S. Rayappa and Ors. (2006) 4 SCC 512,** wherein the Hon'ble Supreme Court examined several aspects of a criminal trial and this fact was also taken into account as to why independent witnesses ignore to depose in favour of the prosecution and in what circumstances the probability of false implication may be ruled out. It was also clarified as to why the prosecution in so many cases is bound to rely upon the witnesses, who happen to be the relative to the deceased (victim). It was held in para 6 and 7 as under.

"6.....By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons.

7. On the contrary it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination. In such a situation, the only natural witness available to the prosecution would be the relative witness. The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously. The High Court has brushed aside the testimony of PW 1 and PW 2 on the sole ground that they are interested witnesses being relatives of the deceased."

42. As discussed above, P.W. 2 Bhurey is the injured witness. Undoubtedly, the testimony of an injured witness is always accorded a special evidentiary status.

43. In **Shivalingappa Kallayanappa and Others Vs. State of Karnataka, 1994 Supp. (3) SCC 235,** it was held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies for the reason that his presence at scene stands established in case it is proved that he suffered the injury during the said incident.

Similar dictum of law was reiterated in **State of U.P. Vs. Kishan Chandra and others, (2004) 7 SCC 629** by observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should

be relied upon *[vide Krishan v. State of Haryana (2006) 12 SCC 459].*

44. We may reiterate that P.W.2 Bhurey, the injured witness, has rightly been relied upon by the trial court and injuries caused to him is an inbuilt guarantee of his presence at the scene of the crime and also because being an injured person, he will not want to let his actual assailants to go unpunished merely to falsely implicate a third party for the commission of the offence. We also do not find any major contradictions or discrepancies in the testimony of P.W.2.

45. It is also pertinent to mention that the law of evidence does not require in particular, number of witnesses to be examined in proof of a given fact, as is evident from the language of Section 134 of the Evidence Act. It was so pronounced in **Chacko Vs. State of Kerala, (2004) 12 SCC 269** that Section 134 of the Evidence Act, 1872 clearly states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of a single witness if he is wholly reliable. Corroboration may be necessary when he is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained.

46. In the case in hand, we have ocular evidence of two witnesses, who corroborate with each other and in the light of the credible and reliable evidence, the prosecution was not under obligation to adduce any other witness in the form of an independent witness.

47. In this context, we can quote **Jayabalan Vs. U.T. of Pondicherry, (2010) 1 SCC 199** wherein the Hon'ble Supreme Court had occasion to consider whether the evidence of interested witness can be relied upon and the Court held as under.

"23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court, while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

Taking a similar view in **Ram Bharosey Vs. State of U.P., A.I.R. 2010 SC 917,** the Hon'ble Supreme Court clarifying the dictum of law held that close relative of the deceased does not, per se, become an interested witness. The law relating to appreciation of evidence of an interested witness is well settled, according to which the version of an interested witness cannot be thrown over board, but has to be examined carefully before accepting the same.

48. In the written statement filed by the accused persons under Section 313 (5) Cr.P.C. it is stated that at the time of the occurrence, which happened in the sugar cane field when Girish and Dinesh were cutting the sugar cane crop and the same was protested by accused Bachchan, other companions of Girish and Dinesh came over there and they assaulted over accused

Nathu and Bachchan Singh with lathi and danda. Kishan Veer was not present at that time and as soon as he came, Dinesh opened fire upon him which unfortunately inflicted upon Girish, who died in the sugar cane field. It is further stated that the accused persons were having no lathi and no lathi injury was caused to Bhurey. However, the report from the accused side was not lodged by the police and they were falsely implicated in this matter. It is further stated that although the accused persons Natthu and Bachchan Singh were medically examined, but the police, with an ulterior motive, did not prepare the medical report in proper manner.

49. P.W.8 in his deposition states that on 26.7.2002, when injured Bachchan Singh and Natthu were brought to C.H.C., Bisauli by Home Guard Atar Singh, he had medically examined them and he has proved their injury report as Ex.Ka.-22 and Ex.Ka.-23. He states that following injuries were found over the body of Bachchan Lal s/o Nathu :

1. Lacerated wound measuring 04 cm. x 0.5 cm. x scalp deep on u-side head which is 05 cm. above the left eye brow. Margins are lacerated irreglar inverted. Bleed on touch.

2. Contusion measuring 09 cm. x 2 cm. on right shoulder which is 02 cm. medial to the right shoulder joint. Shape is cylindrical. Oblique tenderness present. Injury is kept under observation.

As per opinion of the doctor, all the injuries are caused by some blunt and hard object and are simple in nature except injury no.2 which is kept under observation and advised x-ray of right shoulder joint for any bony injury.

50. In the same manner, following injuries were found over the body of Natthu s/o Brij Pal Singh :

1. Lacerated wound measuring 02 cm. x 0.5 cm. x scalp deep on right side head which is 07 cm. above the right eye brow. Margins are lacerated irreglar inverted. Bleed on touch.

As per opinion of doctor, injury is caused by some blunt and hard object and is simple in nature. Duration is fresh.

P.W.8 has further opined that the injuries might have been caused by lathi or any hard object on 25.7.2002 at 7:15 P.M.

51. We have considered this fact that date and time of the present occurrence is said to be on 25.07.2002 at 7:15 P.M. and the same has been opined by the doctor also and hence the medical evidence also corroborates this fact that the injuries to the aforesaid two accused persons might have been inflicted in the occurrence of this case.

52. In this context, it is explicit to scrutinize the evidence of P.W.2, the injured witness, who deposes that when he was trying to defend themselves, he also sustained lathi injuries. They had also used lathi and danda in their defence over accused Natthu and Bachchan. Both the sides were using lathi. Girish was having danda and accused Kishan Veer was holding tamancha and both were attacking to each other.

53. P.W.1 also states that when the witnesses were trying to pacify the accused persons, Bhurey was assaulted by lathi and danda by accused Bachchan. He has admitted that when they used lathi in their

defence, accused Nathu and Bachchan sustained injuries. This witness states that the deceased Girish made no effort to defend himself rather lathi was used by Dinesh, Harpal, Mahindra and Bhurey and by him as well. A total of 10 or 12 blows of lathi were inflicted by them due to which the accused persons also got injured. However, Harpal, Mahendra and he himself sustained no injury, but the injuries of Dinesh were not visible and Bhurey also got injured and the injury was bleeding. He also admits that the lathi, by use of which he has defended himself, is still with him. He had used the lathi by throwing it.

54. P.W.6, the investigating officer, has stated that accused Natthu and Bachchan were arrested in the same night at 11:00 P.M. and they were medically examined at hospital.

55. Apart from P.W.8, who medically examined the accused persons Nathu and Bachchan, the depositions of D.W.1 and D.W.2 are also on record. D.W.1 Avnish Singh, the Deputy Jailor has affirmed this fact that on 26.7.2002, accused Natthu and Bachchan were admitted in the district jail in connection with the present case. It was mentioned in the under trial register, which he produced before the court that they were medically examined at C.H.C. Bisauli. Likewise, D.W.2 Krishan Murari Singh, Pharmacist, District Jail, Budaun has also affirmed this fact that in the injury register relating to under trial and convicted accused persons, the medical examination of Bachchan Lal and Natthu at C.H.C., Bisauli is mentioned.

56. In the light of the aforesaid evidence, we find that the prosecution comes with a specific case that when the accused persons attacked over the son of the informant, the informant and his witnesses trying to defend themselves also used force over the accused persons with lathi and danda and in that fight, accused persons Natthu and Bachchan sustained injuries. They were medically examined by Government doctor at the instance of the police and P.W.8 states that the injuries sustained by both the accused persons were simple and fresh and it might have been caused on 25.7.2002 at 7:15 P.M. The medical examination of Bachchan Lal and Natthu was conducted on 26.7.2002 at 12:30 P.M. and 12:50 P.M. respectively.

57. Hence, we find that the prosecution is not silent over the issue of injuries sustained by the accused persons Bachchan Lal and Natthu nor this fact has been concealed by the prosecution witnesses, rather it is clearly buttressed by the evidence as to how both the accused persons sustained injuries.

58. The sequence of incident in this case as came into light, is that when accused Kishan Veer taking desi pistol, alongwith the co-accused Natthu and Bachchan having lathi and danda with them, came over the house of the informant, a fire was made by accused Kishan Veer upon the deceased and he fell down. The informant alongwith Bhurey, Mahendra, Har Pal, Dinesh etc. tried to rescue and in the meantime, accused Bachchan also applied lathi over the injured Bhurey and then the informant side, to defend themselves, used lathi over the accused persons and co-accused Natthu and Bachchan sustained injuries. This sequence has been narrated by P.W.1 in his deposition and is well corroborated by the eyewitness / injured P.W.2 Bhurey. In this backdrop, the informant and his fellows had certainly a reasonable apprehension

that if they do not defend themselves, they might also be caused injuries by the accused persons, who were having desi pistol, lathi and danda.

59. Section 96 of Indian Penal Code provides specific provision as to "Nothing is an offence which is done in the exercise of the right of private defence."

In the same fashion, Section 97 of Indian Penal Code also provides that "Every person has a right, subject to the restrictions contained in Section 99, to defend - (First) - His own body and the body of any other person, against any offence affecting the human body....."

However, Section 99 of Indian Penal Code is required to be referred here, which provides as under.

"99. - Acts against which there is no right of private defence.--There is no right of private defence against an act, which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.

There is no right of private defence against an act, which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised.--The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.--A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows or has reason to believe, that the person doing the act is such public servant.

Explanation 2.--A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded."

60. For the sake of better appreciation of the facts of the case, a perusal of Sections 101 and 102 of Indian Penal Code is also desirable. The duo Sections provide as under.

101. When such right extends to causing any harm other than death.--If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in Section 99, to the voluntary causing to the assailant of any harm other than death.

102. Commencement and continuance of the right of private defence of the body.--The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to

commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

61. Hence, we do not find ourselves in agreement with the plea raised by the learned counsel for the appellants that the injuries sustained by the accused persons Natthu and Bachchan remained unexplained and the prosecution has failed to accord any plausible explanation to the injuries sustained by both the accused persons.

62. Now, if we return to the facts and circumstances of the case, we gather from the evidence adduced on record that the informant side started using their right of private defence when one fire was shot over the deceased and the two accused persons were aggressive with lathi and danda in their hands. It is very pertinent to mention that when the son of the informant fell down after receiving the gunshot injury, it was very natural and probable for the informant side to have a reasonable apprehension that the accused might have fired again, which could be fatal for anyone and they had also under reasonable apprehension that by use of lathi and danda, they could further inflict injuries to any person from the informant side and this reasonable apprehension forced the informant and his fellows to defend themselves and in exercise of private defence, they inflicted simple injuries to the accused persons Bachchan and Natthu. It is also to be mentioned that injured Bhurey has also sustained simple injuries in the occurrence and thus we find that exercise of right of private defence was never exceeded by the informant side and they genuinely used their right of private defence in order to defend themselves as soon as a reasonable apprehension of danger to the body arose in their mind.

63. P.W.1 states in clear terms that when accused persons Natthu and Bachchan sustained injuries, all the accused persons fled away. It is nowhere deposed in the ocular version of the case that the accused persons were chased by the informant side or when they were fleeing away, any further attempt was made by the informant side to attack over them. Thus, the informant side, no doubt, inflicted injuries upon the bodies of accused persons Natthu and Bachchan, but the same was done in the exercise of their right of private defence, which was never exceeded and was used in a controlled and required manner and at this juncture, we find a proper and plausible explanation of the injuries inflicted upon the two accused persons and we are also of the considered view that for infliction of the injuries to two accused persons, the informant side is entitled for the protection granted under Section 96 of the Indian Penal Code.

64. F.I.R. of the case is prompt. The occurrence happened on 25.7.2002 at 7:15 P.M. and the F.I.R. was lodged on the same day at 22:25 P.M. about 3 hours after the incident.

65. The F.I.R. and registration G.D. has been proved in evidence as Ex.Ka.-3 & Ka-4 and the written report of the case, which was dictated by the informant Bhoop Singh to Harish Chandra Gupta and subsequently read over to him, has been proved as Ex.Ka.-1 by P.W.1 Bhoop Singh, the informant. Hence the circumstances regarding recording of the F.I.R. are natural and genuine.

66. Hence in this case, the F.I.R. was lodged with utmost promptness and

virtually there was no delay in lodging the same, which eliminates the chance of false implication.

67. In **Mehraj Singh Vs. State of U.P., (1994) 5 SCC 188**, while emphasising the importance of recording a prompt F.I.R., the Hon'ble Supreme Court observed as under-

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story."

In **Thulia Kali Vs. State of Tamil Nadu reported in (1972) 3 SCC 393** the Hon'ble Supreme Court observed as under.

".....first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused."

Similarly, in **Kishan Singh through LRs Vs. Gurpal Singh and others reported in (2010) 8 SCC 775** the Supreme Court held that "Prompt and early reporting of the occurrence by the informant with vivid details gives assurance regarding truth of its version. In case, there is some delay in recording the FIR the complainant must give an explanation for the same. Undoubtedly, delay in lodging FIR does not make the complainant's case improbable when such delay is properly explained."

68. It has been impressed upon by the learned counsel for the appellants that the alleged recovery of the murder weapon from the pointing out of appellant Kishan Veer is totally false and the alleged murder weapon - the desi pistol was never sent for any examination to forensic laboratory and the learned trial court has found that it was not used in the commission of the crime and a benefit has been sought for in favour of the appellants on this ground also.

69. A perusal of the record shows that P.W.5, P.W.9 and P.W.10 are the witnesses of the recovery of murder weapon on the pointing out of accused-appellant Kishan Veer and out of them, P.W.10 is said to be an independent public witness of recovery and P.W.9 has proved the desi pistol as Material Ex.-1 and khokha cartridge as Material Ex.-2.

70. In connection with the Arms Act case, the F.I.R., registration G.D., place of recovery of murder weapon and charge-sheet have been proved in evidence. However, the learned trial court, while dealing with the charge under Section 25 Arms Act, has mentioned in the impugned judgment and order that earlier a report regarding demolition of the case property was produced by the prosecution, but subsequently the case property was

produced before the Court and was proved as Material Ex.-1 & 2.

71. We also find that the Investigating Officer of the case P.W.5, in his examination-in-chief, has stated that the case property was demolished on 18.01.2007 and a report thereof has been sent by HCP 165 Tejpal Singh of Sadar Maalkhana. The said report has been filed on record by P.W.5, whose statement was recorded before the court on 21.04.2015. However, P.W.9, who was subsequently produced before the court, has proved the desi pistol and khokha cartridge as Material Ex.-1 & 2 respectively. The learned trial court has emphasized on this situation and correctly opined that this makes the prosecution story highly suspicious so far as the recovery of murder weapon is concerned.

72. The prosecution sanction by the District Magistrate is a sine qua non to launch prosecution under Section 25 Arms Act, but the same was also not proved by the prosecution, which is a prominent dent in the prosecution case under the Arms Act.

73. We concur with the learned trial court that charge under Section 25 Arms Act in the aforesaid circumstances is not proved beyond reasonable doubt and accordingly the trial court has rightly acquitted the appellant Kishan Veer under Section 25 Arms Act.

74. On the basis of aforesaid discussion, analysis and scrutiny of the evidence on record and also keeping in view the relevant laws governing this case, we are of the considered view that the learned trial court has not committed any legal or factual error in convicting the accused-appellant Kishan Veer under Section 302 IPC and accused-appellants Natthu and Bachchan under Section 302/34 IPC. The evidence on record is explicit on the point that the crime was committed by these two appellants in furtherance of common intention of all and hence they are also liable for the offence with the aid of Section 34 IPC as "The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself", as held in **Sewa Ram and Another Vs. State of U.P., A.I.R. 2008 SC 682**. The conviction of the all the aforesaid three accused-appellants under Section 323/34 also requires no interference. However, accused-appellant Kishan Veer has been rightly acquitted under Section 25 Arms Act. No perversity is found in the impugned judgment and order either on any legal or factual point and we have no option but to concur with the learned trial court and hence the conviction and sentence of accused-appellant Kishan Veer under Section 302 IPC and accused-appellants Natthu and Bachchan under Section 302/34 IPC and conviction and sentence of the all the aforesaid three accused-appellants under Section 323/34 and acquittal of Kishan Veer under 25 Arms Act is hereby affirmed.

75. In the light of foregoing discussions, appeals preferred by accused-appellants Kishan Veer Singh, Natthu Singh and Bachchan Singh lack merit and they are, accordingly, **dismissed** and impugned judgment and order dated 28.03.2019 is confirmed. Accused-appellant Kishan Veer Singh is in jail, however, accused-appellants Natthu Singh and Bachchan Singh are on bail. Their bail bonds stand cancelled. They be taken into

custody forthwith for serving the remaining sentence.

76. Let a copy of this judgment along with trial court record be sent to the Court concerned for necessary compliance. A copy of this judgement be also placed in the connected appeal.

(2023) 4 ILRA 1074
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.04.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Appeal No. 6495 of 2017
And
Criminal Appeal No. 6497 of 2017

Rajveer Singh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Kamlesh Tripathi, Sri Man Bahadur Singh, Sri Kaulesh Tripathi, Sri Noor Mohammad, Sri Kalyan Singh, Sri M.C. Tiwari, Sri Pradeep Kumar Singh, Sri Ashish Kumar Singh, Sri S.K. Verma (Senior Adv.), Sri Vipin Lal Srivastava

Counsel for the Opposite Party:
G.A.,

Criminal Law - Indian Penal Code, 1860 – Sections 302/34 & 201 - Punishment for murder - The Code of Criminal Procedure, 1973 – Sections 161, 313 – Evidence Act, 1872 – Section 106 - Life imprisonment - Appeal against conviction - FIR was lodged by informant on information received from Gajraj Singh regarding murder of his daughter - During trial PW-1 St.d that incident was witnessed by PW.2, Ravi, PW-3 and Sanjay - During trial, PW-2 and PW-3 declared hostile - Sole witness, mentioned in the FIR was not produced before trial court - Another witness Ravi, was not produced before court by prosecution - PW-4 declared hostile - Recovery memo for recovery of ashes, burnt bones of deceased was not signed by appellants, witnesses who signed were not produced before court - The FSL report didn't give opinion about origin of recovered ashes and burnt bones – Against PW-1 , appellant - Rajveer and his deceased daughter lodged criminal cases and PW-1 also lodged cases against said appellant – According to DW-1, deceased has died due to illness - DW-2 proved medical prescription of deceased issued by his clinic, she had died because of dehydration – As per St.ment of appellants they have been falsely implicated, to enter into the settlement in cases which were lodged by appellant and her daughter - Basis of conviction of appellants was circumstantial evidence, presumption - Chain of circumstances is not complete - No eye witness, prosecution case is based on St.ment of PW-1 who was not witness of incident - Evidence of PW-1 is hearsay evidence, no relevancy under Evidence Act - PW-1 couldn't prove motive of appellants to murder - Appellants proved motive of PW-1 to falsely implicate them - No evidence which connects appellants with death of deceased - Memo of recovery is not reliable, not proved by SDM as prepared by his direction- Hence, prosecution fails to prove its case against appellants beyond doubt. (Para 2, 20, 21, 22, 25, 26)

Appeals are allowed. (E-13)

List of Cases cited:

1. Ravindra Singh @ Kaku Vs The St. of Punjab in Criminal Appeal No.1307 of 2019

2. Indrajit Das Vs The St. of Tripura (Criminal Appeal No.609 of 2015)

3. Nagendra Sah Vs St. of Bihar reported in (2021) 10 SCC 725

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

1. Heard Sri Man Bahadur Singh, learned counsel for the appellant and learned AGA for the State.

2. Present two appeals were filed against the judgement and order dated 28.10.2017 passed by learned Additional District & Sessions Judge (FTC), Court No.3, Bulandshahr in Sessions Trial No.271 of 2012 (State Vs. Rajveer Singh and another) by which both the appellants were awarded life imprisonment along with fine of Rs.20,000/- each, under Section-302 read with Section 34 IPC and in case of non-payment of fine they would further undergo two years incarceration. Appellants were also imposed six months imprisonment along with fine of Rs.10,000/- each under Section-201 IPC and in case of non-payment of fine, they would further undergo one year imprisonment.

Prosecution Case

3. As per the prosecution case, first informant Harbir Singh Arya Advocate (PW-1) had given a Tehrir dated 20.10.2011 to Station House Officer, Police Station-Narora, District-Bulandshahr stating therein that his son Lavkesh was married to Pooja, daughter of Rajveer resident of village-Kamalpur in the year 2009. Since, the date of marriage Smt. Pooja refused to live with his son Lavkesh and she has also lodged case under dowry prohibition act as well as for maintenance against him as well as his family. On 18.10.2011 at 9:30 pm, he received a phone call from Gajraj Singh, son of Banshi Singh, resident of Ganaura Nagli that his daughter-in-law Smt. Pooja has been killed by her parents, brother and Rahisuddin by forcibly administering poison to her and just to falsely implicate him, they initially planned to bring the dead body of Pooja at his house. When they could not get chance, they disposed off the dead body of Pooja by burning it. After receiving the aforesaid information, first informant, Harbir Singh had given information of this incident to SP Sri R.S. Rathore on his mobile phone. It was further mentioned that he could not register the case because of the fear of accused persons.

4. After receiving the aforesaid information, FIR was registered in case crime no.252 of 2011, under Sections-302, 201 IPC on 20.10.2011 at 10:50 am against Rajveer as well as mother and brother of Pooja and also against Rahisuddin.

5. During investigation, police prepared site plan of place of incident where the deceased was administered poison as well as the place where ashes and bone of dead body of Pooja was recovered from and recovery memo for recovering the ashes and bone was also prepared and thereafter, ashes and other remains along with soil of the place of incident was also sent for chemical examination and thereafter, on the basis of available evidence, charge-sheet dated 20.01.2022 under Sections-302 and 201 IPC was filed against the present appellants and charge-sheet against the other co-accused persons namely Pawan and Roopwati was also filed on 21.03.2012, under Sections-302 and 201 IPC before the concerned court. Appellants were committed to Sessions court on 13.03.2012 and also the case of other co-accused persons on 22.07.2012. Thereafter,

the Sessions court summoned the accused persons and these accused persons also appeared before the Sessions court. Thereafter, after hearing the Assistant District Government Counsel as well as Defence counsel, charges were framed against the present appellants under Section-302 read with Sections-34 and 201 IPC in Sessions Trial No.271 of 2012. The charges were also framed against other co-accused persons namely, Pawan and Smt. Roopwati, under Section-302 read with Sections- 34 and 201 IPC on 27.01.2014 for which accused persons denied and demanded trial.

Prosecution Evidence

6. To prove its case, prosecution produced first informant Harbir Singh as PW-1, Budhh Pal Singh as PW-2, Nanak as PW-3, Bishan Singh as PW-4, SI Tezvir Singh as PW-5, (chik FIR and GD writer), SI Naresh Kumar (Investigating Officer) as PW-6 and documentary evidence, the Tehrir report (Ext Ka-1), chik FIR (Ext Ka-2), GD (Ext Ka-3), site plan where the poison was administered to Pooja (Ext ka-4). Site plan where the ashes of the dead body of Pooja recovered (Ext Ka-5), memo of recovery of ashes and bone of body of Pooja (Ext ka-6), charge-sheet no.01 of 2012 against the accused appellants-Rajveer and Rahisuddin in Sessions Trial No.271 of 2012 (Ext. Ka-7). Charge-sheet No.01A of 2012 against co-accused Pawan and Smt. Roopwati (accused of Sessions Trial No.555 of 2012) (Ext Ka-8) and also the report of Forensic Science Laboratory (Paper No.19A) showing no opinion about the bone and ashes. Prosecution completed this defence on 07.09.2017, thereafter, statement of accused under Section 313 Cr.P.C. were recorded in which they denied from the incident in question.

Statement of Accused under Section 313 Cr.P.C.

7. Appellant-Rajveer stated that he has been falsely implicated just to pressurize him to enter into compromise with the first informant Harbir because his daughter Pooja as well as he lodged criminal cases against the first informant as well as against his family members under Sections-498A, 323, 504, 506 IPC and ¾ Dowry Prohibition Act and also the case for maintenance under Section 125 Cr.P.C. and his daughter Pooja has died due to natural death while bringing her to the clinic of doctor as she was suffering from high fever and diarrhea.

8. Similarly appellant-Rahisuddin also stated in his statement under Section 313 Cr.P.C. that he has been falsely implicated in the present case by the first informant only because he is the witness of the case registered by Pooja against the first informant and his family members and because of his false implication, first informant want to pressurize him to enter into compromise and not to pursue the case on behalf of Smt. Pooja. Statements of other co-accused namely, Smt. Roopwati and Pawan were recorded under Section 313 Cr.P.C. in Sessions Trial No.555 of 2012 are not relevant as both of them were acquitted in that case.

Evidence of Defence

9. In support of defence, Sanjay Singh was examined as DW-1, Dr. Rameshwar Singh was examined as DW-2 and in documentary evidence, original copy of two medical certificates dated 14.10.2011 (Paper No.-93A) and 18.10.2011 (Paper No.93B) and charge-sheet submitted in NCR No.25/10 under Sections-504, 506

IPC, Police Station-Narsena, District-Bulandshahr against Lavkesh son of Harbir (Paper No.99B), copy of the order dated 23.07.2011 passed by the Additional Civil Judge (Junior Division)/Judicial Magistrate, Court No.2, Bulandshahr in Miscellaneous Case No.06 of 2010 (Smt. Pooja Vs Lavkesh) under Section-125 Cr.P.C. (Paper No.100B), certified copy of the order dated 22.05.2017 passed by Additional Chief Judicial Magistrate, Court No.3, Bulandshahr in Case No.2040 of 2012 (State Vs. Lavkesh and others) (Paper No.101B). Certified copy of chik FIR of Case No.2040 of 2012 (Paper No.102 B) as well as certified copy of order dated 20.05.2017 passed in Case No.2040 of 2012 (Paper No. 103-B).

Discussion on Prosecution Evidence

10. PW-1 Harbir Singh stated in his statement that he knows and recognizes accused Rajveer, Smt. Roopwati, Pawan and Rahisuddi. Rajveer is my samdhi and Smt. Roopwati is my samdhan and accused Pawan is son of Rajveer and accused Rahisuddin is friend of accused Rajveer. Lavkesh is my son who got married with Pooja, daughter of Rajveer on 01.12.2019. Pooja on the investigation of Roopwati refuses to live with my son Lavkesh just after the marriage. Pooja also filed case in the Bulandshahr court for maintenance and court also granted her maintenance. After the compromise in dowry case, Pooja refused to take maintenance. In mediation centre where the cousin of Pooja, Budhh Pal Singh was present, she expressed her desire to him to go to our village Habauda. Pooja also lodged a case under Section 406 IPC against my wife Rajni, my son Lavkesh and my sister Krishna under the pressure of accused Rajveer. Though, subsequently, summoning order passed by CJM was set aside in revision in that case. He also lodged an FIR against Rajveer and others but stay was granted by Hon'ble High Court. I have also filed complaint case in Court at Garhmukteshwar, under Sections-452, 323, 504, 306 IPC, Police Station-Sambhawali, against accused Rajveer but stay was granted in favour of Rajveer by the Hon'ble High Court. On 11.05.2010, accused Rajveer brought Pooja at Garhmukteshwar in the office of Sub-Registrar where Pooja executed deed for dissolution of marriage which was registered and Rajveer also received Rs.1,10,000/- in lieu of that. This act of Rajveer was against the wishes of Pooja. In the night of 18.10.2011 at 10:30 pm, Gajraj Singh informed me on my phone that his daughter-in-law Pooja has been killed by his father Rajveer, Roopwati and brother Naresh and Pawan along with Rahisuddin by forcibly administering her poison and they are planning to bring the dead body of Pooja in his village- Habauda but driver Laxman refused to come here, thereafter accused person disposed of the dead body by burning the same at their agriculture land. He had also confirmed the above incident from Budhh Pal Singh on mobile. This incident was witnessed by Gajraj Singh, Banshi Singh, Sanjay, Budhh Pal Singh and Nanak and he also intimated the same to SSP Bulandshahr through phone. He did not go to Police Station-Narsena, on that date, because of fear of accused persons. He has given written report on 20.10.2011 in Police Station-Narsena which is before me as Ext No. Ka-1 in my writing and signature. Subsequently, he came to know that accused Rajveer wanted to fix second marriage of Pooja with Udayveer of village-Bhadaura after taking money, for which ceremony of godhbharai was also conducted on 06.10.2011 in which Gram Pradhan of village-Habauda, Sri

Bishan Singh was also present and date for marriage was also fixed as 05.11.2011. Pooja had refused for this marriage. She wanted to come back at our village and for this reason the accused persons mercilessly killed her.

11. In his cross-examination, PW-1 stated that he received information about the death of Pooja on 9:30 pm through phone and at that time, he was in his village- Habauda, Police Station-Sambhawali, District-Hapur. At that time, he was practising as an Advocate in Garhmukteshwar court. On 19.10.2011, he did not go to Garhmukteshwar court for practice. He was not aware whether there was a holiday on 19.10.2011 or not.

On 19.10.2011, he went to Hapur to take medicine for his wife. On 19.10.2011 at 6:00 am, he along with his wife went to Hapur to visit doctor through motor cycle. In Hapur, he consulted with doctor in Tara Chand Government Hospital and returned back at 11:00 am to his house. He did not have any medical prescription or any receipt of purchasing the medicine.

He is also aware that at that time, Senior Police Officer as well as Administrative officers used to sit in Hapur and probably office of DSP was situated there. He did not give any information (or application) regarding the murder of Pooja to any Senior Police Officer or Administrative Officer on 19.10.2011, because I had already informed on 18.10.2011 to SSP Bulandshahr through Telephone. He informed SSP Bulandshahr on 18.10.2011 at 9:40 pm but he did not remember the number on which I talked to SSP Bulandshahr. At the time of calling to SSP Bulandshahr, my wife and my children were also present with me. He did not mention the mobile number of SSP Bulandshahr in his report. He also did not tell the phone number of SSP to Investigating Officer because I have not asked for the same. I am not aware whether I had called on personal or Government mobile number of SSP. I cannot tell P & T personal number or Government number of then SSP. My village is 7 Km from Police Station-Sambhawali. When any person goes from my village to Hapur then we go through police station-Sambhawali because police station-Sambhawali is situated at main road. I have not given any information to Police Station-Sambhawali on 19.10.2011.

On 20.10.2011, I along with Jitendra Pradhan went to Police Station-Syana, District-Bulandshahr. Police Station-Syana is 16 to 17 km far from my village. I have not submitted any report on 19.10.2011 or 20.10.2011 in Police Station-Syana. Jitendra Singh Pradhan returned back to his village from police station-Syana. In Syana, Budhh Pal Singh met me. I went to police station-Narsena along with him. Narsena is 28-30 km from my village. On being asked question, why he did not go to police station-Narsena on 19.10.2011 and why he went there on 20.10.2011 then in his reply, he stated that my wife was ill on 19.10.2011 and I went to take medicine for her. I remained with her. Therefore, I did not submit any report on 19.10.2011. I have not mentioned this fact in my report that my wife was ill and I went to take her medicine and for this reason, there was a delay in submitting report. This fact is correct that I have mentioned in my report that because of fear of accused persons, not because of illness of my wife there was a delay in submitting report. I had lodged report after preparing the same on 20.10.2011.

I have not mentioned in my FIR that driver Laxman was not ready to bring Car to his village and this information had spread in the village. But on reading his statement recorded under Section 161 Cr.P.C., he states that Investigating Officer has not recorded above statement. I cannot tell the reason for the same. I have neither mentioned in my FIR that dead body was burnt in agriculture land nor informed to Investigating Officer but he mentioned in FIR as well as stated in his statement that the dead body has been disposed off by burning the same. I have not seen the accused persons disposing the dead body by burning the same. I have not mentioned in FIR that second marriage of Pooja was fixed by accused Rajveer against her wishes with Udayveer after taking money and date of marriage was also fixed for which Pooja had refused, therefore, the accused had killed Pooja. I got the above information after 2 to 2 ½ month after the above incident and thereafter, he informed the police in writing but he does not remember on which date he has intimated to police and also he does not have any receipt for submitting any information to police. He also did not remember in which month he had given information to police about the incident. I have not mentioned in the FIR that I have verified the incident of murder of Pooja through mobile from Budhh Pal Singh and this incident was seen by Gajraj Singh, Ravi, Sanjay, Budhh Pal Singh, Nanak, though I have stated in the statement to Investigating Officer. On perusal of his statement recorded by Investigating Officer, he states that I.O. has not recorded the aforesaid thing in his statement because of local political pressure. Therefore, I have also made a complaint to SSP Bulandshahr personally but I did not have receipt of the same. I have not filed any copy of that complaint in the Court till date. It is also correct that he has mentioned the name of Gajraj Singh as witness in his first information report and one of witness driver Laxman, but names of Budhh Pal Singh, Ravi, Sanjay, Nanak were not mentioned in FIR because he was not aware about these witnesses till lodging of the FIR. He has told the name of the above witnesses to Investigating Officer in his statement but he has not written the name of those witnesses except the name of Gajraj. I know the name of Budhh Pal but he did not mention his name in the FIR because he is relative of Rajveer. At present, relation of Budhh Pal with Rajveer is not cordial.

It is correct that Rajveer has lodged case against me and my family for the harassment of his daughter Pooja under Section 498A IPC which is still pending in the court. In that case, accused Rahisuddin is not the witness. Rajveer has also lodged the case for threatening against me and my family which is still pending in the court which was registered prior to present case under Section 302 IPC. It is correct that accused Rahisuddin is witness in that case. Second marriage of Lavkesh was consummated with Pooja daughter of Raghuraj resident of village-Gangeshwari, district-Amroha and Lavkesh has been residing with me.

On being asked question whether second daughter-in-law has been residing with him. He did not reply to the same on the ground that the same is not concerned to present case. On being questioned that his second daughter-in-law lodged a case under Section-354 IPC against him, he replied that Yes that case was registered but after investigation, final report was submitted which was accepted in the court also. The cases which I have registered

against Rajveer and others were registered subsequent to the registration of cases by Rajveer against him and anothers under Sections-498A, 406 IPC.

12. Buddh Pal Singh was examined as PW-2. In his statement, PW-2 stated that accused Rajveer Singh is his maternal uncle and Smt. Roopwati is my maami who is wife of the accused Rajveer. Accused Pawan is son of accused Rajveer. The name of other son of accused Rajveer is Naresh. Accused-Rahisuddin is friend of accused Rajveer Singh. He also knows first informant Harbir Singh and his son Lavkesh.

Daughter of Rajveer namely, Pooja got married with son of Harbir Singh, Lavkesh on 01.12.2009 but because of non-adjustment between two families, their marriage could not proceed further and both parties started lodging cases against each other. I went with my maternal uncle Rajveer for panchayat at the house of Harbir, village-Habauda because I was mediator of marriage. In panchayat, goods and articles given in dowry were returned, which was brought by him and Rajveer after five months of marriage, by loading it in jugaad. After five to six days of bringing the goods and articles of dowry, I and Rajveer along with Pooja went to the Registry office Garhmukteshwar. There marriage of Pooja and Lavkesh was annulled. Harbir Singh had given Rs.1,10,000/- to my maternal uncle Rajveer and Rajveer, after receiving the money executed notary affidavit. Thereafter, Rajveer Singh, Harbir Singh and I returned back to their houses. Subsequently, I came to know that Rajveer wanted to get marry to his daughter in village-Bhadaura but Pooja had refused for that and Pooja wanted to go at Harauda. During conciliation proceedings, Pooja also told me bhaisahab please arrange for sending me to Harauda.

On 08.10.2011, I and Nanak who belongs to my village, had reached Kamalpur at the house of my maternal uncle Rajveer at 3:00 pm. There, I had seen that Rajveer, Roopwati, son of Rajveer Pawan and Naresh as well as friend of Rajveer Rahisuddin had surrounded Pooja. Rahisuddin was having glass full of poison, Rajveer opened the mouth of Pooja and Rahisuddin forcibly administered her poison from that glass, thereafter, Pooja fainted. We went to our houses because of fear and reached at 5:00 pm and in the night at about 9 or 9:30 pm, he received phone call of Harbir Singh, who asked him whether there occurred any incident. Thereafter, I obtained information from the son of my maternal uncle Subhash about the status of the above incident who informed me that Pooja has died. Then, we told Harbir Singh that Vakil sahab Pooja has died. Rajveer Singh, Rahisuddin, Arjun and Deepak, they had come to my village 10 to 15 days earlier and threatened me not to give any witness because he is their relative. Otherwise, we will tell you.

13. In the cross-examination, PW-2 retracted from his statement given in examination-in-chief and did not support the prosecution story and clearly stated that he had not seen the incident because he was staying at 400 metres away from the house of Rajveer. When he reached at the house of Subhash then he got information about the incident which occurred with Pooja. He did not remember who told him about the incident at the house of Subhash. After receiving information, Subhash and several other people of village went to the house of Rajveer where about 250-300 persons were

already assembled but I am not in a position to tell the name and place. I have not seen any incident of surrounding Pooja by Rajveer, Pawan, Naresh, Roopwati and Rahisuddin and I have also not seen any glass containing poison in the hand of Rahisuddin. I have also not seen Ramveer opening the mouth of Pooja and Rahisuddin administering the poison from glass in the mouth of Pooja. I have told whatever the villagers told me. I don't remember which villager told me about the said incident. I have not told any of the incident of village-Kamalpur to any of the person. When I received the call of Harbir Singh, I don't remember where I was at that time. The incident of Kamalpur dated 18.10.2011 did not happen before me. I have not seen deceased Pooja in Kamalpur on 18.10.2011. On that day, I did not go to the house of Rajveer in village-Kamalpur. As PW-2 did not support the prosecution story, therefore, prosecution declared him hostile and also cross-examined PW-2. In his cross-examination, PW-2 stated that statement given by him on 08.11.2016 was given by him on the basis of information received from villagers. He cannot tell the name of villagers who had given him the information. Accused Rahisuddin is friend of Rajveer. This is correct that after lodging of the present case, Harbir and accused persons entered into compromise. This is incorrect that I have seen Rajveer, Roopwati, Pawan, Naresh and Rahisuddin surrounding Pooja.

14. Nanak was examined as PW-3 but he did not support the prosecution story, therefore, he was declared hostile at the request of prosecution and put to cross-examination. In his cross-examination, PW-3 stated that it is incorrect, that he had gone to the house of Rajveer on 18.10.2011 along with Budhh Pal Singh and it is also incorrect that on that day, he had seen Rajveer, Pawan, Naresh, Roopwati and Rahisuddin surrounding and catching hold of Pooja. He is not aware how Pooja has died. He did not tell anything about the death of Pooja to Harbir Singh.

15. Bishan Singh was examined as PW-4 but he did not support the prosecution story, therefore, he was also declared hostile by the prosecution and prosecution was also allowed to cross-examine him. In his cross-examination, PW-4 stated that it is incorrect that he participated in godhbharai rasam of second marriage of daughter of Rajveer, Pooja. PW-5 was formal witness who was Sub-Inspector Tejveer Singh, who proved the chik FIR and carbon copy of GD. PW-6 was Sub-Inspector of Naresh Kumar who was an Investigating Officer of Case Crime No.252 of 2011, under Sections-302 and 201 IPC. In his statement, he stated that after arresting Rajveer and Rahisuddin, he had taken them in the jungle (agriculture filed). He stated that Rajveer and Rahisuddin in presence of SDM, Kunwar Bahadur Singh gave information about the place where ashes and burnt bone of dead body of Pooja were found and memo of recovery was prepared on the spot as per the direction of SDM in presence of witnesses. He proved above memo of recovery (Ext Ka-6) which was signed by SDM as well as witnesses. He also proved sealed bundle containing two small containers. One is having normal soil and other is having ashes and bone of deceased. On opening the sealed bundle, he stated that this is the same soil and ashes as well as bones which I have sent for Forensic Science Laboratory after sealing the same. Normal soil was marked as Ext No.1, ashes on small container was exhibit as Ext No.3 and bone were exhibited as Ext No.4. The

container containing the ashes and bone was marked as Ext No.5. In cross-examination, PW-6 stated that it is correct that he is telling first time in the court about the information by Gajraj to first informant through phone, though same was not mentioned by him in case diary. He did not go to the house of Rajveer between 3 pm to 7:30 pm. He went to the place of incident (agriculture land) along with Rajveer and Rahisuddin at 5:55 pm. When he reached at the house of Rajveer then he found Rajveer, Rahisuddin were there and immediately after reaching at their house, he recorded the statement of Rajveer and Rahisuddin. Memo of recovery (Ext Ka-6) does not have signature of accused Rahisuddin and Rajveer.

First informant did not tell me his mobile number. First informant did not tell me in his statement that his wife was ill and he went to take medicine for his wife and for this reason, lodging of the FIR was delayed. First informant also did not tell him why driver Laxman was not ready to bring the dead body of the deceased at his village. First informant also did not tell him in his statement that Rajveer has fixed the second marriage of Pooja with the son of Udayveer, resident of village-Bhadaura after taking money with him for which *godhbharai rasam* was fixed for 08.10.2011 and at that time, village Pradhan of Bhadaura, Sri Bishun Singh was present. First informant did not tell him that he has verified about the incident through mobile from Buddh Pal Singh, PW-2 and Budhh Pal Singh and Nanak has seen this incident. During investigation also, first informant did not inform him that Budhh Pal and Nanak had seen this incident. Budhh Pal and Nanak are also not witnesses in charge-sheet. First informant did not tell in his statement the name of any other witness except the Gajraj. I have submitted charge-sheet against the four accused. It is correct that there is a Rajwaha (canal) adjacent to the agriculture land of Rajveer. Report of Forensic Science Laboratory regarding ashes and bone, sent by me is available and this report did not express any opinion about the origin of piece of burnt bone and ashes.

Discussion on Evidence of Defence

16. Defence produced Sanjay Singh as DW-1, who belongs to the village of accused Rajveer. DW-1 stated that Pooja has died. On the day when Pooja had died, Budhh Pal and Nanak did not come to his village and neither he met with them. Pooja had died because of illness. Pooja was not murdered by anybody. I have not seen any person either committing the murder of Pooja or administering her poison. At the time of last rites of Pooja at the bank of ganga, 200-250 persons had participated in her last rite. In cross-examination by the prosecution, DW-1 stated he belonged to the caste of accused Rajveer and he used to go to the house of Rajveer. I was not present at the time of incident. I have not seen any incident. Therefore, I cannot tell that Pooja has died because of illness. Pooja was suffering from fever. He is not aware which doctor treated Pooja.

17. Dr. Rameshwar Singh was examined as DW-2 by the defence. He stated in his statement that he completed his BMS degree in the year 1980-81 from Kanpur. On perusal of Paper No.94B/2, he stated that this prescription was issued by my clinic and as per this prescription, Pooja had come at my clinic on 14.10.2011 and at that time Pooja was suffering from diarrhea, acidity and fever of 101-102 degrees. I had treated her and given

medicine. Paper No.94B/2 was issued in my writing and signature and my seal is on that prescription. This paper was marked as Ext Kha-1. On perusal of Paper No.94B/1, it is stated that this paper was written in my writing and signature. Both these papers were prepared at the time of examination of Pooja. Paper No.94B/1 was marked as Ext. Kha-2. As per Paper No.94B/1, Pooja came to my clinic on 18.10.2011 and at that time she was suffering from Pyranea Gastritis. Condition of patient was very poor, therefore, on the basis of her condition at 2:30 pm, he referred her for Kailash Hospital. Dehydration is possible because of the illness of patient. Severe dehydration may cause death. On cross-examination by the prosecution, he stated my signature on Ext No. Kha-1 and Kha-2 were not different. Patient Pooja came to me in normal condition. He does not know Pooja personally.

Contention of Appellant

18. Appellant contended that FIR was highly belated, ante- dated, ante-timed and prepared after due consultation and afterthought. Inquest memo dated 20.10.2011 sent by Investigating Officer to SDM contains a blank space for writing case crime number and that goes to show that FIR was not in existence even up to the time of alleged recovery of remains of body of Pooja. As per the prosecution case, first informant is said to have received information from one Gajraj Singh, alleged eye witness about the incident at 9:30 pm on 18.10.2011 but first informant had lodged first information report on 20.10.2011 at 10:50 am and reason for delay for lodging the FIR, as mentioned in FIR is that due to fear of accused, first informant could not come to police station whereas in his evidence PW-1 has stated that FIR was delayed due to illness of his wife. It was further submitted there is false implication of appellant-Rajveer because appellant-Rajveer and deceased had lodged criminal cases against the first informant and his family under Sections-498A, 406, 323, 504, 506 IPC as well as under Section 125 Cr.P.C. and first informant also lodged criminal cases against the deceased as well as the appellant-Rajveer and his family members. Relationship between the deceased and her husband (son of first informant) was dissolved by mutual agreement and two families were not having cordial relation with each other. Therefore, first informant grabbed the opportunity to settle his personal scores and launched present malicious prosecution in active connivance of Investigating Officer/SHO against whom appellant-Rajveer had preferred a complaint dated 19.10.2011 before SSP, Bulandshahr. Appellant- Rahisuddin was a witness in a criminal case filed by the deceased against the first informant, therefore, he was also falsely implicated on that ground. It was further contended by learned counsel for the appellant that Pooja had died due to illness which was absolutely natural death and there is no evidence that Pooja has died due to unnatural death by poisoning. Deceased Pooja was suffering from loose motion and diarrhea and she was treated by DW-2 who also proved his medical prescription dated 14.10.2011 as well as 18.10.2011 and Pooja died on her way to Kailash Hospital, where she was referred to by DW-2 considering her critical condition. Last rite of Pooja was conducted in presence of 100 villagers at the bank of river ganga on 18.10.2011. Learned counsel for the appellants also submitted that the alleged eye witness of FIR had given his statement under Section 161 Cr.P.C. but he was not produced before the

trial court. Similarly, name of Kharak, Ravi and Sanjay were mentioned in charge-sheet as eye witnesses but they were not examined as prosecution witnesses before the trial court and even the charge-sheet witness, Sanjay instead of supporting the case of prosecution appeared as DW-1 as a defence witness and clearly stated that cremation of Pooja was conducted at river ganga in presence of 100 villagers. It was further contended that witness of motive, Udayveer was not produced before the court and even the prosecution witness, Gram Pradhan, Bishan Singh, PW-4 was said to be present in the godhbharai of second marriage of Pooja and Udayveer did not support the prosecution case while examined as PW-4. Recovery memo was not proved by Sub-Divisional Magistrate who witnessed the recovery. Even the alleged two independent witnesses of recovery, namely, Ram Lal Singh and Khadhak Singh were not produced before the trial court to prove the recovery of remains of deceased Pooja from the agriculture land of appellant- Rajveer. This case is based on circumstantial evidence but chain of circumstances is not complete and conviction of the appellants is solely on the basis of recovery of remains of body of deceased which was not proved nor supported by forensic evidence as well as on the basis of presumption under Section-106 of the Evidence Act, 1872 (hereinafter referred to as the "Evidence Act'), despite the fact that appellants have been fully discharged their burden regarding the death of Pooja by their statement under Section 313 Cr.P.C. as well as examining the defence witnesses, DW-1 and DW-2. Therefore, it was submitted by the appellant that order of trial court is absolutely erroneous and without any evidence and deserves to be set aside and appellants are entitled to be acquitted.

Contention of State

19. Learned AGA contended that from the evidence of PW-1, it is established that accused, just to falsely implicate the first informant as well as because of annoyance with Pooja who refused to get second marriage under the pressure of appellant Rajveer, had murdered Pooja. It was further contended that recovery memo of the remains of deceased Pooja shows that ashes and burnt parts of bones of deceased Pooja were recovered from the agriculture land of appellant Rajveer on the basis of information given by the appellant. It was further contended by learned AGA that it is the common practice among hindus that after the cremation, the ashes of dead bodies is emerged in river but in the present case, ashes of dead body of deceased Pooja was recovered from the agriculture land of the appellant- Rajveer, which establishes that after committing the murder of Pooja, had concealed the ashes of her dead body in his agriculture land after digging a pit in it. Therefore, there is no illegality in the judgement of trial court and same deserves to be affirmed.

Analysis and Conclusion

20. Sole basis of lodging the FIR on part of the first informant (PW-1) is the information received by him from Gajraj Singh regarding the murder of deceased Pooja. Subsequently, during trial PW-1 had stated that the incident of causing death was also witnessed by Budhh Pal Singh, Ravi, Nanak and Sanjay apart from Gajraj Singh. During trial, Budhh Pal Singh (PW-2) and Nanak (PW-3) did not support the prosecution story and were declared hostile. The sole witness (Gajraj) mentioned in the FIR who was the main source of information regarding the murder

of Pooja was not produced before the trial court to support the prosecution story. Apart from this, another witness Ravi, who as per the statement of PW-1 had seen the incident, was not produced before the court by the prosecution. Even the witness of motive for causing the murder of Pooja, Bishan Singh (PW-4) did not support the prosecution story, therefore, he was declared hostile.

21. The recovery memo for recovery of ashes and burnt bones of deceased Pooja on the basis of information given by the appellants which was marked as Ext No. Ka-6 was not signed by any of the appellants and the witnesses who signed this recovery memo namely, Ram Lal Singh and Kadhak Singh, were not produced before the court to prove the aforesaid recovery memo (Ext Ka-6). The above evidences shows the entire prosecution story is based on hearsay evidence of PW-1 as well as circumstantial evidence. Even the Forensic Science Laboratory report which was marked as Paper No.19A did not give any opinion about the origin of recovered ashes and burnt bones. PW-1 in his statement clearly admitted that the appellant- Rajveer as well as his daughter deceased Pooja had lodged criminal cases against PW-1 and, PW-1 had also subsequently lodged cases against appellant no.1-Rajveer, prior to lodging the present case and this fact was also admitted to PW-1 that appellant- Rahisuddin was also the witness of one of the cases lodged by the appellant-Rajveer. Learned Sessions Judge while passing the impugned judgement also observed that if deceased Pooja was died because of illness then there was no occasion on the part of the appellants to dump the ashes and burnt bones in his agriculture land by digging the pit and he has not given any information to police. Though, as per the hindu customs rites, ashes and bones should be emerged in ganga or any river. Therefore, learned Sessions Judge on the basis presumption under Section 106 of the Evidence Act convicted the appellants.

22. The appellants in support of the cause of death of deceased Pooja produced DW-1 and DW-2. DW-1 Sanjay Singh, though as per the statement of PW-1, was a witness of murder of deceased Pooja but he appeared before the court as defence witness and denied the prosecution story and on the other hand stated that Pooja has died due to her illness. DW-2 who was the doctor, proved the medical prescription of Pooja issued by his clinic regarding her illness and duly proved that Pooja was seriously ill and he referred her to Kailash hospital considering her critical condition and also proved that Pooja could have died because of dehydration. In their statement under Section 313 Cr.P.C., both the appellants namely, Rajveer and Rahisuddin, clearly stated that they have been falsely implicated just to pressurize them to enter into the settlement in the cases which were lodged by the appellant-Rajveer and her daughter Pooja. Basis of conviction of the appellants was circumstantial evidence as well as presumption under Section 106 of the Evidence Act, though chain of circumstances is itself not complete because there was no eye witness of the incident and entire prosecution case is based on the statement of PW-1 who himself was not the witness of incident but his information was based on the information received from Nanak (PW-3) and Budhh Pal Singh (PW-2) and Gajraj, though neither PW-2 nor PW-3 supported the prosecution story and Gajraj was not produced before the Court in support of prosecution case. Therefore, the evidence

of PW-1 is simply a hearsay evidence which has no relevancy as per the Evidence Act. PW-1 also could not prove the motive on the part of appellants to murder Pooja. On the other hand, the appellants had proved the motive on the part of PW-1 to falsely implicate them.

23. Hon'ble Supreme Court in the judgement of **Ravindra Singh alias Kaku Vs. The State of Punjab in Criminal Appeal No.1307 of 2019** decided on **04.05.2022** clearly held that in case where conviction is only based on circumstantial evidence then inconsistencies in the testimony of important witnesses cannot be ignored to uphold the conviction. Similarly, Hon'ble Supreme Court in the judgment of **Indrajit Das Vs. The State of Tripura in Criminal Appeal No.609 of 2015 decided on 28 February, 2023.** Relevant part of paragraph no.10 of the said judgement is quoted hereinunder :

"10. The present one is a case of circumstantial evidence as no one has seen the commission of crime. The law in the case of circumstantial evidence is well settled. The leading case being ***Sharad Birdhichand Sarda vs. State of Maharashtra 1984 (4) SCC 116.*** *According to it, the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence. The said principle set out in the case of* ***Sharad Birdhichand Sarda (supra)*** *has been consistently followed by this Court. In a recent case -* ***Sailendra Rajdev Pasvan and Others vs. State of Gujarat Etc. AIR 2020 SC 180, t****his Court observed that in a case of circumstantial evidence, law postulates two-fold requirements. Firstly, that every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt and secondly, all the circumstances must be consistent pointing out only towards the guilt of the accused. We need not burden this judgment by referring to other judgments as the above principles have been consistently followed and approved by this Court time and again."*

24. Hon'ble Supreme Court in the judgment of **Nagendra Sah Vs. State of Bihar reported in (2021) 10 SCC 725**. Relevant part of paragraph nos.17, 22 and 23 of the said judgement is quoted hereinunder :

"17. As the entire case is based on circumstantial evidence, we may make a useful reference to a leading decision of this Court on the subject. In ***Sharad Birdhichand Sarda v. State of Maharashtra 1984 4 SCC 116,*** *in paragraph 153, this Court has laid down five golden principles (Panchsheel) which govern a case based only on circumstantial evidence. Paragraph 153 reads thus : -*

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should' and not "may be' established. There is not only a grammatical but a legal distinction between "may be proved' and "must be or should be proved" as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793*** *wherein the following observations were made:*

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

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

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

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

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

22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

25. The above judgements of Hon'ble Supreme Court clearly observe that conviction on the basis of circumstantial evidence is not proper unless the chain of circumstances is complete but, in the present case, there is no evidence which connects the appellants with the death of deceased Pooja. As PW-1 was not the eye witness and other alleged eye witness who were the source of information to PW-1 did not support the prosecution story and even there is no documentary evidence which could establish the alleged recovered ashes and burnt bones belong to Pooja. Even, the memo of recovery (Ext Ka.6) of ashes and part of the burnt bones is not reliable because same was not signed by the appellants even same was not proved by the SDM under whose direction and supervision the above memo recovery was

prepared. Prosecution has also failed to establish the complete chain of circumstances.

26. In view of the above fact, the judgement of Sessions Judge dated 28.10.2017 is not based on any conclusive evidence but, simply on the basis of presumption and circumstantial evidence which itself was not sufficient. Therefore, we are of the considered opinion that prosecution could not prove its case against the appellants beyond doubt. Therefore, judgement and order dated 28.10.2017 passed by the learned Additional District & Sessions Judge (FTC), Court No.3, Bulandshahr is set aside and appellants are acquitted from the charges under Sections-302/34, 201 IPC in case crime no.252 of 2011, Police Station-Narsena, Bulandshahr. Therefore, appellants namely, Rajveer and Rahisuddin be immediately be released if they are not wanted in any other cases.

27. Accordingly, both the appeals are **allowed**.

(2023) 4 ILRA 1088
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.04.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Crl. Misc. Anticipatory Bail Appl. No. 104 of 2023

Naitik Shukla ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Sri Gaurav Singh, Sri Kumar Sreshtha, Sri Krishap Shanker Singh, Sr. Advocate

Counsel for the Respondents:
G.A., Sri Rakesh Kumar Shukla

Criminal Law - Indian Penal Code, 1860 – Section 306 - Abetment of Suicide - As per allegations in F.I.R. lodged by father of deceased, his son who was working in Courier Company, did not turn up in his office on 10.09.2022 - His father tried to contact him but he was not available - Missing report lodged on 17.09.2022 – His son has committed suicide in a lodge by hanging himself - Suicide note of 11 pages written in english language was found, it was mentioned that applicant and two others were responsible for his suicide – Held, for constitution of offence of abetment to commit suicide, "the instigation" need not be expressed in so many words - The intention to "instigate" can only be gathered from facts and circumstances, which preceded the "act of suicide" - At the stage of grant of bail (anticipatory or regular), a deep analysis of a suicide note, which is legally a dying declaration, is uncalled for - Mental status, anguish, agony caused to victim by direct acts of applicant were responsible for compelling him to take his own life - Vehemently argued that intention is not a mystical thing and can be gathered from overt acts – Hence, not a fit case to grant benefit of anticipatory bail. (Para 3, 6, 7)

Application rejected. (E-13)

List of Cases cited:

1. Shabbir Hussain Vs St. of M.P. & ors., reported in 2021 SCC OnLine SC 743

2. St. of W. B. and Indrajit Kundu & ors., reported in (2019) 10 SCC 188

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Kripa Shankar Singh, learned Senior Counsel assisted by Sri Kumar Sreshtha and Sri Gaurav Singh, learned counsels for the applicant, Sri Rakesh Kumar Shukla, learned counsel for the first informant, learned A.G.A. for the State and perused the record.

2. This application has been moved on behalf of the applicant- **Naitik Shukla** seeking anticipatory bail in Case Crime No.0687 of 2022, under section- 306 I.P.C., Police Station- Kotwali, District- Lalitpur.

3. As per the allegations in the F.I.R. lodged by father of the deceased his son Uday Bajpayee, who was working in Expressway Courier Company Agra, did not turn up in his office on 10.09.2022; his father tried to contact him but he was not available, therefore the first informant, his wife and his younger son went to Agra to enquire about his whereabouts but he was not found there; the first informant lodged a missing report on 17.09.2022; later, he was informed that his son has committed suicide in a lodge in Lalitpur by hanging himself. It is mentioned in the F.I.R. that a suicide note of 11 pages written in english language was also found in which it was clearly mentioned that the present applicant Naitik Shukla and two others were squarely responsible for his suicide.

4. It is contended on behalf of the applicant that he is innocent and has been falsely implicated in this case; the deceased was working as an Executive in the company; the applicant and the deceased were working at different units; he never instigated the commission of suicide and nor he can be connected with the same; before this incident, an altercation took place between the applicant, the deceased and some other employees of the company for which he lodged an F.I.R. It is argued that the gap between that incident and the commission of suicide is so long that it cannot be presumed that the previous incident contributed towards commission of suicide and that the applicant was responsible for the same. Two of the judgements of the Hon'ble Supreme Court in **Shabbir Hussain vs. State of M.P. and Others, reported in 2021 SCC OnLine SC 743** and **State of West Bengal and Indrajit Kundu and Others, reported in (2019) 10 SCC 188** have been cited to stress the argument that the previous incident cannot be treated as the precursor for the instant crime and nor the applicant can be slapped with any responsibility for the same.

5. The application for anticipatory bail is opposed by the learned A.G.A. and the private counsel for the first informant highlighting the fact that the 11 pages suicide note describes in sequence all the facts and circumstances, right from the date of the F.I.R. lodged from the side of the applicant about a previous incident between the two, till commission of suicide; even a cursory look at the suicide note shall give an impression that the deceased was being harassed by the applicant and he felt insulted and frustrated to such an extent that he was forced to take such extreme step of taking his own life; my attention has been drawn to whatsapp message/status uploaded by the deceased a few days before committing suicide in which he said that the present applicant and two others Sunil and Girish Tomar have been threatening him to fire him from the job and that the instant applicant has been demanding alcohol etc. and bullying and brow beating him on his small mistakes; he misbehaved and said objectionable things to him, therefore he is dropping his job and going to commit suicide.

6. As far as the legal argument raised by the applicant is concerned, it is argued that for constitution of offence of abetment to commit suicide, "the instigation" need not be expressed in so many words. The intention to "instigate" can only be gathered

from facts and circumstances, which preceded the "act of suicide". Further, at the stage of grant of bail (anticipatory or regular), a deep or penetrative analysis of a suicide note, which is legally a dying declaration, is uncalled for. Merits of the evidence are important, even for bail but not in the same manner as in a full-fledged trial. The mental status, the anguish, the agony caused to the victim by direct acts of the applicant were responsible for compelling the deceased to take his own life. It is vehemently argued that intention is not a mystical thing and can be gathered from overt acts. As far as grant of anticipatory bail to co-accused Girish Tomar and Sunil Kumar is concerned, present applicant's case stands on different footing as he prima-facie appears to be the main culprit.

7. I considered the submissions of both the sides in the light of material on record, nature of accusations, role of applicant and all attending facts and circumstances of the case. I do not find it a fit case to grant benefit of anticipatory bail.

8. Hence, the anticipatory bail application is **rejected**.

9. However, any of the observation made herein shall not be taken as a comment on merits of the case and the learned trial court shall be at liberty to form its own opinion, on the basis of material before him, at any stage of the case.

(2023) 4 ILRA 1090
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.04.2023

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. Bail Application No. 7975 of 2023

Pappu ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Sri Vishnu Murti Tripathi

Counsel for the Respondents:
G.A., Sri Juned Alam, Sri Pradeep Kumar

Criminal Law - Indian Penal Code, 1860 – Sections 363, 366 & 376(3) – The Protection of Children from Sexual Offences Act, 2012 – Sections ¾ - The Code of Criminal Procedure, 1973 – Sections 161, 164 – Informant (Mother of victim) St.d that her daughter (minor) went to attend nature's call on 21.08.2022-- When she did not return, a search was undertaken but she could not be found - On 24.08.2022 she lodged the F.I.R against unknown person u/s 363 I.P.C – Held, according to educational document, age of victim on the date of occurrence was about 15 years and 8 months and according to her medical examination, age is opined between 17 to 18 years, therefore, she is a minor girl - Consent of a minor girl is immaterial - Victim in her St.ment St.d that she was not only forcefully kidnapped but forcefully married also and applicant has made physical relationship against her will - St.ment of victim has not been recorded till date, Possibility that applicant will try to influence her – Accordingly, bail application rejected with directions. – (Para 2, 3, 9, 10)

Bail application rejected. (E-13)

List of Cases cited:

1. Arya Samaj, Gwalior Vs St. of M.P. & ors., 2017 SCC OnLine MP 904

2. Ashish Morya Vs Anamika Dhiman, 2022(12) ADJ 584 (DB)

3. Bhola Singh & anr. Vs St. of U.P. & ors. (Habeas Corpus W. P. No. 637 of 2022)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri Vishnu Murti Tripathi, learned counsel for applicant, Sri Pradeep Kumar, learned counsel for informant and Sri Chandan Agarwal, learned A.G.A.-I for State.

2. Applicant has approached this Court by way of filing the present Criminal Misc. Bail Application under Section 439 Cr.P.C. in Case Crime No.525 of 2022 under Sections 363, 366, 376(3) I.P.C. and 3/4 of POCSO Act, Police Station-Kokhraj, District - Kaushambi after rejection of his Bail Application vide order dated 05.12.2022 passed by Special Judge(POCSO Act), Kaushambi.

3. Informant (Mother of victim) has lodged an F.I.R. that her daughter (D.O.B. 01.01.2009) went to attend nature's call on 21.08.2022, however, when she did not return, a rigorous search was undertaken but she could not be found and, therefore, on 24.08.2022, she lodged the F.I.R against unknown person under Section 363 I.P.C.

4. Learned counsel for applicant submits that delay of three days in lodging F.I.R. remained unexplained. It appears that victim was recovered alone on 15.11.2022, thereafter, she gave her statement under Sections 161 and 164 Cr.P.C. that she along with applicant ran away and got married, however, later on they were apprehended.

5. Learned counsel further submits that victim has taken contrary stand in her statement before Magistrate that applicant has enticed her and forcefully kidnapped and took her to Prayagraj for Marriage. She was forcefully remained with applicant, who made physical relationship against her will.

6. Learned counsel further submits that according to radiological examination, age of victim is opined between 17 to 18 years. It was a case of consensual relationship and victim has love affair with applicant. They got married and lived together as husband-wife.

7. The above submissions are opposed by learned A.G.A.-I for State that according to educational document, age of victim on the date of occurrence was about 15 years and 8 months, therefore, she was a minor girl and as such her consent, if any, is immaterial. She has specifically stated in her statement recorded under Section 164 Cr.P.C. that applicant not only enticed her but forced her to marry and made physical relationship against her will.

8. Learned A.G.A.-I referred a certificate of marriage issued by Arya Samaj, Krishna Nagar, Prayagraj and has submitted that they have solemnized marriage of a minor girl, which is an illegal act and for that this Court may issue an appropriate direction.

9. In the present case, according to educational document, age of victim on the date of occurrence was about 15 years and 8 months and according to her medical examination also, age is opined between 17 to 18 years, therefore, victim is a minor girl and accordingly, there is merit in argument of learned A.G.A-I that consent of a minor girl is immaterial. Victim has specifically stated in her statement recorded under Section 161 Cr.P.C. that she was not only

forcefully kidnapped but forcefully married also and applicant has made physical relationship against her will and since, statement of victim has not been recorded till date during trial, therefore, there is a possibility that in case of bail, applicant will try to influence her.

10. Accordingly bail application is rejected, however, Trial Court is directed to record the statement of victim expeditiously, preferably within a period of three months. Thereafter applicant will have liberty to file a fresh bail application.

11. Before parting with judgment, the Court took serious note that Arya Samaj, Krishna Nagar, Prayagraj has issued a marriage certificate of applicant with victim, a copy of same is on record. Marriage certificate does not indicate how age of victim is verified i.e. above 18 years. It was the duty of Arya Samaj Krishna Nagar, Prayagraj that before solemnizing marriage, it should be carefully verified whether they are solemnizing a marriage between two adult persons or not. It amounts to a child marriage which was opposed by Swami Dayanand Saraswati Ji.

12. It would be apposite to mention here that Arya Samaj, a reformist movement was commenced in 1875 by Swami Dayananda Saraswati and is based on following ten basis principles :-

(i) God is the efficient cause of all true knowledge and all that is known through knowledge.

(ii) God is existent, intelligent and blissful. He is formless, omniscient, just, merciful, unborn, endless, unchangeable, beginning-less, unequalled, the support of all, the master of all, omnipresent, immanent, un-aging, immortal, fearless, eternal and holy, and the maker of all. He alone is worthy of being worshipped.

(iii) The Vedas are the scriptures of all true knowledge. It is the paramount duty of all Aryas to read them, teach them, recite them and to hear them being read.

(iv) One should always be ready to accept truth and to renounce untruth.

(v) All acts should be performed in accordance with Dharma that is, after deliberating what is right and wrong.

(vi) The prime object of the Arya Samaj is to do good to the world, that is, to promote physical, spiritual and social good of everyone.

(vii) Our conduct towards all should be guided by love, righteousness and justice. (viii) We should dispel Avidya (ignorance) and promote Vidya (knowledge).

(ix) No one should be content with promoting his/her good only; on the contrary, one should look for his/her good in promoting the good of all.

(x) One should regard oneself under restriction to follow the rules of society calculated to promote the well being of all, while in following the rules of individual welfare all should be free.

13. Vivah Sanskar has always been a sacred and pious process for a bride and groom before they enters into their Grihasth Ashram. According to Arya Samaj's ritual, it includes Varmala & Swagat, Vidhi Madhuparkaa, Yagna & Kanyadaan, Havan & Godan, Pani Grahan Sanskar, Shilarohan, Lajahom, Phere or Parikrama, Kesh Mochan, Saptapadi & Hriday Sparsh Mantra, Sindoor & Mangalsutra and Surya Darshan. They at the time of Vivah Sanskar odour to be Arya Samajist and they devout the rituals with all sincerity and devotion, therefore, it become a duty of responsible office bearers of Arya

Samaj to stop their pious efforts to propagate teachings of Swami Dayanand Ji including to curb "child marriage' to be misused by persons, who indulge them in solemnising such marriage which may not be legalised. For example a marriage of minor as the case in hand, which would also in direct conflict of one of the mottos of Swami Dayanand, to stop "child marriage'.

14. Of late, Court has encountered with certificate being issued for marriages solemnised by Arya Samaj's ritual by misleading them on basis of forged or incorrect declaration that both bride and groom are major, however invariably it was found to be contrary to record and thus indulged the members of Arya Samaj to commit not only an illegality but to act against the teachings of their guru. This would not less than betraying the trust of Swami Dayanand imposed on members of Samaj. As referred above, facts of present case are glaring example where accused and victim have played fraud with belief of Arya Samaj. The victim is a minor girl who was less than 16 years when her marriage was solemnised with applicant.

15. It is high time when Arya Samaj has to do introspection so that they may not be subjected to fraud. They have to make stringent rules and procedure to verify the credentials of prospective bride and groom, especially when they are on run from their respective families or they are approached through touts, who are prevailing in Allahabad as they are promising couples on run, that they will get protection from this Court. If responsible members does not take cognizance of this menace, a day will come soon that Arya Samaj Mandir will become a place for solemnizing illegal marriage and their prestige will be in doom.

16. I have first hand information that how a priest at an Arya Samaj Mandir, near to High Court has convinced a person that marriage can be solemnized with minimum papers and he would get concession in fee fixed for marriage. Priest has endeavoured that said person be convinced so that marriage of prospective bride and groom be solemnized at the Mandir. It shows how a pious place is becoming a place for conducting activity for money which may not fall under "legal activity'.

17. The Court has perused judgment passed by Division Bench of Madhya Pradesh High Court at Gwalior in **Arya Samaj, Gwalior Vs. State of M.P. and others, 2017 SCC OnLine MP 904** and in judgment passed by Division Bench of Allahabad High Court in **Ashish Morya Vs. Anamika Dhiman, 2022(12) ADJ 584 (DB)** and by this Court in **Habeas Corpus Writ Petition No. 637 of 2022(Bhola Singh and Another Vs. State of U.P. and 5 Others) decided on 31.08.2022.**

18. Therefore, this Court is suggesting *inter alia* some suggestions and also issuing some directions:

1. A check list of essential documents be prepared and a mechanism be developed to cross check veracity and genuineness of documents to verify age of proposed couple and in case of any doubt, marriage may not be solemnized.

2. A mechanism be developed to ascertain whether any criminal proceedings are initiated against groom or bride and whether any age of boy or girl is disclosed therein or not.

3. A counselling be proposed to couples so that they may not enter into any criminal act i.e solemnizing a marriage before reaching marriageable age.

4. Format of marriage certificate be modified to include details of parentage, details of proof of age and details of witnesses with their ID proof. They may be required to file an affidavit also.

5. Or any other measure, which would be appropriate to stop child marriage

19. It is a old saying that "Prevention is better than Cure", therefore, it is directed that Arya Samaj Krishna Nagar, Prayagraj shall not solemnise any marriage where proposed groom and bride have no consent from there families for a period of two months from today.

20. The apex body of Arya Samaj is "Sarvadeshik Arya Pratinidhi Sabha', having its office at 15 Hanuman Road, New Delhi. The Court directs its President to look into above referred legal issues and proposed suggestions so that a guideline be issued by the apex body with the object to avoid Arya Samaj Mandir to be a part of "child marriage' and for that discussion/consultation be undertaken with stake holders, Senior Arya Samajists etc. The President, Sarvadeshik Arya Pratinidhi Sabha shall prepare a guideline/report which shall be submitted before this Court through Registrar General within a period of eight weeks from today.

21. Registrar (Compliance) is directed to take steps.

22. List before appropriate Bench for consideration of guideline/report submitted by the President, Sarvadeshik Arya Pratinidhi Sabha.

(2023) 4 ILRA 1094
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Crl. Misc. Anticipatory Bail Appl. No. 12494 of 2022

Unish Khan ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Anil Pratap Singh Raghav

Counsel for the Respondents:
G.A.

Criminal Law - Essential Commodities Act, 1955 - Sections 3 &7 – The Code of Criminal Procedure, 1973 – Schedule I Part 2 - As per prosecution case - On the basis of confidential information about black marketing of grains by fair price shop licensee, the sub-inspector along with Regional Food Officer reached the shop of applicant but it was closed - After several failed attempts to contact shop owner, it was sealed - On 30.09.2022, team constituted by A.D.M. inspected shop in presence of shop owner and witnesses, 12 gunny bags of wheat and 6 gunny bags of rice were found less than the stock - On this ground, FIR was lodged - The offence under aforesaid section as bailable or non-bailable, in case of offence committed after 08.07.1998 – Validity - Held, offence fell u/s 7(1)(a)(ii) of the Act being punishable with imprisonment extending up to 7 years r/w Schedule I Part 2 of Code are not bailable and correct position of law is that said provision of Code shall be taken into consideration to determine whether offence punishable under Essential Commodities Act is bailable or non-bailable – Judgment in Rajeev Kumar Vs St. of U.P. is per incuriam and oversighting clear and unambiguous statutory provisions - Hence, anticipatory bail application rejected. (Para 2, 3, 16, 18, 23)

Application rejected. (E-13)

List of Cases cited:

1. Dinesh Kumar Dubey Vs St. of M.P.; 2001 (1) M.P.H.T. 213

2. Rajeev Kumar Vs St. of U.P. (Crl Misc. Anticipatory Bail Application u/s 438 No. 10698 of 2021)

3. Smt. Shakila Vs St. of U.P. & anr.(Application u/s 482 No.44486 of 2012)

4. Nemchand Agrawal Vs St. of M.P.; M.Cr.C. 6111 of 1999

5. Rajesh Khatik Vs St. of M.P. (Misc. Criminal Case No. 3248 of 2022)

6. Arun Bharti Vs St. of M.P. (Misc. Criminal Case No. 20337 of 2020)

7. Hariom Vs St. of M.P., 2011 (1) MPLJ (Cri.) 267

8. Santosh Sahare Vs St. of M.P. (MCRC No. 2914/2015)

9. Balwant Vs St. of M.P., 2001 (3) MPLJ 414

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Anil Pratap Singh Raghav, learned counsel for the applicant and Sri O.P. Mishra, learned AGA for the State.

2. The present application has been moved on behalf of the applicant-Unish Khan seeking anticipatory bail in Case Crime no. 0979 of 2022, under Sections 3/7 of Essential Commodities Act, 1955, P.S. Khurja Nagar, District Bulandshahr.

3. As per prosecution case, on the basis of a confidential information about black marketing of grains by the fair price shop licensee, the sub-inspector from local police station along with Regional Food Officer reached the shop of the present applicant but it was found closed; after several failed attempts to contact the shop owner; the shop was sealed. On 30.09.2022, the team constituted by the A.D.M. inspected the shop in presence of the licensee/shop owner and the witnesses; 12 gunny bags of wheat and 6 gunny bags of rice were found less than the stock. On the basis of this, FIR Case Crime No. 0979 of 2022, under Sections 3/7 of Essential Commodities Act, 1955 was lodged and was investigated upon.

4. It is contended on behalf of the applicant that the applicant is innocent and is not involved in any kind of black marketing; the case against him is registered without any basis at the initiative of a political party; the applicant has no criminal antecedents and that he is ready to abide by the conditions which may be imposed by the court.

5. Besides opposing the anticipatory bail application on merits, it is opposed on the ground that the offence with which the applicant has been charged is bailable, hence, the provisions of Section 438 Cr.P.C. shall not apply and therefore the anticipatory bail application is not maintainable. To support this contention a judgment of Allahabad High Court passed in ***Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 10698 of 2021*** vide order dated 10.11.2021 ***(Rajeev Kumar vs. State of U.P.)*** has been cited before me. I went through the judgment of the Allahabad High Court. Quoting certain parts of the judgment of M.P. High Court in ***Dinesh Kumar Dubey vs. State of M.P.; 2001 (1) M.P.H.T. 213***, the court expressed an opinion that the offences under Sections 3/7 of Essential Commodities Act, 1955 are

bailable. The Allahabad High Court held as below:-

"The above legal position is not clear to most of the Investigating Officers and the courts below and therefore, the bail application of the accused persons in such cases are rejected by the Magistrate and the special courts, treating the offences to be non-bailable."

6. The relevant para of the pronouncement of the M.P. High Court as quoted in the Allahabad High Court's judgment is reproduced here again:-

"It appears that by the Essential Commodities (Special Provisions) Act, 1981 Section 10A of the original Act of 1955 was amended and after the word 'Cognizable', the words 'and non-bailable' were introduced. The said Act of 1981 was to remain in force for a period of five years only from the date of commencement of 1981 Act. Thereafter by the Essential Commodities (Special Provisions) Continuance Act, 1987 Para 2 of the preamble of 1981 to the Essential Commodities (Special Provisions) Act, 1981 was amended and in place of five years period of 10 years was substituted. Thereafter by Third Amendment, the said period of continuance was made for fifteen years. After expiry of fifteen years no amendment Act was brought into force but certain ordinances were issued. The last of the ordinance was issued in the year 1988, which lost its life and efficacy by lapse of time, thereafter no Act or ordinances have been issued to continue the provisions of 1981 Act. Learned counsel for the State was given opportunity to go through the provisions of law and report to the Court as to whether after 1988 any further Act has been brought in existence or any other ordinance was issued to continue the effect of 1981 Act. Learned counsel for the State submits that despite his best efforts he could not find any other Act or ordinance which continued the effect and operation of 1981 Act.

3. If 1981 Act has lost its life then any amendment incorporated by the said Act, which was to remain in force for a period of five, ten or fifteen years would come to an end and additional words, "And non-bailable" shall become non-est and otios. Section 10A without the said amendment shall now be read as "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 every offence punishable under the Act shall be 'Cognizable'.

4. In view of the above legal provisions the offence is not non-bailable. Cognizance of such an offence can be taken but in the absence of any other provisions showing the offence to be non-bailable, the offence would continue to be bailable in view of Schedule-II to the Code of the Criminal Procedure, 1973."

7. There is no dispute on the point that the Essential Commodities Act, 1955 was amended by the Essential Commodities (Special Provisions) Act, 1981. Section 10-A of the Act of 1955 was amended in 1981 and the word 'non-bailable' was introduced after the word 'cognizable'. This is not disputed that 1981 amendment was to remain in force for a period of 5 years only, thereafter for the words '5 years' words '10 years' were substituted. Consequently, the amended part remained in force for total period of 15 years. The last of the ordinance issued in the year 1988 lapsed as no ordinance came thereafter to continue the provisions of Act of 1981. On the basis of aforesaid undisputed positions, the High Court of M.P. was of the view that the offence under

Sections 3/7 of Essential Commodities Act, 1955 no longer remained non-bailable. In para-4 of the judgment just quoted above, the M.P. High Court expressed an unambiguous view that in absence of any other provisions showing the offence to be non-bailable the offence shall continue to be bailable in view of the Schedule-I Part 2 of the Cr.P.C.

8. It may importantly be noted that by the **Essential Commodities (Amendment) Act, 1974 (Act No. 30 of 1974)**, Section 10-A of the principal Act was amended and the word 'bailable' was omitted. This amendment came into force on **2nd June, 1974**. It is quite obvious that before coming into effect of the Amendment of 1974, the offences were being treated bailable by virtue of provisions of Section 10-A of the principal Act.

9. To clarify further it may be noted that by the Essential Commodities (Special Provisions) Act, 1981 word 'bailable' was substituted by the word 'non-bailable' that is the offences became non-bailable by coming into force of 1981 Act, however, before the amendment of 1981 came into operation, Section 10-A had no application as it did not say whether the offence shall be treated as bailable or non-bailable. To summarize before coming into effect of 1974 Act, the offences were bailable and after coming into force of 1974 Act, Section 10-A remained silent on the question of bailability/non-bailability of the offence till the Act of 1981 came into force. Subsequently, because of lapse of ordinance, the position as existing just before the promulgation of Essential Commodities (Special Provisions) Act, 1981 was revived i.e., Section 10-A did not say whether the offence is treated as bailable or non-bailable by virtue of 1974 Act till coming into effect of 1981 Act.

10. Now very pertinent question arises whether to treat the offence under Section 3/7 of Essential Commodities Act, 1955 as bailable or as non-bailable in case of offence committed after 08.07.1998. The judgment of the Allahabad High Court given in ***Rajeev Kumar vs. State of U.P. (supra)*** has referred to G.O. dated 03.10.1998 from the judgment of ***Smt. Shakila Vs. State of U.P. and Another, Application under Section 482 No.44486 of 2012***, which was addressed to all the District Magistrates of this State making it very clear that Essential Commodities (Special Provisions of 1981 and Essential Commodities (Ordinance) Act, 1988 became ineffective from 31.03.1997 and 08.07.1998 respectively.

11. It may be usefully be noted that Section 10-A was inserted below Section 10 of the principal Act by the second amendment of 1967 (Act No. 36 of 1967) w.e.f. 30.12.1967. The newly inserted Section 10-A is quoted as below:-

"Offences to be cognizable and bailable--Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), every offence punishable under this Act shall be cognizable and bailable."

12. This newly Act added Section 10-A was amended by Act No. 30 of 1974 w.e.f. 22.06.1974 and the word 'bailable' was omitted. Thus legal position becomes quite clear that because of lapse of amendment of 1981, the offences under the Essential Commodities Act shall be treated as cognizable and as far as the point of

bailability and non-bailability is concerned, **it shall be dealt with as per the provisions of Cr.P.C., 1973.**

13. Schedule-I Part 2 of the Cr.P.C. applies to offences punishable under other laws. It says that offences punishable with death or imprisonment for life or imprisonment upto 7 years but more than 3 years shall be non-bailable.

14. Section 7 of the Essential Commodities Act, 1955 is as below:-

"(1) If any person contravenes any order made under section 3,--

(a) he shall be punishable,--

(i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine:

[Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three months;]

(b).....

(c) .....

(2) .....

(2A) .....

(2B) .....

(3) ....."

It may be noted that certain offences shall be punishable for imprisonment up to 1 year only and certain other offences shall be punishable with imprisonment up to 7 years. As Section 10-A which was inserted by the Act 36 of 1967, as amended by amendment Act of 1974, stands revived, after lapsing of Essential Commodities (Special Provisions) Act, 1981, hence, the offence committed after 08.07.1998 shall be goverened as per the provisions of **Schedule I Part 2 of the Cr.P.C**. and therefore shall be treated bailable or non-bailable depending upon the term of maximum punishment imposable.

15. It is very essential to note that the judgment of a coordinate Bench of this Court was passed on the basis of judgment of M.P. High Court pronounced in ***Dinesh Kumar Dubey (supra)***. However, the opinion given in that judgment of the M.P. High Court was digressed from by pronouncement of the same High Court in ***Misc. Criminal Case No. 3248 of 2022 passed on 04.02.2022 in Rajesh Khatik vs. State of M.P.*** The judgment in ***Nemchand Agrawal vs. State of M.P.; M.Cr.C. 6111 of 1999*** in which the provisions of Section 10-A of the Act were touched upon, were also placed before the M.P. High Court to stress the point that the offences under Sections 3/7 of the Essential Commodities Act are bailable. The M.P. High Court was of the view that certain point of law was not brought and not argued before the Court cannot be treated as precedent. The Court did not agree with the view taken in Nemchand (supra) and ***Dinesh Kumar Dubey (supra)*** citing reasons as below:-

"8. As demonstrated earlier the statutory legal position, as it exists today, is that the offence under section 7(1)(a)(ii) of the Act which is punishable with imprisonment for seven years is non-bailable. The question is whether the view taken in the four cases referred to above should be followed by this Bench or there is a scope for clarification without referring

the matter to a larger Bench. It is axiomatic that a decision is an authority for the question of law which it decides and not for a question which was not raised or considered. A sub-silentio order or assumption in disregard of a clear and unambiguous statutory provision is not a precedent. If a provision in a statute is construed or interpreted one way or the other that would be a precedent for the future and would be binding on co-ordinate benches. But something which has been assumed and not decided cannot be considered as authoritative binding precedent.

10. Failure to consider a statutory provision is one of the clearest cases in which the Court is not bound to follow its own decisions. Bonalumi v. Secretary of State, (1985) 1 All ER 797. In Young v. Bristol Aeroplane Co. Ltd., (1944) 2 All ER 293, it has been observed by Lord Greene, M.R.C.P.:"Where the Court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the Court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam." It has been held by a Division Bench of this Court in United India Insurance Company v. Mahila Ramshree, 1996 JLJ 691 that a judgement is per incuriam if the relevant law has not been considered and it has no binding effect."

16. Ultimately it was held that as the offence fell under Section 7(1)(a)(ii) of the Act being punishable with imprisonment extending up to 7 years read with Schedule I Part 2 of the Code are not bailable and it was held that the correct position of law is that Schedule I Part 2 of the Code, 1973 shall be taken into consideration to determine the question whether the offence punishable under the Essential Commodities Act, 1955 is bailable or non-bailable.

17. Even before passing of this judgment, the High Court of M.P. in **Arun Bharti vs. State of M.P.; Misc. Criminal Case No. 20337 of 2020 decided on 01.07.2020** considered the position of law in the light of number of judgments pronounced earlier including the judgments in ***Dinesh Kumar Dubey (supra), Nemchand Agrawal vs. State of M.P. (supra), Hariom vs. State of M.P., 2011 (1) MPLJ (Cri.) 267, Santosh Sahare vs. State of M.P. (MCRC No. 2914/2015 decide on 7.5.2015) and Balwant vs. State of M.P.; 2001 (3) MPLJ 414*** held that in judgment of Balwant case is the precedent to be followed wherein it was held that the offences punishable up to 3 years were bailable and offences punishable up to 7 years were non-bailable as per Ist Schedule of Cr.P.C.

18. The judgment inCriminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 10698 of 2021 vide order dated 10.11.2021 (Rajeev Kumar vs. State of U.P.) is per incuriam and has been passed oversighting the clear and unambiguous statutory provisions.

19. The present case before me is of a fair price shop which when checked by the authorities was found short of certain stock. The applicant has not been able to show that the FIR was registered with some ulterior motives. The offence shall fall in the categories under Section 7(1)(a)(ii) entailing punishment up to 7 years.

20. No probable defence or reason has been offered for false implication.

21. I considered all the submissions, facts, circumstances and material before me, It may be kept in mind that anticipatory bail is an extraordinary remedy to be exercised in suitable cases only. The power under Section 438 Cr.P.C. cannot be utilized in a routine manner and definitely not as a substitute for regular bail. This discretionary power calls for existence of facts of the kind where the court is satisfied that its interference is necessary to further the cause of justice and to prevent misuse of process of law.

22. In view of the facts and circumstances of the case I do not find it fit case to grant benefit of anticipatory bail.

23. Hence the anticipatory bail application is **rejected**.

24. **The Registry is directed to circulate this judgment to all concerned.**

(2023) 4 ILRA 1100
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. Ist Bail Application No. 20211 of 2022

Satya Narayan @ Sattan ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri Girish Kumar Singh, Sri Kamlesh Singh, Sri Akhilesh Singh

Counsel for the Respondent:
Sri Paritosh Malviya(A.G.A.)

आपराधिक कानून - भारतीय दंड संहिता, 1860 – धारा 147, 302/34 - दंड प्रक्रिया संहिता, 1973 – धारा 154, 161, 173 – हत्या - प्रर्थम सूचना रिपोर्ट के अनुसार - दिनांक 18.12.2021 को करीब सायं 6 बजे सूचनाकर्ता (मृतिका का ससुर) की बहू, शौच के लिए गाँव के बाहर खेत के तरफ गई थी, उसके साथ उसकी पुत्री के साथ अन्य महिलाए भी थी - शौच से वापस लौटते समय रास्ते में ही आवेदक (मृतिका का पिता) के साथ अन्य लोगों ने चाकू मार कर उसकी बहू की हत्या कर दी - दो वर्ष पूर्व मृतिका ने अपने परिवार की सहमती के बिना सूचनाकर्ता के पुत्र से भागकर विवाह कर लिया था, जिसके कारण आवेदक के साथ परिवार के अन्य लोग रंजिश रखते थे - आरोप पत्र – आवेदक और दो अन्य के विरुद्ध दाखिल किया गया – न्यायलय ने माना कि घटना के समय तीन चक्षुदर्शी उपस्थित थे - उन्होने सभी हमलावरो को पहचान लिया था, जो उसी गाँव के थे व मृतिका के रिरश्तेदार भी थे - उन्होने यह बताया कि कैसे घटना घटी व किसने मृतिका पर प्राण घातक वार किया - आवेदक घटना स्थल पर मौजूद था, घूँघट उठा कर अपनी पुत्री को पहचाना व उसके पुत्र ने चाकू से उसकी हत्या कर दी, जिसकी मृत्यु पश्चात शव विच्छेदन में वर्णित मृत्यु पूर्व चोटों से पुष्टि भी होती है - आवेदक ने पूर्ण योजना के तहत, सामान्य आशय को अग्रसर करने के लिए कार्य किया - अतः वह इस अपराध में प्रथम दृष्टया शामिल है - अन्वेषण के दौरन एकत्र किये गए साक्ष्य घटना को 'सम्मान रक्षा हेतु हत्या' का मामला बनाते है। (पैरा 1,2,3,4,17,18)

जमानत अर्जी खारिज की गई। (E-13)

उद्धृत मामलों की सूची:

1. प्रमोद बनाम उत्तर प्रदेश सरकार (आपराधिक प्रकीर्ण जमानत प्रार्थना पत्र संख्या - 20211 सन् 2022

2. भगवान दास बनाम राज्य (एन.सी.टी. ऑफ दिल्ली) (2011) 6 एस.सी.सी. 396

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

पूर्व कार्यवाही

१. वर्तमान, आपराधिक प्रकीर्ण जमानत प्रार्थना पत्र, आवेदक सत्य नारायण उर्फ सत्तन, जो अपराध संख्या २५६/2021, धारा- १४७,३०२,३४ भारतीय दण्ड संहिता, थाना - बरहज, जनपद- देवरिया, में एक आरोपी है, के द्वारा दाखिल जमानत प्रार्थना पत्र संख्या- ३९/२०२२, न्यायालय सत्र न्यायाधीश, देवरिया आदेश दिनाँक - ०९.०२.२०२२ द्वारा निरस्त होने के उपरान्त, दण्ड प्रक्रिया संहिता की धारा- ४३९ के अंतर्गत, इस न्यायालय में दायर किया गया है।

प्रथम सूचना तथ्य

२. सूचनाकर्ता (शम्भू राजभर) ने एक प्रथम सूचना रिपोर्ट संख्या- २५६ सन् २०२१ (अन्तर्गत धारा - १५४ दंड प्रक्रिया संहिता), थाना- बरहज, जिला- देवरिया में इस सूचना के साथ दर्ज करवाई कि, दिनाँक १८.१२.२०२१ को समय करीब सायं ६ बजे उसकी बहू ज्योती राजभर पत्नी ज्ञानचन्द्र राजभर, शौच के लिए गाँव के बाहर खेत के तरफ गयी थी, उसके साथ उसकी पुत्री रानी राजभर, सोनम राजभर पत्नी भुवर राजभर, करिश्मा राजभर पुत्री श्री किशुन राजभर भी थे। शौच से वापस लौटते समय रास्ते में ही उसके गाँव के सत्य नारायण उर्फ सत्तन पुत्र राम समुझ, राजनाथ पुत्र राम समुझ, भोले उर्फ आशुतोष पुत्र सत्य नारायण व गोलू पुत्र राजनाथ ने चाकू मार कर उसकी बहू ज्योति की हत्या कर दी। ज्योति पुत्री सत्य नारायण दो वर्ष पहले उसके लड़के के साथ घर से भाग गयी थी, जिसके कारण सत्य नारायण, राजनाथ व इसके परिवार के लोग उससे रंजिश रखते थे, इसलिये उपरोक्त चारों ने मिलकर ज्योति की हत्या कर दी।

आरोप पत्र

३. उपरोक्त सूचना पर अन्वेषण किया गया एवं दण्ड प्रक्रिया संहिता की धारा - १७३ के अंतर्गत आरोप पत्र धारा - १४७,३०२,३४ भारतीय दण्ड संहिता के अंतर्गत आरोपी १- सत्य नारायण उर्फ सत्तन (आवेदक) व २- राजनाथ के विरूद्ध दाखिल किया गया तथा बाल अपचारी भोलू उर्फ आशुतोष व बाल अपचारी गोलू उर्फ आशीष के विरूद्ध धारा - १४७,३०२,३४ भारतीय दंड संहिता के अन्तर्गत न्यायालय, किशोर न्याय बोर्ड में दाखिल किया गया।

आवेदक का पक्ष

४. श्री गिरीश कुमार सिंह, आवेदक के विद्वान अधिवक्ता ने यह तर्क दिया कि आवेदक मृतका का पिता है, जबकि सूचनाकर्ता मृतका का ससुर है। वो(आवेदक) निर्दोष है तथा वर्तमान दाण्डिक कार्यवाही में गलत रूप से फंसाया गया है।

५. विद्वान अधिवक्ता नें यह भी तर्क दिया कि अभियोजन कथानक घटना को 'सम्मान रक्षा हेतु हत्या (ऑनर किलिंग)' का रूप देना चाहता है, कि मृतका ने सूचनाकर्ता के पुत्र से दो वर्ष पूर्व उसकी व उसके परिवार की सहमति के बिना विवाह कर लिया था जिसका बदला लेने के लिए आवेदक व उसके

नाबालिग पुत्रों व अन्य ने आवेदक की पुत्री की हत्या कर दी, जबकि सत्यता यह है कि, सूचनाकर्ता की पत्नी मृतका को अपने घर में रहने देना नही चाहती थी। अतः सुनियोजित ढंग से न केवल उसकी हत्या करवाई बल्कि समस्त आरोप आवेदक व उसके परिवार पर डाल दिये।

६. घटना के ३ चक्षुदर्शी गवाह बतायें जाते है परन्तु वो तीनों महिलायें, सूचनाकर्ता के परिवार से है और अन्वेषण अधिकारी ने घटना स्थल के आस-पास रहनें वाले ग्राम वासियों का कोई भी ब्यान नही लिया और न ही वो व्यक्ति जो मृतका को सामुदायिक स्वास्थ केन्द्र पर लाया उसका ही ब्यान दर्ज किया।

७. अभियोजन कथानक के अनुसार मृतका की हत्या करने के पूर्व उसको कुछ दूर तक धकेला भी गया था, परन्तु उसके शरीर पर कोई भी मृत्यु पूर्व चोटें नही पायी गयी।

८- घटना ४ व्यक्तियों द्वारा कारित की गई, आवेदक के नाबालिग पुत्रो पर चाकू से वार करने का आरोप लगाया गया है, परन्तु आवेदक पर कोई विशिष्ट कृत्य करने का आरोप नही है और न ही कोई ऐसा साक्ष्य एकत्र किया गया है, कि आवेदक ने समान्य आशय को अग्रसर करने के लिए या विधि विरूद्ध जमाव के समान्य उद्देश्य को अग्रसर करने के लिए कोई कृत्य किया है।

<u>राज्य (अभियोजन) का पक्ष</u>

९. श्री पारितोष मालवीय, अतिरिक्त शासकीय अधिवक्ता नें उपरोक्त तर्कों का पुरजोर विरोध किया और कथन किया कि आवेदक पर एक संगीन अपराध करने का आरोप है, कि वो अपनी पुत्री के कत्ल में शामिल रहा और सामान्य आशय के अग्रसर मे अपराध में सक्रीय रूप से शामिल रहा।

१०. अन्वेषण के दौरान यह साक्ष्य भी उजागर हुआ कि मृतका (आवेदक की पुत्री) ने वर्ष २०१९ मे सूचनाकर्ता के पुत्र से भागकर व परिवार की इच्छा के विरूद्ध विवाह कर लिया था। जिसके कारण समाज में उनकी बदनामी हुई और इस नाते ग्राम वासी उनको तानें मारते रहते थे, इसलिए योजनाबद्ध तरीके से अपराध कारित कर पुत्री की हत्या कर दी।

११. घटना के तीन चक्षुदर्शी गवाह है, उन्होनें धारा १६१ दं.प्र.सं. के अन्तर्गत ब्यान दर्ज करायें हैं तथा घटना का विवरण भी बताया है, जो प्रथम सूचना के तथ्यों का समर्थन करता है कि, जब वह (घर की महिलायें) शौच करने जा रही थी तो आरोपियों ने पहले तो उनको घेर लिया और फिर घूंघट उठाकर मृतका की पहचान करके उसको दूसरे खेत मे ले जा कर उसकी हत्या कर दी। आवेदक के नाबालिग पुत्र ने चाकू से मृतका पर कई वार किये जिसका समर्थन मृत्यु पश्चात शव विच्छेदन आख्या में लिखित मृत्यु पूर्व चोटों से पूर्णतः सिद्ध होता है जो संख्या मे पाँच है। अतः यह एक 'सम्मान रक्षा हेतु हत्या' है

१२. आवेदक के विद्धान अधिवक्ता के शेष तर्क उनके बचाव के तर्क है जिस पर इस स्तर पर विचार नही किया जा सकता है। जमानत प्रार्थना पत्र निरस्त करने योग्य है।

१३. मेरे द्वारा उभय पक्षों की बहस को सुना गया एवं पत्रावली का परिशीलन किया गया।

१४. न्यायालय द्वारा जमानत की विधि को विस्तृत रूप से अपने **निर्णय दिनांक ०४.०४.२०२३,आपराधिक प्रकीर्ण जमानत प्रार्थना पत्र संख्या- २०२११ सन् २०२२ (प्रमोद प्रति उत्तर प्रदेश सरकार)** में उल्लेखित किया गया, जिसके कुछ अंश निम्नलिखित हैंः-

*"**(क)** सारगर्भित धारणा से संभवतः मूल नियम, जमानत है न की कारागार (देखें : **राजस्थान राज्य, जयपुर बनाम बलचंद @ बलियाः (१९७७ एआईआर २४४७, १९७८ एससीआर (१) ५३५)**। भा.दं.सं की धारा ४३९ के तहत जमानत देने की शक्ति के व्यापक आयाम है तथा न्यायालय को असीमित तो नही परन्तु पर्याप्त विवेकाधिकार प्रदान किये गये है, जिसका उपयोग न तो सामान्य रुप से और न ही मनमाने रुप से, परन्तु न्यायसंगत रुप से करने के लिए प्रस्तावित किया गया है । (देखें: **राम गोविंद उपाध्याय बनाम सुदर्शन सिंहः (२००२) ३ एससीसी ५९८ और नीरू यादव बनाम उत्तर प्रदेश शासन (२०१६)१५ एससीसी ४२२)।***

*(ख) जमानत देने के लिये विचारात्मक कारक है, अपराध होने की परिस्थितियों की प्रकृति और गंभीरता; पीड़ित और गवाहों के संदर्भ में आरोपी की स्थिति और हैसियत; आरोपी के न्याय प्रक्रिया से भागने की संभावना; अपराध दोहराने की संभावना; मामले में संभावित सजा की कठोर संभावना के साथ अपने स्वयं के जीवन को खतरे में डालना; गवाहों के साथ छेड़छाड़; मामले का इतिहास और साथ ही इसकी जांच और अन्य प्रास*गिक आधार, जो अन्य महत्वपूर्ण कारकों पर ध्यान करते हुए, व्यापक रूप से निर्धारित नहीं कि**ये जा सकते है।(देखें :** गुरचरण सिंह बनाम राज्य (दिल्ली प्रशासन), (१९७८) १ एससीसी ११८)

*(ग) प्रासंगिक कारक कौन से हो सकते हैं, इसका कोई निर्धारित नियम (स्ट्रेट जैकेट फॉर्मूला) कभी भी नियत नहीं किया जा सकता है, हालांकि, कुछ महत्वपूर्ण कारक जिन्हें अन्य कारकों के साथ हमेशा विचारणीय माना जाता है, वो हैं , प्रथम दृष्टया अभियुक्त की संलिप्तता, आरोप की प्रकृति और गंभीरता, सजा की कठोरता, आरोपी का चरित्र, स्थिति और उसकी अवस्थिति से संबंधित है।(देखें: **उत्तर प्रदेश शासन प्रति अमरमणि त्रिपाठी, (२००५) ८ एससीसी २१**)*

*(घ) **मन्नो लाल जायसवाल बनाम उत्तर प्रदेश शासन और अन्यः २०२२ एससीसी ऑनलाइन एससी ८९** में उच्चतम न्यायालय ने कहा है कि, जब अभियुक्तों को भारतीय दंड संहिता की धारा १४९ के तहत दंडनीय अपराधों के लिए आरोपित किया गया है और जब उनकी उपस्थिति स्थापित हो जाती है और यह कहा गया हो कि वो विधि विरुद्ध जमाव के सदस्य थे, तो उनकी व्यक्तिगत भूमिका औरा या व्यक्तिगत आरोपी द्वारा किया गया अत्युक्ति महत्वपूर्ण औरा या प्रासंगिक नहीं होती है।*

(ङ) आशिम बनाम राष्ट्रीय जांच एजेंसी : (२०२२) १ एससीसी ६९५ में, उच्चतम न्यायालय ने कहा है कि एक बार जब यह स्पष्ट हो जाये कि समयोचित विचारण संभव नहीं हो पायेगा और आरोपी कारागार में एक दीर्घ अवधि व्यतीत कर चुका है, तो न्यायालय आम तौर पर उसे जमानत पर छोड़ने के लिए बाध्य हो जाते है।

(च) आरोपी को जमानत पर रिहा करने का आधार मात्र इसलिए कि अभियोजन का मामला, परिस्थितिजन्य साक्ष्य पर आधारित है, नहीं हो सकता है, अगर जांच के दौरान साक्ष्य/तथ्य एकत्र किये गये हो और प्रथम दृष्टया घटनाओं की पूरी श्रृंखला स्थापित हो गई है। (देखें : ईश्वरजी नागाजी

माली बनाम गुजरात राज्य और अन्य २०२२ एससीसी ऑनलाइन एससी ५५)

*(छ) यह भी ध्यान में रखा जाना चाहिए कि जमानत देने के लिए विधायिका ने "साक्ष्य" के स्थान पर "विश्वास करने के लिए उचित आधार" शब्दों का प्रयोग किया है, जिसका अर्थ है कि जमानत देने से संबंधित न्यायालय केवल इतनी संतुष्टि कर सकता है कि क्या आरोपी के खिलाफ कोई वास्तविक मामला है और अभियोजन पक्ष आरोप के समर्थन में प्रथम दृष्टया साक्ष्य पेश करने में सक्षम होगा। (देखें : **प्रहलाद सिंह भाटी बनाम एनसीटी आफ दिल्ली और अन्य:(२००१) ४ एससीसी २८०)**।*

*(ज) मुक्त न्याय का एक मौलिक आधार है, जिसके लिए हमारी न्यायिक प्रणाली प्रतिबद्ध है, कि वो कारक जो न्यायाधीश के मानस में ज़मानत को अस्वीकृत या स्वीकृत करने के लिए मूल्यांकित किये गये, वो पारित आदेश में उल्लेखित किये जायें। मुक्त न्याय इस धारणा पर आधारित है कि न्याय न केवल किया जाना चाहिए, बल्कि स्पष्ट और निस्संदेह रूप से होता हुआ दिखना भी चाहिए। न्यायसंगत निर्णय देने का न्यायाधीशों का कर्तव्य इस प्रतिबद्धता का हृदय है। (देखें: **महिपाल बनाम राजेश कुमार,: (२०२०) २ एससीसी ११८ और सुश्री वाई बनाम राजस्थान राज्य और अन्य :२०२२ एससीसी ऑन लाइन एस सी ४५८)***

*(झ) जमानत के आवेदन पर आदेश पारित करते समय विस्तृत विवरण का उल्लेख, इस धारणा के नाते नहीं किया जा सकता है, कि मामला ऐसा है जिसके परिणामस्वरूप दोषसिद्धि हो सकती है या इसके विपरीत, दोषमुक्ति हो सकती है। हालांकि, जमानत के आवेदन पर निर्णय लेने वाला न्यायालय मामले के भौतिक पहलुओं से अपने निर्णय को पूरी तरह से अलग नहीं कर सकता, जैसे आरोपी के खिलाफ लगाए गए आरोप ; अगर आरोप यथोचित संदेह से परे साबित होते हैं और इसके परिणामस्वरूप दोषसिद्धि होती है तो सजा की कठोरता; अभियुक्त द्वारा गवाहों को प्रभावित करने की उचित आशंका; साक्ष्यों से छेड़छाड़; अभियोजन के मामले में निराधारता; आरोपी का आपराधिक पूर्ववृत्त; और आरोपी के विरुद्ध आरोप के समर्थन में न्यायालय की प्रथम दृष्टया संतुष्टि। (देखें: **मनोज कुमार खोखर बनाम राजस्थान राज्य और अन्य (२०२२)३ एनसीसी ५०१, दीपक यादव प्रति उत्तर प्रदेश राज्य व एक अन्य (२०२२)८ एससीसी ५५९**)।"*

<u>सम्मान रक्षा हेतु हत्या (ऑनर किलिंग)</u>

१५. 'सम्मान रक्षा हेतु हत्या' हमारे समाज के लिए एक कलंक के समान है, जहां भारत का संविधान जीवन का अधिकार देता है, वही किसी को भी साधारणतया जीवन छीनने का अधिकार नही देता है। समाज में अपनी झूठी शान बरकरार रखने को एक कारण बताते हुए, यदि परिवार के ही सदस्य या अन्य कोई, अपनी पुत्री या बहन का कत्ल कर देता है तो यह कृत्य सभ्य समाज का घोतक कदापि नही हो सकता, बल्कि एक ऐसे समाज के होने का प्रमाण देता है, जो बर्बर है, जो क्रूर है, जो असभ्य है। ऐसे समाज व ऐसी व्यवस्था को यदि इस सदी में भी सहन करना पड़े तो इस देश के भविष्य के लिए उचित नही होगा। विरोध और इच्छा के विरूद्ध कार्य करने वाले परिवार के सदस्य को मौत के घाट उतारने से न तो किसी का सम्मान बढेगा और न ही उसके साहस की तारीफ होगी, बल्कि यह कायरता ही कहलायेगी।

१६. उपरोक्त विषय पर उच्चतम न्यायालय द्वारा **भगवान दास प्रति राज्य (एन.सी.टी. ऑफ**

दिल्ली)(२०११) छ एस.सी.सी. ३९६ के निर्णय मे की गई टिप्पणी का उल्लेख करना सार्थक रहेगा किः-

" --- इस निर्णय को समाप्त करने से पूर्व हम यह कहना चाहेंगे कि 'सम्मान रक्षा हेतु हत्या' (ऑनर किलिंग), इस देश के कई भागों में, विशेष रूप से हरियाणा, पश्चिमी उत्तर प्रदेश व राजस्थान में सामान्य हो गई है।

बहुधा युवा युगल जो प्यार करने लगते है, उनको पुलिस लाईन्स या आश्रय गृह में पनाह लेनी पड़ती है। हमनें लता सिंह के प्रकरण (पूर्व मे उल्लेखित) में यह निर्धारित किया कि ' सम्मान रक्षा हेतु हत्या' में, 'सम्मान' जैसा कुछ भी नही होता तथा इस तरह के कृत्य, कट्टर व्यक्तियों व सामंती मानस वाले व्यक्तियों द्वारा किये गये बर्बर और क्रूर हत्याओं के अतिरिक्त कुछ भी नहीं है। हमारी राय में, 'सम्मान रक्षा हेतु हत्या' , चाहे कारण कोई भी हो, दुर्लभ से दुर्लभ मामलों की श्रेणी मे आते है जो मृत्यु दंड वांछित करते है। अब समय है, कि इन बर्बर व्यक्तियों व सामंती प्रथाओं को चिन्हित किया जायें, जो हमारे देश पर कलंक है, जो अपमानजनक एवं असभ्य व्यवहार के लिए आवश्यक रूप से एक निवारक है। वह सभी लोग, जो 'सम्मान रक्षा हेतु हत्या' हेतु योजना बना रहे है, उनको ज्ञात होना चाहिये कि फांसी का तख्ता उनकी प्रतीक्षा कर रहा है।"

<u>विश्लेषण-</u>

१७. उपरोक्त वर्णित तथ्यों, तर्कों व विधिक परिस्थितियों से यह उजागर होता है किः-

(क) आवेदक की पुत्री (मृतका) ने अपने परिवार से विरूद्ध व घर से भागकर सूचनाकर्ता के पुत्र से करीब दो वर्ष पूर्व विवाह कर लिया था।

(ख) घटना के समय तीन चक्षुदर्शी उपस्थित थे। उन्होने सभी हमलावरो को पहचान लिया था, जो उसी गांव के थे व मृतका के रिश्तेदार भी थे। उन्होने यह बताया कि कैसे घटना घटी व किसने मृतका पर प्राण घातक वार किया।

(ग) आवेदक घटना स्थल पर मौजूद था, घूंघट उठा कर अपनी पुत्री को पहचाना व उसके पुत्र ने चाकू के कई वारों से अपनी बहन की बर्बरता पूर्वक हत्या कर दी, जिसकी मृत्यु पश्चात शव विच्छेदन में वर्णित मृत्यु पूर्व चोटों से पुष्टि भी होती है।

(घ) आवेदक ने पूर्ण योजना के तहत, सामान्य आशय को अग्रसर करने के लिए कार्य किया। अतः वो इस संगीन अपराध में प्रथम दृष्टवा शामिल है। अन्वेषण के दौरन जो साक्ष्य एकत्र किये गये है, वो भी प्रथम दृष्टवा इस घटना को ' सम्मान रक्षा हेतु हत्या' की घटना है, ऐसा दृष्टिगोचर करते है, क्योकि आवेदक व उसके परिवारजन अपनी पुत्री(मृतका) से, सूचनाकर्ता के पुत्र से भाग कर विवाह करने से समाज में हुए अपने अपमान से नाराज़ थे।

(ङ) आवेदक के विद्वान अधिवक्ता द्वारा दिये गये अन्य तर्क मात्र उनके बचाव के तर्क है, जिस पर इस स्तर पर विचार नही किया जा सकता है।

<u>निष्कर्ष</u>

१८. उपरोक्त तथ्यात्मक व विधिक विश्लेषण का एक मात्र निष्कर्ष है, कि वर्तमान जमानत प्रार्थना

पत्रनिरस्त करने योग्य है, अतः निरस्त किया जाता है।

(2023) 4 ILRA 1106
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.03.2023

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Revision No. 1357 of 2022

Raj Kumar Yadav @ Kalu & Ors.
...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:
Prem Kumar Singh

Counsel for the Opp. Parties:
G.A., Rajesh Shukla, Surya Narayan Mishra

Criminal Law - Indian Penal Code, 1860 - Sections 323, 325, 307, 504 & 506 - The Code of Criminal Procedure, 1973 – Sections 311, 397, 401 – Revisionist moved application u/s 311 CrPC before Trial Court for the cross-examination of PW-1 – Application was rejected with detailed speaking order by Trial Court – Being aggrieved, revision filed – Held, the object of Section 311 CrPC enable the Court at any stage of inquiry summon any person as a witness - The object is to do justice - It is done neither to fill up any gap in the prosecution evidence nor to give any unfair advantage against the accused - This is the admitted fact that accused persons are well known to PW-1 and they are villagers, so, the identity of accused persons could not be doubted - They could be identified even by word spoken by them and time of incident is about 6:30 p.m - At that time the question of darkness is not arise – Hence, no illegality in the impugned order. (Para 2, 3, 4, 8, 9)

Revision dismissed. (E-13)

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard Sri Prem Kumar Singh, learned counsel for revisionists, Sri Surya Naryan Mishra, learned counsel for opposite party no.2, learned AGA for the State and perused the record.

2. This Criminal Revision has been preferred u/s 397/401 CrPC against the order dated 26.11.2022 on the Application dated 26.11.2022 u/s 311 CrPC moved by revisionists, passed by Additional Session Judge, Court No.7, Gonda in Session Trial No. 85/2018, vide Crime No. C-14/2014,u/s 323/325/307/504/506 IPC, P.S. Wzir Ganj, Gonda.

3. Learned counsel for revisionists submitted that the application u/s 311 CrPC has been moved before learned trial court with prayer that for the interest of justice he want to cross-examine the PW-1 Sri Umesh Dutt Singh on following points:

(i) Was it dark at the time of incident?
(ii) Were people's faces visible at the time of incident?
(iii) Were you able to recognize the accused Raj Karan, Krishna Kumar and Shiv Kumar at the time of incident.
(iv) Was the accused name in written report on the advice of villager's?

4. The trial court rejected the application of revisionists for cross-examination of above points by detail speaking order dated 29.11.2022, order of learned trial court reflect that sufficient cross examination has been done by learned counsel for revisionist. Each and every aspect touch by the trial court. Trial is fix for 313 CrPC and on behalf of revisionist delay tactics adopted by the

revisionist and revisionist's application of recall the witness PW-1 for further cross examination have no substance and application u/s 311 CrPC is devoid of merit hence rejected. Being aggrieved with this, the revision has been filed.

5. Learned counsel for revisionists submitted that for just decision of the case, cross-examination of PW-1 is inevitable and due to ignorance of the earlier counsel this question was not asked at the time of cross-examination of the prosecution witness and learned trial court rejected the application u/s 311 CrPC without application of mind if the revision not allowed then the valuable right of revisionist shall be curtailed and pray for one chance for cross examination of PW-1.

6. Learned AGA vehemently opposed and submitted that the accused persons and witnesses are the resident of same village and know each other well by their colloquial stature and language and such person can identify each other even in the dark of night. Learned AGA further submitted that the alleged date of incident was mentioned in FIR as 18.2.2004 at 6.30 p.m. and at that time there was no dark as the sunset time was about 6.00 p.m. Detail examination of PW-1 has already been conducted by learned trial court and learned trial court rightly rejected the application u/s 311 CrPC.

7. I have heard learned counsel for revisionists as well as learned AGA for the State and perused the record.

Section 311 CrPC reads as under:

*"**Power to summon material witness, or examine person present.** Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."*

8. The object of Section 311 CrPC enable the Court at any stage of any inquiry summon any person as a witness, in order to enable the Court to find out the truth and rather just decision the salutary provision of Section 311 are enacted. Thus, the object of this provision is to do the justice. It is done neither to fill up any gap in the prosecution evidence nor to give it any unfair advantage against the accused. The fundamental thing to be seen is whether the Court think it necessary in the facts and circumstances of the particular case before it and the power to be exercised u/s 311 CrPC only for strong and valid reason and it should be exercised with caution and circumspection.

9. On perusal of the order of learned trial court, it is reflected that learned trial court passed the detail order while rejecting the application of the revisionists u/s 311 CrPC. This is the admitted fact that the accused persons are well known to PW-1 and they are villagers, so, the identity of the accused persons could not be doubted. They could be identified even by word spoken by them and the time of incident is about 6:30 p.m. At that time the question of darkness is not arise. Thus, on above discussion this Court is of the view that there is no illegality or irregularity in the order of learned trial court.

10. The revision of the revisionists is devoid of merit.

11. Consequently, the revision is hereby **dismissed**.

(2023) 4 ILRA 1108
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 4382 of 2022

Sandeep Kumar ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Dhiraj Srivastava, Sri V.P. Srivastava Sr. Advocate

Counsel for the Opp. Parties:
G.A., Sri Amar Chandra, Sri Sunil Kumar

Criminal Law- Indian Penal Code, 1860 – Sections 304, 323 & 504 – The Code of Criminal Procedure, 1973 – Sections 161, 319 - Criminal Revision against order impugned by which - Court below on an application of prosecution, summoned the accused - Validity - FIR - Accused Vibha Devi and revisionist caught hold complainant's father and co-accused inflicted knife injuries causing serious bleeding – During investigation, complainant and her sister, both have corroborated allegations of F.I.R - Investigating Officer has exonerated the revisionist - On the basis of affidavits and St.ments of some witnesses - Revisionist was not present at the time of occurrence and from CDR his presence is not established - Incident has occurred at the house of complainant and except complainant and her sister no other person is named as eye-witness - It is settled law that testimony of an injured witness has greater evidenciary value and should not be discarded, but for sound and cogent reasons - Applying the test laid down by Apex Court - There is strong evidence than mere probability of complicity of revisionist - It passes the test which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to the extent that the evidence, if got unrebutted, would lead to conviction – Hence, no infirmity or illegality in the impugned order. (Para 2, 3, 10, 11)

Revision dismissed. (E-13)

List of Cases cited:

1. Brijendra Singh & ors. Vs St. of Raj. (2017) 7 Supreme Court Cases 706

2. Naveen Vs The St. of Har. in Criminal Appeal No (s). of 2022 (Arising out of SLP (Crl.) No. 3746 of 2022)

3. Hardeep Singh Vs St. of Pun. AIR 2014 Supreme Court page 1400

4. Brijendra Singh & ors. Vs St. of Raj. (2017) 7 SCC page 706

5. Rajesh & ors. Vs St. of Har., (2019) 6 SCC 368

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri V.P. Srivastava, learned Senior Advocate, assisted by Sri Dhiraj Srivastava, learned counsel for the revisionist, learned A.G.A. for the State of U.P.-opposite party no.1 and Sri Amar Chandra, learned counsel for the opposite party no.2.

2. This criminal revision is directed against order dated 27.09.2022 passed by Additional Session Judge, Court No.1, Shahjahanpur in Session Trial No.177 of 2016 (State Versus Ashok Kumar) arising out of Case Crime No.377 of 2016 under Section 304, 323 and 504 I.P.C., Police Station Roja, District Shahjahanpur.

3. By the impugned order, learned trial court in exercise of powers under Section 319 Cr.P.C. on the application of the prosecution has summoned the revisionist-accused, Sandeep and another accused Vibha Devi to face trial with co-accused.

4. Km. Anushka Krishna, opposite party no.2 lodged an F.I.R. on 31.03.2016 regarding the incident which has taken place on 29.03.2016 at about 6.30 p.m. alleging therein that the complainant with her sister Surabhi was at her house when her real uncle Ashok Kumar, his wife (Vibha Devi) and Sandeep came there and started abusing. In the meantime her father Ram Krishna came there and requested not to hurl abuses, which infuriated Ashok Kumar who brought a knife from his house and Vibha and Sandeep caught hold the complainant's father and Ashok Kumar stabbed in the stomach of her father causing him serious injuries and profused bleeding. Surabhi also got injury on her right finger while rescuing her father. Her father became unconscious and all the accused ran away. Her father was brought to District Hospital for treatment. The doctors referred him to Lucknow and he was admitted in KGMC, Lucknow and ultimately died on 30.03.2016. The F.I.R. was lodged under Sections 304, 504 and 323 I.P.C. against Ashok Kumar, Vibha Devi and Sandeep. Charge-sheet was submitted against Ashok Kumar. During trial two witnesses Km. Anushka Krishna Complainant, PW 1 and Surabhi PW 2 were examined and theirupon an application under Section 319 Cr.P.C. was moved by the prosecution.

5. Learned counsel for the revisionists contended that after investigation charge-sheet was submitted only against Ashok Kumar on 25.08.2016. The Investigating Officer failed to collect any evidence against revisionist-accused, although the investigation continued. The second Investigating Officer made further investigation and verified the statement of complainant and other witnesses recorded by the earlier Investigating Officer and came to the conclusion that revisionist-accused is not involved, even remotely to the alleged incident and he submitted report to this respect on 09.03.2017 specifically mentioning that revisionist was not at all present on the place of occurrence as is apparent from his call detail record. During trial Anushka Krishna PW 1 and Surabhi PW 2 were examined and they both just repeated the version of the F.I.R without bringing on record any other fact, material or circumstances. They are real sisters and daughters of the deceased. No other prosecution witness or independent witness has been examined. Before the trial court there was no additional circumstance or any sufficient material or any documentary evidence or even statement of any independent witness. There existed on record only the version of the F.I.R. The complainant moved an application under Section 319 Cr.P.C. on 09.11.2016 when investigation against revisionist was still continuing. An objection was filed against it. The trial court called for report from Station House Officer, Police Station Roja, District Shahjahanpur about pending investigation. The Investigating Officer submitted report on 18.02.2017 stating that against revisionist investigation is continuing which included the final report dated 09.03.2017 and CDR dated 29.03.2016 apart from other material. However, trial court allowed the application under Section 319 Cr.P.C. vide order dated 23.06.2018 and summoned the revisionist, Sandeep Kumar. Being

aggrieved with this order, revisionist preferred Criminal Revision No.2189 of 2018 which was allowed by this Court vide its order dated 18.07.2018 setting aside the order dated 23.6.2018 and the matter was remitted to the trial court to decide afresh in the light of the observations. Certified copy of this order was submitted before court below on 24.07.2018, but court below appreciated the material which were already available and ignoring the order of this Court has passed the impugned order dated 27.09.2022 in arbitrary and cursory manner. The learned court below has miserably failed to exercise its jurisdiction while ignoring order of this Court in which this Court has quoted the decisions of Hon'ble Apex Court in Hardeep Singh's case which ought to have been considered while passing the impugned order but such exercise has not been undertaken by the court below. The impugned order dated 27.09.2022 is verbatim to the earlier order dated 23.06.2018 which reflects that court below has not applied its judicial mind and has passed the impugned order in a mechanical manner. It is further contended that the law stands settled by Apex Court and High Court that power under Section 319 Cr.P.C. should be exercised sparingly and in rarest of rare cases and that, too, after application of judicial mind and after considering the evidence and also only after objective satisfaction about strong probability which may lead to conviction of a person sought to be added for trial. Learned counsel submitted that the word, "appears", and "evidence" used in the provisions under Section 319 Cr.P.C. have been interpreted by Apex Court and this Court to the effect that the same should be just lesser than the higher degree of proof for determining the prima facie case for proceeding against the person who has been summoned. There does not exist such degree of either strong suspicion or even probability and no element of prima facie case or only ingredients is meted out. It is further contended that once the trial court has summoned the report and the Investigating Officer has submitted the entire material which demonstrated that revisionist was not at all present at the place of incident and he is not involved in the case, the court below ought to have carefully considered and applied judicial mind about the effect of those material evidences, but it failed to do so. There exists no material on record which may be sufficient for satisfaction of the court below so as to summon the revisionist. The court below has passed impugned order in cursory and casual manner without considering the broad probabilities, detail fact, entire evidence, document produced and the remotest chances of conviction of revisionist, thus the impugned order is not sustainable. Learned counsel placed reliance on the following case laws:

1. ***Brijendra Singh and others Versus State of Rajasthan (2017) 7 Supreme Court Cases 706;***

2. ***Naveen Versus The State of Haryana in Criminal Appeal No (s). of 2022 (arising out of Special Leave Petition (Crl.) No. 3746 of 2022)***

6. Learned A.G.A. appearing for the State and learned counsel for the opposite party no.2 contended that the revisionist is named in the F.I.R. and there are specific allegations against him. He has been assigned role of catching hold the victim. The complainant and her sister Surabhi, the eye-witnesses, in their statement under Section 161 Cr.P.C. have fully corroborated the allegations of the F.I.R., but the Investigating Officer in an improper manner recorded statement of so-called

eye-witnesses and exonerated the revisionist. No cogent evidence has been collected by the Investigating Officer which may indicate that he was not present at the spot. During trial the complainant and her sister Surabhi have been examined and they have supported the allegations of the F.I.R. and have clearly stated about complicity of the revisionist-accused in the incident assigning him role of catching hold. Surabhi has also got injuries in the incident. So, the testimony of PW 1 and PW 2 are of greater value in comparison to the statement of so-called independent witnesses on the basis of which the Investigating Officer has exonerated the revisionist-accused. There is sufficient and cogent evidence available on record as both the complainant and her sister the eye-witnesses have stated about active participation of revisionist-accused in the incident. The order is just and proper. There is no illegality in the impugned summoning order.

7. The Apex Court in the case of **Hardeep Singh Vs. State of Punjab AIR 2014 Supreme Court page 1400** has prescribed the standard of evidence required for exercising powers under section 319 Cr.P.C. The relevant paras 98 and 99 are as follows:

"98. Power under Section 319, Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner."

"99. Thus, we hold that though only a prima face case is to be established from the evidence led before the court not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity, The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319, Cr.P.C. In Section 319, Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319, Cr.P.C, to form any opinion as to the guilt of the accused."

8. In the case of **Brijendra Singh and others Vs. State of Rajasthan (2017) 7 SCC page 706** the Apex Court has reiterated the principles laid down in Hardeep Singh's case. The relevant para no. 13 is quoted below:

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated: power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that

there is some "evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The "evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity."

9. So the test as laid down by Apex Court for invoking powers under Section 319 Cr.P.C. inter alia includes the principle that only when strong and cogent evidence occurs against a person the power under Section 319 Cr.P.C. should be exercised. The test to be applied is one which is more than prima facie case, which is applied at the time of framing of charge.

10. The F.I.R. of this case has been lodged against Ashok Kumar, Smt. Vibha Devi and Sandeep (revisionist) by Anushka Krishna, daughter of the deceased. There are specific allegations in the F.I.R. that the accused Vibha Devi and Sandeep caught hold Ram Krishna and co-accused Ashok inflicted knife injuries in the abdomen causing serious bleeding. It is further alleged that the complainant and her sister Surabhi tried to rescue their father and Surabhi also suffered knife injury in finger of her right hand. During investigation, the complainant and her sister Surabhi, both have corroborated the allegations of the F.I.R. The Investigating Officer has exonerated the revisionist-accused, Sandeep on the basis of affidavits and statements of some witnesses recorded under Section 161 Cr.P.C. in which they have stated that Sandeep was not present on the spot at the time of occurrence and further that from the CDR his presence at the place of occurrence is not established. The complainant Anushka Krishna and Surabhi her sister, who is also an injured, have been examined during trial as PW 1 and PW 2. They have reiterated their version of the incident as stated in the F.I.R. as well as in their previous statements recorded under Section 161 Cr.P.C. It is clear from the allegations of the F.I.R. that the incident has occurred at the house of the complainant and except complainant and her sister no other person is named as eye-witness of the incident. Even in their statements recorded under Section 161 Cr.P.C. no other person is named as eye-witness of the incident. In parcha of Case Diary dated 09.03.2017, the Investigating Officer has submitted that independent witnesses have not stated about the complicity of accused Sandeep in the incident. The previous Investigating Officer has collected the CDR of the mobile of Sandeep and has recorded that Sandeep was not present at the place of

occurrence. So, the evidence on the basis of which the Investigating Officer has exonerated the revisionist is of a very weak type. The CDR of mobile may be relevant for corroboration to prove the presence of accused at the place of occurrence, but not vice versa. Except oral statement of formal witnesses, no other cogent evidence has been collected by the Investigating Officer regarding alibi, while there is cogent evidence on record in the form of testimony of complainant (eye-witness) and her sister Surabhi injured as well as eye-witness of the incident. It is settled law that the testimony of an injured witness has greater evidenciary value and it should not be discarded, but for sound and cogent reasons.

In ***Rajesh and ors vs.State of Haryana***, *(2019) 6 SCC 368 wherein informant named 10 persons for attempt to murder of his son and another with specific allegations against all the accused. The Investigating Officer submitted his report U/s 173 (2) Cr.P.C. against four accused only, no challan filed against six accused (appellants). The trial proceeded against four accused only. During trial, P.W.-1 (complainant) and P.W.-2 (injured witness) specifically stated about the overacts by the accused appellants and role played by them. An application for proceeding against them under section 319 Cr.P.C. was allowed by the trial court. The High Court dismissed the revision. The Apex Court held that, "the appellants herein are also named in the FIR, in the deposition before court, P.W. 1 & 2 have specifically stated against appellants and specific roles attributed to them, on the basis of the same, the persons against whom, no charge-sheet is filed can be summoned to face the trial, no error has been committed by the courts below to summon the appellants therein to face the trial in exercise of power U/s 319 Cr.P.C.*

11. So, it is clear that there is cogent evidence in the form of testimony of eye-witnesses and injured witness. Applying the test laid down by Apex Court on the present set of facts, it is clear that there is strong evidence than mere probability of the complicity of the revisionist-accused and it passes the test as laid down by the Apex Court which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to the extent that the evidence, if got unrebutted, would lead to conviction.

12. It is correct that earlier order passed by the trial court dated 23.06.2018 was set aside by this Court in Criminal Revision No. 2189 of 2018 vide order dated 18.07.2018 and the trial court was directed to revisit the matter and pass a fresh order. This Court in order dated 18.07.2018 has specifically observed that it has not given any opinion as to whether the strong satisfaction arose in the facts, circumstances and the evidence in the present case. In the impugned order, the trial court has narrated the allegations of the application and objections in paras 1st and 2nd of the impugned order. Thereafter, in the last paragraph before operative portion, learned trial court has made an analysis of the facts and evidence on record and on its basis has allowed the application. This Court has to judge the correctness, legality and propriety of the impugned order. The trial court may not have used proper language, but it has analyzed the entire facts, evidence and other material available on record and conclusion drawn by it is just and proper. The intention is to

be gathered from reading the order as a whole. There is no infirmity or illegality or error in the impugned order. There is no sufficient reason to interfere in the impugned order. This criminal revision is liable to be dismissed.

13. This criminal revision is, accordingly, dismissed.

(2023) 4 ILRA 1114
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 4576 of 2022

Satish & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:
Sri Shashi Kumar Mishra

Counsel for the Opp. Parties:
G.A.

Criminal Law- Indian Penal Code, 1860 – Sections 307, 323 & 504 – The Code of Criminal Procedure, 1973 – Sections 161, 319 – As per FIR - Sharafat and Satish suddenly opened fire on her mother – Thereafter, other accused persons assaulted her with lathi, danda - After investigation, I.O. submitted charge-sheet only against Sharafat and Sabir - During trial P.W. 1, P.W. 2 and P.W. 3 were examined - Application u/s 319 Cr.P.C. was moved by prosecution to summon the remaining accused named in FIR - Trial Court has summoned the revisionists – Held, it is undisputed that revisionists are named in FIR - Clear and specific allegations against the accused - Mother of complainant has suffered injuries - Her medico legal report is part of record - In her St.ment complainant and injured both have corroborated version of FIR - Before trial court they have been fully corroborated prosecution story - It is settled law that testimony of injured witness can't be discarded unless there are cogent reasons - The I.O. merely on the basis of C.D.R. has recorded conclusion that revisionists were not present at the time of incident - Injured witness and complainant have fully corroborated their presence at the spot - Impugned summoning order is detailed and reasoned. (Para 2, 3, 8, 11)

Revision dismissed. (E-13)

List of Cases cited:

1. Hardeep Singh Vs St. of Pun. AIR 2014 Supreme Court page 1400

2. Brijendra Singh & ors. Vs St. of Raj. (2017) 7 SCC page 706

3. Shiv Prakash Mishra Vs St. of U.P. & anr. reported in 2019 (109) ACC 632 (SC)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the revisionists, learned A.G.A. for the State and perused the record.

2. This criminal revision is directed against the order dated 23.9.2022 passed by learned Additional District and Sessions Judge, Court No. 4, Bulandshahar in S.T. No. 737 of 2021 (State Vs. Sharafat Ali and others) Case Crime No. 295 of 2020, under section 307, 323 IPC, P.S. Jahangirabad, District Bulandshahar. By the impugned order learned trial court exercising the powers under section 319 Cr.P.C. on the application of prosecution has summoned the revisionists-accused to face trial with other co-accused.

3. The O.P. No. 2 lodged an FIR that on 27.6.2020 at about 2:30 p.m. Sharafat

and Satish suddenly opened fire on her mother Nagina. Thereafter, Sabir, Satish, Basheer, Satendra and Dharmveer assaulted her with lathi, danda, fists and kicks. The co-villagers and the husband of Nagina picked Nagina from the spot and admitted her in Bulandshahar hospital. She was referred to Meerut Medical College due to her serious condition. After investigation the I.O. submitted charge-sheet only against Sharafat and Sabir. During course of trial three witnesses complainant Shahana, P.W. 1, injured Nagina, P.W. 2 and Raju, husband of Nagina, P.W. 3 were examined. At this stage an application under section 319 Cr.P.C. was moved by the prosecution to summon the remaining accused named in the FIR. The learned trial court after hearing both the parties by the impugned order has summoned the revisionists-accused.

4. Learned counsel for the revisionists contended that the I.O. has recorded the statement of complainant, injured, husband of injured and other witnesses. He also obtained CDR to ascertain the location of the accused Dharmveer, Satish and Sharafat and their location was not found on the spot. He also recorded the statement of Lekhpal Dev Kumar who stated that the wife of revisionist no. 1 moved an application to the District Magistrate with regard to possession of the disputed land and upon the spot the Revenue Inspector and police reached there and after measurement the possession was handed over to revisionist no. 1. It is also contended that medical examination of the injured Nagina was conducted at C.H.C. Jahangirabad. Four injuries were noted and X-ray was advised. It was conducted by the S.B.B.P. Hospital and no radiological bony abnormality was found. As no foreign body was found it can be safely referred to that injured has not suffered any fire arm injury. During course of trial three witnesses were examined by the prosecution. On the basis of it the court below on an application moved under section 319 Cr.P.C. summoned the revisionists. While passing the summoning order the trial court apart from the evidence recorded before the trial court also considered the evidence collected during course of investigation which is not permissible as held in catena of decisions. Only material collected by trial court during inquiry or trial can be used to arraign the additional accused. It is further contended that the Hon'ble Apex Court reiterated time and again that the power under section 319 Cr.P.C. is a discretionary and extra ordinary power which should be exercised sparingly. The crucial test to be applied is one which is more than prima-facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un-rebutted in likelihood the newly added accused would be conducted as has been held in case of Hardeep Singh Vs. State of Punjab and others. The power under section 319 Cr.P.C. cannot be exercised in a casual and in a cavalier manner, it should be exercised only when strong and cogent evidence occurs against a person and further to add a person as additional accused under section 319 Cr.P.C. stronger evidence is required then near probability of complicity of that person. This is the test that has to be applied as laid down in various case laws. While in present case if the summoning order is tested upon the touch stone then it appears that no satisfaction has been recorded which is required.

5. It is further contended that it is also settled law that the material evidence which has been laid before the court has been

taken into consideration and not the statement recorded under section 161 Cr.P.C. could be utilized while exercising power under section 319 Cr.P.C. as has been done in the present case, as such the same is liable to be set-aside. The learned trial court summoned the revisionists in mechanical manner and failed to consider the ratio of law as laid down in the case laws cited in the impugned order in its true perspective. It is further contended that Hon'ble Apex Court in latest decision in case of Shiv Prakash Mishra Vs. State of U.P. and another reported in 2019 (109) ACC 632 (SC) was pleased to observe and the relevant paragraph 9 is quoted herein below:-

9. The standard of proof employed for summoning a person as an accused person under section 319 Cr.P.C. is higher than the standard of proof employed for framing a charge against the accused person. The power under section 319 Cr.P.C. should be exercised sparingly. As held in Kailash Vs. State of Rajasthan: (SCC p. 55, para 9).

"9.....the power of summoning an additional accused under section 319 Cr.P.C. should be exercised sparingly. The key words in section are "it appears from the evidence" . . . ."any person" ... "has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under section 319 Cr.P.C. would be used by the court."

6. Lastly it is contended that prosecution story has not been corroborated as there are material contradictions even in the statement recorded during trial and further medical evidence does not corroborates the prosecution story. The impugned summoning order is not sustainable being illegal.

7. Learned A.G.A. contended that revisionists are named in the FIR and there are specific allegations against them that they participated in the crime and assaulted the victim. One person has suffered injury. Her medico legal report is part of record. The complainant, injured and other witnesses have corroborated the prosecution story. Three witnesses have been examined during course of trial. They also corroborated the evidence of trial. The I.O. has wrongly exonerated the revisionists-accused. There is sufficient material on record against revisionists-accused. The learned trial court after appreciating the entire material on record has found that there is sufficient material and has passed the summoning order. There is no illegality in the impugned summoning order.

8. It is undisputed that the revisionists-accused are named in the FIR. There are clear and specific allegations that they took part in the assault. The mother of the complainant has suffered injuries in the incident. Her medico legal report is part of record. In her statement under section 161 Cr.P.C. the complainant and injured both have fully corroborated the version of the FIR. Before the trial court they have been examined and in that statement they have also again reiterated the allegations of the FIR and fully corroborated the prosecution story. Nagina, P.W. 2 is an injured witness and it is settled law that testimony of injured witness can not be discarded unless there are cogent reasons. The I.O. merely on the basis of C.D.R. has recorded the conclusion that revisionists were not present at the place of occurrence at the time of incident. While the injured witness

as well as complainant have fully corroborated their presence at the spot and that they have took part in the incident and assaulted the injured causing her injuries.

9. The Apex Court in the case of **Hardeep Singh Vs. State of Punjab AIR 2014 Supreme Court page 1400** has prescribed the standard of evidence required for exercising powers under section 319 Cr.P.C. The relevant paras 98 and 99 are as follows:

"98. Power under Section 319, Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

99. Thus, we hold that though only a prima face case is to be established from the evidence led before the court not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity, The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319, Cr. P.C. In Section 319, Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319, Cr.P.C, to form any opinion as to the guilt of the accused."

10. The facts of this case are distinguished from the case law of **Brijendra Singh and others Vs. State of Rajasthan (2017) 7 SCC page 706** because in that case the I.O. has collected the plethora evidence about the alibi of the accused while in this case there is no such kind of evidence which can be used to discredit the statement of injured witness.

11. The learned trial court has narrated the entire facts and allegations made in the application, the evidence available on record and after being satisfied that there is sufficient material on record has passed the impugned summoning order. The impugned summoning order is detailed and reasoned one. There is no perversity or illegality in the impugned summoning order.

12. The revision is devoid of merit and is hereby dismissed.

(2023) 4 ILRA 1117
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 4309 of 2022

Nadeem Tarik ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:

Sri Girish Kumar Mishra

Counsel for the Opp. Parties:
G.A., Sri Mohd. Afzal

Criminal Law – The Code of Criminal Procedure Code, 1973 - Section 216 - Indian Penal Code, 1860 - Sections 498A, 323, 504, 506 & 3(1) (v) - D.P Act, 1961 – Section ¾ - Criminal Revision - against, order impugned by which - Trial Court has rejected application filed by accused U/s 216 Cr.P.C - Chargesheet was submitted under aforesaid Sections - Charges framed -Trial commenced - Whether revision is maintainable - Held, application has been moved for alteration of charge U/s 216 Cr.P.C. but its implication is discharge of accused from charge of Section 315 IPC – It is a matter of final adjudication which is to be analyzed in view of entire evidence available on record and not on the basis of any peace-meal evidence - There is no sufficient ground to drop charge of Section 315 IPC on basis of St.ment of doctor - Application moved by revisionist is misconceived and has rightly been rejected. (Para 2, 3, 6)

Revision dismissed. (E-13)

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the revisionist, learned counsel for opposite party no.2 and learned AGA for the State.

2. This criminal revision is filed against the order dated 24.08.2022 passed in sessions trial no.106 of 2019 (*State vs. Nadeem Tarik*) crime no.49 of 2014 passed by Additional Sessions Judge/ FTC court no.1. By the impugned order, the learned trial court has rejected the application 47 ka filed by accused U/s 216 Cr.P.C.

3. The revisionist is accused in the sessions trial. Charge-sheet was submitted U/s 498A, 323, 504, 506 and 3(1) v IPC and 3/4 D.P. Act. Charges were also framed against the revisionist-accused. Trial commenced. After recording the statement of P.W.-4 Dr. Mursarat Mujeeb, an application U/s 216 Cr.P.C. was filed by the accused alleging therein that it has come on the record that no act has been done with intent to prevent child being born alive or to cause it to die after birth. The testimony of P.W.-4, Dr. Mursarat Mujeeb clearly discloses that no abortion was done by her. She has admitted that she has not done any abortion or admitted complainant/ victim. It is clear that false allegations were imputed by the complainant. From the cross-examination of P.W.-4, it is evident that incident of any abortion of child killing or any cruelty as stated in the FIR is vague, false and fictitious and no such incident ever occurred. In the present case, specifically in contest of section 315 Cr.P.C. was imputed upon the so called observation of doctor P.W.-4 and the doctor has clearly stated about non abortion, non injury and non criminal activity towards the patient and consequently question on apprehension of any activity having nexus with section 315 IPC itself vanishes. Henceforth, in the above noted facts and circumstances of the charge U/s 315 IPC is to be altered.

4. Learned counsel for the revisionist mainly contended what are the grounds mentioned in the application.

5. Learned AGA and learned counsel appearing for opposite party no.2 raised preliminary objection about the maintainability of this revision and submitted that the order is interlocutory, so this revision is not maintainable.

6. It is clear from the material available on record that charges were framed against the revisionist-accused on the basis of material available on record. Although application has been moved for alteration of charge U/s 216 Cr.P.C. but actually its implication is discharge of the accused from the charge of section 315 IPC. It is no stage to give the finding that U/s 315 IPC is not made out on the basis of statement of any particular witness. Whether any offence is made out or not, is a matter of final adjudication which is to be analyzed and considered in view of the entire evidence available on record and not on the basis of any peace-meal evidence. So there is no sufficient ground to drop the charge of section 315 IPC at this stage only on the basis of statement of doctor. The application moved by the revisionist is misconceived and has rightly been rejected by the learned trial court. There is no merit in this revision and is liable to be dismissed.

7. Accordingly, the revision is hereby ***dismissed***.

(2023) 4 ILRA 1119
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 5082 of 2022

Sachin & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Kripa Shankar Trwari, Shivani Chaudhary

Counsel for the Opp. Parties:
G.A., Sri Ram Raj Pandey

Criminal Law- Indian Penal Code, 1860 - Sections 323, 504, 506 & 354 - **The Code of Criminal Procedure, 1973 – Sections 161, 319** - **As per FIR - Seven accused persons armed with Lathi, Danda, country made pistol entered into house of first informant and started to assault and his son causing them injuries -Accused also torn clothes of first informant and threatened her with death - After investigation chargesheet was submitted only against four persons - Application was moved by prosecution to summon other accused persons named in FIR on ground that complainant is also an injured witness - In her St.ment complainant has supported allegations of FIR - Trial Court has summoned revisionists to face trial – Held, there are specific allegations against accused showing their complicity in incident - Evidence of an eye witness has greater evidentiary value and unless compelling reasons exist it is not to be discarded - Impugned order is based on cogent evidence and there is no perversity or illegality. (Para 2, 3, 7, 8)**

Revision dismissed. (E-13)

List of Cases cited:

1. Hardeep Singh Vs St. of Punjab AIR 2014 Supreme Court page 1400

2. St. of M.P. Vs Man Singh (2003) 10 SCC 414

3. Abdul Sayeed Vs St. of M.P. (2010) 10 SCC 259

4. St. of U. P. Vs Naresh (2011) 4 SCC 324

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard learned counsel for the revisionists, learned counsel for the O.P. No. 2 as well as learned A.G.A. for the State and perused the record.

2. This criminal revision is filed against the order dated 30.10.2022 passed

by Judicial Magistrate, Baghpat in Case No. 1604 of 2021 (State Vs. Rahul and others) Case Crime No. 298 of 2020, P.S. Singhawali, District Baghpat. By the impugned order learned Magistrate has summoned the revisionists under section 319 Cr.P.C. to face trial for the offence under section 323, 504, 506 and 354 IPC.

3. The FIR of this case was lodged on 21.9.2020 at 14:40 hours with regard to the incident dated 15.9.2020 at about 6:30 p.m. Besides other avermnts it is alleged in the FIR that seven accused persons namely Ramesh, Chachin, Smt. Ram Bhateri, Manish, Smt. Sheela, Vilendra and Smt. Suneeta with common intention and armed with Lathi, Danda, country made pistol and sharp edged weapons entered into the house of the first informant and started to assault first informant and his son Charchil causing them injuries. They also torn the clothes of the first informant and threatened her with death. The first informant and her son received injuries in this incident and they were medically examined. After investigation charge-sheet was submitted only against Smt. Sheela, Smt. Ram Bhateri, Vilendra and Rahul. During course of trial the complainant Ilmo was examined as P.W. 1. Thereafter, an application under section 319 Cr.P.C. was moved by the prosecution to summon the other accused persons named in the FIR on the ground that Smt. Ilmo-the complainant is also an injured witness. In her statement before the court she has supported the allegations of the FIR. The learned trial court after hearing the parties by the impugned order has summoned the revisionists to face trial for the offence under section 323, 504, 506 and 354 IPC.

4. It is contended by the learned counsel for the revisionists that according to allegations of the FIR Charchil son of complainant was also assaulted but in his statement under section 161 Cr.P.C. Charchil has not named the revisionists. The complicity of the revisionists was also not found in the incident by the I.O. during course of investigation and they were exonerated. It is also contended that FIR has been lodged with delay of six days without any plausible explanation. The learned trial court has not considered the objections filed against the application under section 319 Cr.P.C. while passing the impugned order. The learned trial court has passed the order in a cursory manner without application of mind. During course of investigation it is found that Sachin is employed in police department and on the alleged date of incident he was present on his duty. It is next contended that till the time of passing the impugned order only one witness P.W. 1 has been examined and only on that basis the impugned order has been passed which is perverse and illegal.

5. Learned A.G.A. and learned counsel for the O.P. No. 2 contended that revisionists are named in the FIR with specific allegations of being armed with deadly weapons, lathi, danda and assault. The complainant and her son have suffered injuries in this incident. The complainant is also an injured witness. She has fully corroborated the allegations of the FIR and her previous statement under section 161 Cr.P.C. The I.O. has not recorded the statement of injured witness namely Charchil and just to benefit the accused recorded his statement at his own and on its basis exonerated the revisionist-accused. It is further contended that the complainant/injured witness in her statement before the court has fully corroborated the prosecution story as set up in the FIR and the complicity of the

revisionist is established from it. The learned trial court after considering the entire material on record came to the conclusion that the complicity of the revisionists-accused is fully established and has passed the summoning order, so there is no illegality in the impugned summoning order.

6. The Apex Court in the case of **Hardeep Singh Vs. State of Punjab AIR 2014 Supreme Court page 1400** has prescribed the standard of evidence required for exercising powers under section 319 Cr.P.C. The relevant paras 98 and 99 are as follows:

"98. Power under Section 319, Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.
99. Thus, we hold that though only a prima face case is to be established from the evidence led before the court not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity, The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319, Cr. P.C. In Section 319, Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319, Cr.P.C, to form any opinion as to the guilt of the accused."

7. It is undisputed that revisionists-accused are named in the FIR and there are specific allegations against them showing their complicity in the incident. They have been assigned the role of assault being armed with lathi, danda and other weapons. The complainant has suffered injuries in this incident, so she is an injured witness. The complainant in her statement before the trial court has corroborated the allegations of the FIR and has specifically stated that revisionists-accused along with other accused came at her house armed with lathi, danda and other weapons and assaulted her and her son Charchil. The evidence of an eye witness has greater evidentiary value and unless compelling reasons exist his statement is not to be discarded lightly. The Apex Court in the cases of **State of M.P. Vs. Man Singh (2003) 10 SCC 414, Abdul Sayeed Vs. State of M.P. (2010) 10 SCC 259 and State of Uttar Pradesh Vs. Naresh (2011) 4 SCC 324** has laid-down the aforesaid proposition of law.

8. The learned trial court has narrated the entire facts and evidence available on record and after analyzing the material on record has come to the conclusion that there is sufficient ground to summon the revisionists for the offence under section 323, 504, 506 and 354 IPC. The impugned order is based on cogent evidence which

meet the standard prescribed for exercising powers under section 319 Cr.P.C. There is no perversity or illegality in the the finding recorded by the learned trial court. There is no ground to interfere in the impugned order.

9. The revision lacks merit and is hereby dismissed.

(2023) 4 ILRA 1122
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Appeal No. 235 of 1991

Hakim & Ors. ...Appellants
Versus
The State of U.P. ...Respondent

Counsel for the Appellants:
Sri Mohd. Arshad Khan, Sri Amar Jeet Upadhyay, Sri Ambreen Masroor, Sri Mohammad Arshad Khan, Sri Sukhbir Singh(A.C.)

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Section 302/34 – Punishment for murder – The Code of Criminal Procedure, 1973 – Section 313 - Appeal against conviction – As per FIR - On 30.09.1987 at about 8 pm, children of complainant and appellant had a quarrel - After this appellant with his two sons reached to the house of complainant, where they were told by complainant and his father to keep their children under control - Appellant and his sons threatened - Accused started beating complainant and his father with Lathi and Ballam - Appellant was armed with spear, other accused were armed with Lathi – Complainant's father got a blow of spear - Case was registered against all the accused persons - Charge-sheet was submitted – Held, the incident occurred on the spur of moment - There was only one single injury which was caused by one of accused - It cannot be said that accused had any premeditated intention of murdering the deceased, they had gone to residence of deceased only to complain about quarrel – Thus, Section 34 IPC can't be said to be proved - In post mortem report, deceased had injuries on abdomen, and died after being operated, therefore, it was not a premeditated act - They were physically fighting - The weapons used were not deadly weapons - The act of accused will be falling within purview of Section-304(II) IPC – Hence, sentence undergone by appellant would be sufficient as the incident is of the year 1988 and appeal is of the year 1991. (Para 2, 3, 11, 14, 20)

Appeal is partly allowed. (E-13)

List of Cases cited:

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

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

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

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

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

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

7. St. of Punjab Vs Bawa Singh, (2015) 3 SCC 441

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

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Arun Kumar Singh Deshwal, J.)

1. Heard learned amicus curiae, Sri Sukhbir Singh, for the sole surviving accused-Aziz.

2. This appeal challenges the judgment and order dated 14.02.1991 passed by Ist Additional Sessions Judge Meerut, in Sessions Trial No. 488 of 1988 whereby the learned Additional Sessions Judge has convicted accused-appellant under Section 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life and for offence under Section-323 IPC, rigorous imprisonment for one year. Both the sentences were directed to run concurrently.

3. The brief facts of the prosecution story are that on 30.09.1987 at about 8 pm, children of complainant Meharban and accused Munna had a quarrel. After some time Munna and his two sons Hakeem and Aziz reached to the house of the complainant and they were told by complainant and his father Alla Mehar to keep their children under control. Upon this, Munna and his sons threatened consequences of children's quarrel. All the accused with intention to commit murder started beating complainant and his father Alla Mehar with Lathi and Ballam. Hakeem was armed with spear while other accused were armed with Lathi. Alla Mehar got a blow of spear. He was taken to Police Station. It was also alleged that occurrence was seen by Iqbal and Mohd. Haneef. A written report was lodged at Police Station-Sardhana. Case was registered against all the accused persons. The investigation culminated into lodging of charge-sheet was submitted against the 3 accused. The case was committed to the court of Sessions.

4. On being summoned, the accused-appellant pleaded not guilty and wanted to be tried. The trial started and the prosecution examined 9 witnesses who are as follows:

1	Iqbal	PW1
2	Meharban	PW2
3	Sirajuddin	PW3
4	Dr. Sharad Chand Nigam	PW4
5	Dr. Fariduddin	PW5
6	Dr. M.L. Agarwal	PW6
7	Yadram	PW7
8	Vijay Singh	PW8
9	Surendra Pal Singh	PW9

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

1	F.I.R	Ex.Ka.6
2	Written Report	Ex.Ka.1
3	Application	Ex.Ka.2
4	Injury Report	Ex.Ka.3 and Ex.Ka.5
5	P.M. Report	Ex. Ka.4
6	Panchayatnama	Ex.Ka.11
7	Charge Sheet Mool	Ex.Ka.18
8	Site Plan With Index	Ex.Ka.17

6. At the end of the trial, after recording the statements of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused-appellant, Aziz & others as mentioned above.

7. This is an appeal of the year 1991. Out of the three accused, two have passed away i.e. Hakim and Munna. The main assailant who was armed with spear has also passed away. The appeal is taken up for hearing after we granted bail to accused Aziz. This Court directed to release the accused-Aziz on the said date. It is reported that he is still not released despite the orders of this Court.

8. It is submitted by learned counsel for the appellant that the learned Judge has held that Section 34 IPC is made out. It is submitted that, even from the FIR, it cannot be said that the accused, three in number, had any intention or rather common intention to do away with the deceased. The accused did not have what is known as any deadly weapon. It cannot be said that Section 34 IPC is made out.

9. It is further submitted that the participation of the accused with a common intention is not proved. It cannot be said that there was a pre-medidated plan and were acting in pursuance of the said plan. All that happened was due to quarrel between children of two family members of the incident which occurred at the spur of the moment. There was no existing prior intentions.

10. Per contra, Sri Patanjali Mishra, learned AGA for the State, submits that this was a pre-planned attack by going to the house of the deceased, and therefore, the finding of fact may not be interfered by this Court.

11. While going through the evidence, it is clear that the act occurred on the spur of the moment. The FIR is dated 30.09.1987 which also goes to show that the incident occurred on the spur of the moment. While going through the record, it is very clear that there was only one single injury which was caused by one of the accused. It cannot be said that accused had any premeditated intention or object of murdering the deceased as they had gone to the residence of the deceased only to complain about the quarrel which had taken place between children. The incident occurred on the spur of the moment, hence, Section 34 IPC cant be said to be proved. The conviction with aid of Section 34 IPC cannot be concurred by this Court.

12. It would be relevant to refer to Section 299 IPC, which reads as under:

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

13. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts loose sight of the true scope and meaning of the terms used by the legislature in these sections, and allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be is to keep in focus the keywords used in the various clauses of Sections 299 and 300 of

IPC. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

14. The evidence also goes to show that firstly the accused were charged with commission of offence under Sections-307 & 323 IPC. The offence, if any, committed by the accused-Aziz, would fall within Sections-304(II) & 326 IPC. The death of the deceased as held above was not a premeditated death and that the act of the accused would fall within Section-304(II) IPC for the following reasons:

The injuries as seen in the post mortem report goes to show that the deceased had injuries on abdomen. He died after few days of the injuries being caused. The factum data, the evidence led and fact that the deceased died after being operated, therefore, it is held that it was not a premeditated act. There were quarrel between each other and they were trying to save each other. They were physically fighting. All the weapons used were also not deadly weapons. In the circumstances, the act of the accused will be falling within the purview of Section-304(II) IPC, the conviction under Section-323 IPC and the default sentence has already been undergone, we do not dealt into the same. The court itself has not awarded any default sentence.

15. This takes this Court to the quantum of sentence. In this regard, we have to analyse the theory of punishment prevailing in India.

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

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization.

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

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

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

19. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective

and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

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

21. In view of the above, sentence undergone by accused-appellant, Aziz, would be sufficient as the incident is of the year 1988 and appeal is of the year 1991. The accused-appellant, Aziz, in fact be set free forthwith if he is not wanted in any other case.

22. In view of the above, the appeal is partly allowed. Judgment and order dated 14.02.1991 passed by the learned Additional Sessions Judge, Meerut shall stand modified to the aforesaid extent. Record be sent back to the Court below forthwith.

23. A sum of Rs.15,000/- be paid to Sri Sukhbir Singh, learned amicus curiae appearing in this matter for Aziz by the High Court Legal Services Committee.

(2023) 4 ILRA 1127
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 890 of 2022

Jai Prakash Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhagwan Dutt Pandey

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar, Sri K.R. Singh

Service Law - U.P. Development Authorities Non-Centralized Services retirement of Rules, 2011 - Rule 2(h), (i) – Constitution of India, 1950 – Article 14 - Pension - Petitioner was appointed as work charge employee on 07.12.1987 - He continued to serve on Class III Post as Clerk – Treated as regular employee, regularized by order dated 24.12.2010, he retired on 30.09.2016 - Respondent authority has refused to grant him pension, other benefits on retirement – Held, Rules of 2011 are parallel to Rules of St. Government, read down by Supreme Court, being held in violation of Article 14, as they create an artificial categorization of similarly situated employees – In the present case, an artificial classification is created as admitted, as the work charge employees perform the same duties as the regular employees, throughout treated as regular employee - They were regularized in continuation of their work charge services - Hence, direction to Respondent authority to ensure regular payment of pensionary, other benefits to petitioner, treating their entire service to be performed as regular employee of Development Authority within a period of three months, back pension shall be paid for the last three years only. (Para 2, 3, 8, 10)

Writ petition allowed. (E-13)

List of Cases cited:

1. Prem Singh Vs St. of U.P. & ors., (2019) 10 SCC 516

2. Dr. Shyam Kumar Vs St. of U.P. & ors. (Writ-A No.8968 of 2022)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Shri Bhagwan Dutt Pandey, learned counsel for petitioner, Shri K.R. Singh, Advocate appearing for respondent no.3 and 4 and learned Standing Counsel for the State.

2. Petitioner has approached this Court challenging the order dated 16.10.2021 whereby the respondent authority has refused to grant him pension and other benefits on retirement which he claim to be entitled. The facts of the case are that the petitioner was appointed as work charge employee on 07.12.1987. He continued to serve on Class III Post as Clerk. He was treated as regular employee and was regularized by order dated 24.12.2010 and thereafter, he retired on 30.09.2016.

3. Learned counsel for petitioner submits that he is entitled for pension under U.P. Development Authorities Non-Centralized Services retirement of Rules, 2011(Rules of 2011). Reference is made to Rule 2(h) to (i) which reads as follows:

"(h) "Pensionable post" means a post which fulfills the following three conditions, namely-

(i)the post is in any cadre of the Uttar Pradesh Development Authorities Non-Centralized Services

(ii)the employment is substantive and permanent, and

(iii) the service is paid by any Authority.

(i)"Qualifying service" means the service of a member of service which conforms to the following conditions :-

(i) The service must be under an Authority.

(ii) The employment must be substantive /regular / permanent.

(iii) The service must be paid by an Authority excluding the following periods of:

(i) temporary or officiating service in a non-pensionable establishment under any Authority.

(ii) service in a work charged establishment, and

(iii) service in a post paid from contingencles:

Provided that the service of a member of service does not qualify for pension and gratuity, except compensation gratuity, until he has completed twenty years of age.

Provided further that period of continued, temporary or officiating service under any Improvement Trust, Authority, Palika Board, Nigam, Central or State Government shall count as qualifying service if it is followed by confirmation on the same post or any other post without any interruption of service.

Note: If service rendered in a non-pensionable establishment, work charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an Interruption of service but shall not count towards qualifying service.

4. Further submission is that similar rules prevailed with regard to employees of

the State Government which also provide non-counting of services performed on work charge basis. A three Judge's Bench of Supreme Court on reference in case of **Prem Singh vs. State of U.P. and others, (2019) 10 SCC 516** considered their entitlement for pension. The relevant paragraphs of the said judgment reads:

"8. We first consider the provisions contained in the Uttar Pradesh Retirement Benefits Rules, 1961 (for short ?the 1961 Rules?). Rule 3(8) of the 1961 Rules which contains the provisions in respect of qualifying service is extracted hereunder:

"3. In these rules, unless is anything repugnant in the subject or context"

*(1)-(7) * * **

(8) "Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except?

(i) periods of temporary or officiating service in a non-pensionable establishment;

(ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contingencies shall also count as qualifying service.

Note. If service rendered in a non-pensionable establishment work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service.

9. Regulations 361, 368 and 370 of the Uttar Pradesh Civil Services Regulations are also relevant. They are extracted hereunder:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:

First - The service must be under Government.

Second - The employment must be substantive and permanent.?

These three conditions are fully explained in the following Regulations.

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post shall qualify, except"

(i) periods of temporary or officiating service in non-pensionable establishment;

(ii) periods of service in work-charged establishment; and

(iii) periods of service in a post paid from contingencies."

10. The qualifying service is the one which is in accordance with the provisions of Regulation 368 i.e. holding a substantive post on a permanent establishment. The proviso to Rule 3(8) clarify that continuous, temporary or officiating service followed without interruption by confirmation in the same or any other post is also included in the qualifying service except in the case of periods of temporary and officiating service in a non-pensionable establishment. The service in work-charged establishment and period of service in a post paid from

contingencies shall also not count as qualifying service.

11. The Note appended to Rule 3(8) contains a provision that if the service is rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies, falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service. Thus, the Note contains a clear provision to count the qualifying service rendered in work-charged, contingency paid and non-pensionable establishment to be counted towards pensionable service, in the exigencies provided therein.

12. The provisions contained in Regulation 370 of the Civil Services Regulations excludes service in a non-pensionable establishment, work-charged establishment and in a post paid from contingencies from the purview of qualifying service. Under Regulation 361 of the Civil Services Regulations, the services must be under the Government and the employment must be substantive and permanent basis.

.....

30. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In Narain Dutt Sharma v. State of U.P. [CA No. _____2019 arising out of SLP (C) No. 5775 of 2018] the appellants were allowed to cross efficiency bar, after ''8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak with effect from 15-9-1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs 200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs 205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularised time to time by different orders. However, the services of some of the appellants in few petitions/appeals have not been regularised even though they had served for several decades and ultimately reached the age of superannuation.

31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularised. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of

their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

32. In view of the Note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work-charged, contingencies or non-pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

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

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make Rule 3(8) valid and non-discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

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

36. There are some of the employees who have not been regularised in spite of having rendered the services for 30-40 or more years whereas they have

been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularised under the Government instructions and even as per the decision of this Court in State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one-time measure, the services be regularised of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularised. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

37. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

5. He further submits that since similar rules for pensionary benefits exist in the respondent authority, therefore, the matter is squarely covered by the said judgment and petitioners herein should also be extended the benefit of the law settled in the case of **Prem Singh (Supra).**

6. Learned counsel for the Development Authority and learned standing counsel strongly opposed the submissions of the petitioner. Reliance is placed upon the judgment of this court dated 08.11.2021 in writ petition SS no.259155 of 2017 (Ram Das Yadav Vs. State of U.P.); Judgment dated 27.01.2022 passed in Special Appeal No.21 of 2022 (State of U.P. and Others Vs. Raj Bahadur Bhaskar); judgment and order dated 28.01.2003 passed in Special Appeal defective No.31 of 2023 (State of U.P. Vs. Mohd. Sarif Khan and another); and judgment and order dated 14.02.2013 passed in Special Appeal No.89 of 2022 (State of U.P. and 3 others Vs. Lalan).

7. All the four judgments relied upon by the counsel for respondents pertains to Ordinance of 2020 followed by Act of 2021. So far as Act of 2021 is concerned, the same is applicable only upon the employees of State Government. There is no similar Act which is applicable with regard to employees of the Non-Centralized Services of the Development Authority. Even otherwise Act of 2021 is already read down by this Court by judgment dated 17.02.2023 passed in **Writ-A No.8968 of 2022** ***(Dr. Shyam Kumar Vs. State of U.P. and others).*** Relevant paragraphs of the same reads as:

"9. Therefore, the question now before this Court is whether by bringing Act of 2021, the State Government has

done away with the vice pointed out by the Supreme Court in case of Prem Singh (supra). In the said judgment, the Supreme Court found that the State Government has adopted exploitative labour practice by taking work of regular employees from work charge employees on long term basis without any rationale classification while refusing them benefits available to regular employees. Supreme Court specifically held that the State Government can not get involved in corrupt labour practices. On the aforesaid grounds, the Supreme Court read down the provisions of Rule 3(8) of the Rules of 1961 and struck down Regulation 370 of Civil Services Regulations and Para 669 of the Financial Handbook.

10. It is the duty of State to create new temporary or permanent posts as per its needs and make appointments on the same. Law also permits State to appoint daily wagers or work charge employees, but only when the work is for short period or is in a work charge establishment for fixed duration. Law does not permit the State to take work for long period, extending even for the entire working life of a person, on temporary or work charge basis. In such cases, it is the duty of State to create new posts and make appointments, giving all benefits of regular employees. Otherwise, State would be found to be adopting exploitative labour practice. This is the vice pointed out by the Supreme Court in Prem Singh's case (supra), and instead of removing the same, the State by Section 2 of the Act of 2021 has extended the sphere of its illegality. By Section 2 of the Act of 2021, it desires to take benefit of its own failure of creating posts in time and making appointments on the same, by not counting the said period of such service for pensionary benefits. State still fails to explain the rationale on the basis of which it has created this new classification and the manner in which, by the amended provision, it has removed the irrationality.

In case Section 2 of the Act of 2021 is given a literal meaning it would mean that services rendered by a person on a temporary or permanent post alone can be counted for pension. The same would again be an exploitative device and labour malpractice, as by this, the State Government is again attempting to use persons to work for it on long term basis, just like regular employees, without giving them benefits they are entitled to as regular employees. The very vice pointed by the Supreme Court in the judgment of Prem Singh (supra) with regard to work charge employees is, in fact, now made applicable to even larger number of employees and extended to daily wagers and other persons not working on a temporary or a permanent post including, work charge employees.

In case of V. Sukumaran vs. State of Kerala (2020) 8 SCC 106, the Supreme Court held:

"22. We begin by, once again, emphasising that the pensionary provisions must be given a liberal construction as a social welfare measure. This does not imply that something can be given contrary to rules, but the very basis for grant of such pension must be kept in mind i.e. to facilitate a retired government employee to live with dignity in his winter of life and, thus, such benefit should not be unreasonably denied to an employee, more so on technicalities."

Thus, again to save Section 2 of the Act of 2021 from the vice/arbitrariness, in the spirit of the judgment of Prem Singh (supra), the word 'post' is required to be diluted to save it from arbitrariness and hence, the word 'post' used in Section 2 of

the Act of 2021, be it temporary or permanent, has to be read down as 'services rendered by a government employee, be it of temporary or permanent nature'."

8. Therefore, none of the aforesaid judgment is applicable to the facts of the present case. The present Rules of 2011 are parallel to the Rules of State Government which have been read down by the Supreme Court, being held in violation of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. In the present case also an artificial classification is created as admittedly, as the work charge employees perform the same duties as the regular employees and are throughout treated as the regular employee. They were also regularized in continuation of their work charge services. Thus, the matter is squarely covered by the law settled in case of **Prem Singh (Supra).**

9. Thus, the writ petition is ***allowed*** and impugned order dated 16.10.2021 is set aside.

10. Respondent no.3-Vice Chairman, Gorakhpur Development Authority, Gorakhpur is directed to ensure regular payment of pensionary and other benefits to the petitioner under the Rules of 2011, treating their entire service to be performed as regular employee of the Development Authority within a period of three months. However, back pension shall be paid for the last three years only.

(2023) 4 ILRA 1134
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2013

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 9143 of 2013

Constable No. 405 Anjani Kumar Pandey ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Raj Najth Pandey, Sri I.K. Singh, Sri Vinod Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Indresh Kumar Singh

Civil Law - Service Matter - Disciplinary Proceeding - When the enquiry report is submitted, any recommendation of punishment is not permissible - Such a recommendation directly interferes with the power of the disciplinary authority (Para 4, 5)

Allowed. (E-5)

List of Cases cited:

1. Shiv Raj Singh Vs St. of U.P. & ors. CMWP No. 2230 of 2014 dt 28.3.2018

2. Yashpal Singh Vs St. of U.P. & ors. Writ-A No. 23402 of 2014 dt 23.4.2014

3. Himachal Pradesh St. Electricity Board Ltd.Vs Mahesh Dahiya, (2017) 1 SCC 768

4. Allahabad Bank Vs Prem Narain Pande & ors. (1995) 6 SCC 634

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

1. Heard Shri Vinod Kumar Singh, learned counsel for the petitioner and Shri Girijesh Tripathi, learned standing counsel for respondents.

2. The case of the petitioner is that while submitting the Enquiry report which

was initiated in a disciplinary proceedings against the petitioner and finally culminated into rejection of the revision preferred by the petitioner for challenging the order passed by the disciplinary authority and appellate authority wherein the same ground has been taken that the enquiry report as submitted before the disciplinary authority was having the report after enquiry with a conclusion for imposition of the penalty prescribed under the rules pertaining to major penalty and the same is unwarranted while placing the enquiry report wherein charges levelled against the petitioner has been found proved. While assailing the order of punishment dated 10.12.2011 the ground for assailing the same with regard to recommendation of punishment while preferring the enquiry report has been strongly relied upon by the petitioner but no material consideration has been drawn either by the appellate authority or by the revisional authority.

3. Learned counsel for the petitioner challenged all the three orders passed by the disciplinary authority, appellate authority as well as by the revisional authority and substantiated the stand which is squarely covered with the judgments rendered by this court as well as by the Hon'ble Apex Court wherein it has been held that, it is required on the part of the disciplinary authority to provide copy of the enquiry report alongwith show cause notice without making his mind for proposed punishment. It is further argued by the learned counsel for the petitioner that the legislation framed the rules specially with regard to the conduction of enquiry and disciplinary proceedings against the government servants a different level has been set up so that the unaffected and free thought of process may be prevailed while taking a decision over the subject matter put up before him in the shape of either accepting the contentions of the grounds taken up in the punishment order or the grounds put forward for challenging the same.

4. At the very initial level when the Enquiry report has been submitted before the disciplinary authority by the Enquiry officer as nominated at the time of initiation of disciplinary proceeding the recommendation of punishment is not at all permissible since being the initial stage where the disciplinary authority must be free from all prejudices/thoughts against the delinquent employee, otherwise there might be a great chances for infiltration of impartial conclusion which is warranted to be arrived by the disciplinary authority while adjudicating the enquiry report in pursuance to the charges levelled against the employee alongwith the rebuttal in the shape of the reply as submitted by the charged officer/employee of the department.

5. The recommendation of the punishment is the direct interference in the power of the disciplinary authority which has never been permitted or granted by the statutory provisions as contained in the disciplinary and appellate rules for conduction of the enquiry and culmination of the disciplinary proceeding initiated against any government employee and as such the same has been negated by this court in **Civil Misc. Writ petition No. 2230 of 2014** decided on 28.3.2018 **(Shiv Raj Singh vs. State of U.P. and other), Writ-A No. 23402 of 2014 decided on 23.4.2014 (Yashpal Singh vs. State of U.P. and 2 others).**

6. The above mentioned decisions of this court is broadly based on the judgment

of the Apex Court in the case of **Himachal Pradesh State Electricity Board Ltd. vs. Mahesh Dahiya, (2017) 1 SCC 768** alongwith the case of **Allahabad Bank vs. Prem Narain Pande and others (1995) 6 SCC 634.**

7. Per contra learned standing counsel vehemently opposed the prayer as made in the petition but the principles as laid down by the Hon'ble Apex Court which has been followed by this court while adjudicating the controversy as raised in similar situated conditions and cases as mentioned above has not been denied, learned standing counsel based his argument that the punishment awarded to the petitioner is justified since in the disciplined post absence of only of few hours may attribute to the penalty as awarded to the petitioner, in the instant matter the petitioner absented himself from the duty for more than two years which culminated into order of suspension and thereafter dismissal from service after due conduction of the disciplinary proceeding against him.

8. So far as the charges levelled against the petitioner, the same has been explained on various grounds, interalia the prolonged illness of his wife compelled him to stay without seeking formal approval of leave but the same has been intimated well within time. The ground of recommendation of punishment at the time of submitting the enquiry report as well as on the other grounds as mentioned in the memo of appeal as well as revision the orders dated 10.12.2011, 29.4.2012 and 29.8.2012 passed by respondent nos. 5,4 and 3 respectively are hereby quashed and set aside.

9. The respondent no.5 is hereby directed to treat the petitioner as a regular incumbent of the department and extend all the benefits being the retired employee of police department after attaining the age of superannuation in the month of January, 2015 itself, the entire exercise with regard to extension of benefit of back wages, retiral dues and other admissible increments shall be completed as expeditiously as possible preferably within a period of four months from the date of production of certified copy of this order.

10. The writ petition stands allowed accordingly.

(2023) 4 ILRA 1136
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 31818 of 2009

Ram Chandra Chaurasiya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Jatan Yadav, Sri M.N. Khan, Sri Rahul Jain

Counsel for the Respondents:
C.S.C., Sri P.K. Yadav

Civil Law - Service Matter - Intermediate Education Act, 1921 - Age of Superannuation - By Government Order dated 27.02.2004, the age of superannuation for assistant teachers was fixed at 62 years - Petitioner was compelled to retire at the age of 60 years on the ground that the institution, being a minority institution, has separate retirement rules according to its scheme of administration - Institution case that due to the institution's minority status,

laws and rules of the State of U.P. contrary to the scheme of administration do not apply - Held: Once a minority institution is recognized by the State Government, all applicable rules, provisions, and Government Orders are enforceable - Respondents were directed to treat the petitioner as retired upon attaining the age of 62 years.

Allowed. (E-5)

List of Cases cited:

1. T.M.A. Pai Foundation & ors Vs St. of Karn. & ors., 2002 (8) SCC 481

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

1. Heard Shri Rahul Jain, learned counsel for the petitioner, Shri P.K. Yadav, learned counsel for the respondent nos. 3 and 5 and Shri Girjesh Tripathi, learned Standing counsel for the respondent nos. 1 and 2.

2. It is the case of the petitioner that he was rendering his services before the respondent no. 3 as an assistant teacher and as per the Intermediate Education Act, 1921 which has been regulated with the different amendment introduced by the State Government of U.P. from time to time the age of superannuation pertaining to the petitioner is 62 years, whereas he has been compelled to retire at the age of 60 years only. Having been aggrieved with the notice/order of retirement dated 10.12.2008 and the same is under challenge in the instant petition.

3. For substantiating the claim of the petitioner, the provisions of the regulation as well as the extent rules applicable over the petitioner has relied upon which is ensured by the legislation for each and every teacher imparting in the same services before the different institution recognized by the competent authority i.e. respondent no. 2.

4. Considering the provisions applicable over the petitioner and his specific letter dated 09.04.2009 has been issued by the respondent no. 2 in favour of respondent no. 3 and it has been clarified that the age of superannuation for the assistant teacher has already been declared through Government Order dated 27.02.2004 is 62 years and as such the committee of management of Saint Joseph's High School, Mahoba is hereby requested to ensure the retirement of the petitioner and after completion of the 62 years and the same has been appended along with the petition as Annexure No. 8.

5. Per contra, learned counsel for the respondent nos. 3 and 5 vehemently opposed the prayer as made in the petition on the ground that the committee of management is having the separate Rules in respect of the retirement of the assistant teacher were engaged in the institution on the term and condition which is admissible and applicable both of them, the term and condition is directly governed with the scheme of administration as adopted by the respondent no. 3 and the same has been approved by the Deputy Director Education (Madhyamik), Jhansi Division, District - Jhansi.

6. After having the rival contention has raised by the learned counsels for the respective parties along with the perusal of the letter of administration submitted by the learned counsel for the petitioner at the time of filing the rejoinder affidavit in reply to the counter affidavit preferred by the respondent no. 3 and 5 and the same has not been disputed at any point of time since

the document appended as Annexure No. 2 to the rejoinder affidavit, wherein it is crystal clearly mentioned in the scheme of administration of the institution i.e. respondent nos. 3 and 5 at para 22 (iii) which is reproduced hereinbelow:

"3- विद्यालय के कर्मचारीयों का सेवा की एक्ट तथा रेग्युलेशन्स से निर्धारित होंगे। यदि सेवा के लिए कोई समझौता होगा, तो यह उन्ही अंश में मान्य होगा जिस अंश में एक्ट तथा रेग्युलेशन्स के प्रावधानों के अनुकूल होगा।"

7. The definition of act and regulation is well defined under the clause 3 of the scheme of administration available under the definitions, Act means Intermediate Education Act, 1921 and Regulation, means all the Rules, instructions as well as Government Orders in shape of Act issued by Department of Education, State Government of U.P. from time to time.

8. The scheme of administration adopted by the respondent nos. 3 and 5 is such explanatory in respect of every affairs which is applicable over each and every employee of the institution and the same shall be governed with the strict provisions of the Intermediate Education Act, 1921 so far as the Government Orders and different other statutory provisions are concerned all shall be equally applicable over each and every employee irrespective of the institution governed under the minority in Status. The sole ground is relied by the learned counsel for the respondent nos. 3 and 5 that the institution is minority and as such the connecting laws as well as Rules pertaining to the State of U.P. shall not be applicable is contrary to the scheme of administration itself. Once the institution irrespective of its status specially a mentioned in the petition as minority once recognized by the State Government the entire rules, provision as well as Government Orders shall be applicable in strict in the two letter and separate by the institution which is mandatory in nature.

9. The Eleven Judges Bench in **T.M.A. Pai Foundation & Ors Vs. State of Karnataka & Ors, 2002 (8) SCC 481,** had again occasion to consider the scope and ambit of Article 30 of the Constitution. The Apex Court in the said case has framed various questions. One of the questions, 5(c) which is relevant in the present case was also framed. It is useful to quote paragraphs 136, 137 and also paragraph 161 in which the Answer to question 5(c) is given, which are as under:

"136. Decisions of this Court have held that the right to administer does not include the right to maladminister. It has also been held that the right to administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle of education, consistent with national interest. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also -- for example, laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality.

137. It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of the land pertaining to health, morality and standards of education apply. The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same. By the same analogy, there is no

reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).

161. The essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole and united India. Articles 29 and 30 do not more than seek to preserve the differences that exist, and at the same time, unite the people to form one strong nation."

10. In view of the aforementioned facts and circumstances as well as by intensive reading of the scheme of administration, the ground as taken up by the as learned counsel for the respondent nos. 3 and 5 is not tenable in the eye of law and as such the notice/order of retirement dated 10.12.2008 issued by respondent no. 3 is hereby quashed and set aside.

11. The writ petition is hereby **allowed** with direction to the respondent nos. 3 and 5 to treat the petitioner retired after attaining the age of 62 years and ensure the payment along with the backwages, admissible incrimants thereupon within 15 days from the date of the production of the certified copy of this order produced before them. Retiral benefits along with the payment of delayed interest admissible to the rate of the current lending rate of the nationalized Bank will be admissible to the petitioner.

(2023) 4 ILRA 1139
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 50320 of 2009

Jai Prakash Yadav ...Petitioner
Versus
D.G. (C.R.P.F.) C.G.O. New Delhi & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gopal Misra, Sri Malik Juned Ahmad

Counsel for the Respondents:
A.S.G.I., Sri C.P. Gupta, Sri Sanjay Kr. Om

Civil Law - Service Matter - Quantum of Punishment - Bigamy - Central Reserve Police Force Act 1949 - Section 11(1) - CRPF Rules 1955 - Rule 27 - Petitioner, already married, performed a second marriage without seeking permission - Dismissal order passed under S. 11(1) - Court held that the disciplinary authority was required to impose only a minor punishment under S. 11(1) but instead illegally imposed a major punishment (dismissal), which was illegal. (Para 10)

Allowed. (E-5)

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

1. Heard Sri Malik Juned Ahmad, learned counsel for the petitioner and Sri Sanjay Kr. Om, learned counsel for Union of India representing all the respondents.

2. This petition has been moved with a prayer to *"issue a writ, order or direction in the nature of certiorari quashing the impugned dismissal order dated 26.04.2008 passed by respondent no.4 as well as the orders dated 14.7.2009, 23.12.2008 and 9.8.2008 passed by the respondent nos. 1, 2 and 3 respectively."*

3. It is the case of the petitioner that after conducting the enquiry a disciplinary proceeding has been initiated with the charges of bigamy against the petitioner, after adopting the due procedure of the enquiry as prescribed under rule 27 of CRPF rules 1955 the punishment order dated 26.04.2008 passed by the disciplinary authority that is respondent no. 4 through which the order of dismissal has been passed against the petitioner. Being aggrieved with the dismissal order the petitioner preferred a statutory appeal and the same was also rejected vide order dated 09.08.2008 by the respondent no. 3 and finally the order passed by the disciplinary authorities as well as while preferring the representation before the respondent no. 2 which was also dismissed vide order dated 23.12.2008. After receiving the order dated 23.12.2008 passed by the revisional authority, the petitioner preferred a representation before the Directorate General, Central Reserve Police Force and the same was also rejected vide order dated 14.07.2009, at the time of raising arguments on behalf of the petitioner, learned counsel for the petitioner mentioned that the representation as preferred by the petitioner before the respondent no.1 was not the statutory provision but that was in shape of the representation for seeking sympathy over the illegal action as carried out by the other responding authorities.

4. The above mentioned orders were put to challenge in the present petition but on other grounds inter-alia, determination of the quantum of punishment has been erroneously determined by the disciplinary authority while passing the order dated 26.04.2008, which has been dealt under Section 11(1) of the Central Reserve Police Force Act 1949.

5. Learned Counsel for the petitioner pointed out the Section 11(1) of the Act of 1949 which is reproduced here below:-

11. "Minor punishments.-

(1) The Commandant or any other authority or officer as may be prescribed, may, subject to any rules made under this Act, award in lieu of, or in addition to, suspension or dismissal any one or more of the following punishments to any member of the Force whom he considers to be guilty of disobedience, neglect of duty, or remissness in the discharge of any duty or of other misconduct in his capacity as a member of the Force, that is to say,?

(a) reduction in rank;

(b) fine of any amount not exceeding one month?s pay and allowances;

(c) confinement to quarters, lines or camp for a term not exceeding one month;

(d) confinement in the quarter-guard for not more than twenty-eight days, with or without punishment drill or extra guard, fatigue or other duty; and

(e) removal from any office of distinction or special emolument in the Force.

(2) Any punishment specified in clause (c) or clause(d) of sub-section (1) may be awarded by any gazetted officer when in command of any detachment of the Force away from headquarters, provided he is specially authorised in this behalf by the commandant.

(3) The assistant commandant, a company officer or a subordinate officer, not being below the rank of subedar or inspector, commanding a separate detachment or an outpost, or in temporary command at the headquarters of the Force, may, without a formal trial, award to any member of the Force who is for the time being subject to his authority any one or more of the following punishment for the

commission of any petty offence against discipline which is not otherwise provided for in this Act, or which is not of a sufficiently serious nature to require prosecution before a criminal court, that is to say,?

(a) confinement for not more than seven days in the quarter-guard or such other place as may be considered suitable, with forfeiture of all pay and allowances during its continuance;

(b) punishment drill, or extra guard, fatigue or other duty, for not more than thirty days with or without confinement to quarters, lines or camp;

(c) censure or severe censure: Provided that this punishment may be awarded to a subordinate officer only by the Commandant.

(4) A jemadar or sub-inspector who is temporarily in command of a detachment or an outpost may, in like manner and for the commission of any like offence, award to any member of the Force for the time being subject to his authority any of the punishments specified in clause (b) of sub-section (3) for not more than fifteen days."

5. The fact as highlighted by the learned counsel for the petitioner has not been disputed since the same is very much available in the order dated 16.04.2008 which has been passed by the disciplinary authority after conducting proper disciplinary proceedings in consonance with the rules 27 of the rules of 1955 while framing the order passed by the disciplinary authority, appellate authority as well as passed by the disciplinary authority has been basically assailed in the present petition on the ground of the quantum of punishment which is contrary to the Section 11(1) of the Act of 1949.

6. By bare perusal of the Section 11 it is crystal clearly apparent that any punishment determined by the disciplinary authority under section 11 the same must be minor in nature whereas in the instant matter the order of dismissal comes under the major punishment as determined over the petitioner.

7. Per contra, learned Standing Counsel appearing on behalf of the respondents vehemently opposed the prayer on the ground that the action of the petitioner which is self reflectory while conducting the enquiry and it has been proved that the petitioner who was already married and performed second marriage without seeking permission, which was not permissible in the eyes of law and as such the punishment awarded in shape of dismissal is appropriate and proportionate to the illegal action as carried out by the petitioner.

8. While responding the precise query over the material in question as highlighted by the learned counsel for the petitioner with regard to the attraction of Section 11(1) of the CRPF Act of 1949, the same is unanswered by the learned counsel for the respondent.

9. In view of the above mentioned facts and circumstances, it is crystal clear that once the reliance has been taken up by the disciplinary authority for determining the punishment under Section 11(1) CRPF Act 1949, it was only option available before the disciplinary authority to impose the minor penalty but the same has been contrary determined in shape of the dismissal against the petitioner which is apparently illegal and as such the order dated 26.04.2008 along-with the orders dated 14.7.2009, 23.12.2008, 09.08.2008 and the order dated 14.07.2009 are hereby quashed and set aside. However, the liberty

is open for the responding authorities to reconsider the matter strictly in accordance with Section 11(1) of the CRPF rules of 1949 Act for determining the punishment, if required in shape of minor penalty only.

10. Writ petition stands **allowed**, accordingly.

(2023) 4 ILRA 1142
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2023

BEFORE

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

First Appeal From Order No. 67 of 2000

The Oriental Insurance Co. Ltd. Shakarpur, Delhi ...Appellant

Versus

Asghar & Ors. ...Respondents

Counsel for the Appellant:
Amresh Sinha

Counsel for the Respondents:

Civil Law -Workmen's Compensation Act, 1923 - Section 30 – Appeal - Truck driver murdered during course of employment – Truck Owner acknowledged deceased's employment as driver in police report - Commissioner granted compensation to heirs of deceased truck driver - Insurance company challenged award on grounds of lack of evidence linking death to employment, absence of valid driving license, and non-impleadment of vehicle owner's legal heirs - Held: Murder during employment is compensable under the Workmen's Compensation Act as per Supreme Court precedent in Rita Devi v. New India Assurance Co. Ltd - High Court's jurisdiction u/s 30 limited to substantial questions of law - Commissioner's factual findings not to be disturbed unless perverse – Appeal dismissed.

Allowed. (E-5)

List of Cases cited:

1. Rita Devi Vs New India Assurance Co. Ltd., LAWS(SC)2000 4 99

2. North East Karnataka Road Transport Corporation Vs Smt. Sujatha ; Civil Appeal No.7470 of 2009 dt 2.11.2018

3. Golla Rajanna Etc. Etc. Vs Divisional Manager & anr., 2017 (1) TAC 259 (SC)

4. Mayan Vs Mustafa & anr., 2022 ACJ 524

5. Salim Vs New India Assurance. Co. Ltd. & anr., 2022 ACJ 526

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

1. This appeal has been preferred by the appellant under Section 30 of Workmen's Compensation Act challenging the judgment and award dated 30.11.1999 passed by the Workmen's Compensation Commissioner/Assistant Labour Commissioner, Bulandshahr in WC Case No. 6 of 1999 whereby the learned Commissioner has awarded compensation of Rs.2,16,910/- with interest at the rate of 12%.

2. The appellant has challenged the award of the learned Commissioner on the following substantial questions of law:

"A). Whether in absence of any evidence to establish that the death was the result of kidnapping of the alleged vehicle and killing by the kidnappers while the deceased was in the course of employment of the owner of the truck, Court below was justified in allowing the claim petition?

B). Whether in absence of any evidence in respect of the valid driving license held by the deceased at the time of alleged incidence, the Court below was justified in allowing the claim petition?

C). Whether the death of the owner of the vehicle during pendency of the claim petition and non-impleadment of his heirs and legal representatives, the appellant company was liable to be absolved of its liability?

3. The deceased-Anwar Ahmad was driver of respondent-owner and was being paid Rs.2000/- per month plus Rs.50/- for daily diet. He was employed at Truck No.HR26A 2045. On 1.2.1997, upon the direction of respondent-owner, the deceased went to Gwaliar from Delhi by plying the loaded truck. On 3.2.1997, during the course of his employment he was murdered and his dead body was found in Agra near *Jharna Nala* under Atmadpur Police Station. The legal heirs of the deceased was denied compensation by the original respondents and, therefore, they preferred the claim petition which was allowed by the learned Commissioner as above.

4. As far as question No.A is concerned, the said issue is no longer res integra. The answer to this question whether a murder can be said to give rise a case under Workmen's Compensation Act, is covered by judgment of the Apex Court in **Rita Devi Vs. New India Assurance Company Limited, LAWS(SC)2000 4 99**. As far as other substantial questions of law are concerned, the commissioner has come to the conclusion that the owner had shown the deceased as driver of the truck while lodging the report before the police station and that is how he has accepted the employment of the deceased. As far as non-joinder of legal heirs of the owner is concerned, the learned commissioner after hearing the appellant and on considering the objection raised by claimants had rejected the application of the appellant-Insurance Company. Be that as it may, all these questions are in the realm of question of facts and the finding of the Commissioner on these issues are not perverse.

5. This Court is fortified in its view by the decision of the Apex Court passed in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018, Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC) & Mayan vs. Mustafa and another, 2022 ACJ 524** wherein the Apex Court has held that under Section 30 of Workmen Compensation Act, the High Court cannot enter into the arena of facts unless they are proved to be perverse and unless there is a question of law involved. The decision in **Salim vs. New India Assurance. Co. Ltd. and another, 2022 ACJ 526** also will not permit this Court to interfere with the well reasoned judgment of learned Commissioner.

6. In view of the above, the appeal fails and is dismissed.

7. Interim relief, if any, shall stand vacated forthwith. The Registry will forward this order to the Workmen Compensation Commissioner who shall immediately summon the legal heirs of the claimant and disburse the amount kept in fixed deposit with interest accrued on the said amount till date within 30 days from the date of receipt of this order.

(2023) 4 ILRA 1144
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.04.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 2542 of 2023

Dr. Richa Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Utsav Mishra

Counsel for the Respondents:
C.S.C., Shubham Tripathi, Vinayak Saxena

Civil Law - Constitution of India, Article 226 - *Review of earlier judgment in a subsequent judgment* – The petitioner prayed for the judgment dated 29.01.2019 in Writ Petition No. 6785/2018 to be declared per incuriam. *Held*: The Court held that the said judgment cannot be subjected to review or its validity questioned in the present writ petition. A Bench of any court is bound to follow the decision of another coordinate Bench of equal strength to maintain judicial propriety. The judgment of a Single Judge can only be set aside by a Division Bench in a special appeal or by the Supreme Court in an appeal against the said order. Accordingly, the petitioner's arguments in this regard are rejected. (Paras 26, 27)

Civil Law - Service Law - *Dispute pertaining to appointment after a lapse of 19 years* - Petitioner cannot be permitted to challenge and dispute the appointment for the first time after a lapse of 19 years from the date of respondent no. 6's appointment, or after a substantial length of time following her own appointment in 2013. If the petitioner had been serious about challenging respondent no. 6's appointment as Assistant Professor, she could have done so within a reasonable period after her own appointment in 2013. Having remained a silent spectator, she is deemed to have acquiesced. Petitioner cannot be allowed to contest the initial appointment dispute at her convenience. (Para 23)

Writ Petition dismissed. (E-5)

List of Cases cited:

1. St. of U.P. & ors. Vs Arvind Kumar Srivastava & ors. (2015) 1 SCC 347

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

1. Heard Sri Sandeep Dixit, Senior Advocate assisted by Sri Utsav Mishra for the petitioner, Sri S. K. Kalia, Senior Advocate assisted by Sri Shubham Tripathi and the Standing counsel for the respondents.

2. The petitioner has assailed the decision of the respondents to give charge/appointment to respondent No.6 as Head of Department of Microbiology in Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow (hereinafter referred to as the SGPGIMS) and further seeks a direction to the respondents to appoint the petitioner on the said post.

3. It has been submitted by learned counsel for the petitioner that the petitioner was initially appointed as Assistant Professor in Department of Microbiology in SGPGIMS on 24.5.2013 and subsequently she was confirmed on the said post. She was further promoted to the post of Associate Professor in Department of Microbiology under Career Advancement Scheme (CAS) on 28.12.2016 and further promoted to the next higher post of Additional Professor on 16.3.2020 on which she is presently working.

4. It is submitted that SGPGIMS was established by the statute known as Sanjay Gandhi Post Graduate Institute of Medical Sciences Establishment Act, 1983 and with regard to reservation and age relaxation for all the reserved category candidates rules of Government of Uttar Pradesh are applicable. According to sub regulation (3) of rule 40 of First Regulation of 2011 and as per Regulation 53 of First Regulation 2011 the President of the respondent Institute is Chief Secretary of Government of Uttar Pradesh and is the appointing authority of class 1 officers of the SGPGIMS.

5. In pursuance of advertisement No.22/2003-04 which was issued for recruitment of reserved category candidates, respondent No.6 was selected and appointed to the post of Assistant Professor in Department of Microbiology and at the time of filing of the writ petition was holding the post of Additional Professor.

6. Learned counsel for the petitioner has submitted that respondent No.6 who belongs to scheduled tribe category is a native of State of Manipur and had applied under the Scheduled Tribe category. It is stated that respondent No.6 was not eligible for being appointed under reserved category on the post of Assistant Professor in Department of Microbiology. The appointment of respondent no.6 and other persons appointed in pursuance to the advertisement N.22/2003-04 was questioned by certain members of Legislative Council and appointments made thereunder were also duly considered by the State of U.P. and it was held that the candidates who belong to outside the State cannot be given benefit of reservation. However, such candidates are eligible to apply on unreserved vacancies only and, hence, entire matter was placed before the governing body of SGPGIMS for consideration of such appointment.

7. The matter was also raised before this Hon'ble Court in writ petition No.1472 (S/B) of 2007 (Dr. Rishi Setti Vs. State of U.P. and others) and the said matter is still pending consideration. The issue was also raised at various other forums including Uttar Pradesh State Commission for Backward Classes and a meeting was held on 3.3.2009 under the Chairmanship of Secretary, State of U.P. where it was decided that such posts which have been filled-up in violation of reservation policy be declared as ex-cadre posts, and entire aforesaid exercise culminated in passing of the Government Order dated 15.10.2010 issued by Principal Secretary, Medical Education, State of U.P. whereby the State Government took decision to declare the 8 posts occupied by such persons belonging to outside the State of U.P. (including respondent No.6), who had been extended the benefit of reservation policy and had been appointed on the reserved category posts meant for candidates belonging to scheduled castes, scheduled tribe and other backward classes having domicile of U.P., be declared as ex-cadre posts. In compliance with the aforesaid decision, the respondent institute was directed to take necessary action in compliance thereof.

8. In compliance of the aforesaid Government Order dated 15.10.2010 an office order dated 15.9.2016 was issued by Director, SGPGIMS where it was provided that the posts occupied by the candidates belonging to reserved category candidates of outside the State be declared as having been appointed on ex-cadre posts. It was further provided that they shall not be

eligible for holding the posts of Head of Department or any administrative post or any responsible post.

9. Being aggrieved of the Government order dated 15.10.2010 issued by Principal Secretary, Medical Education, State of U.P. as well as office order dated 15.9.2016 issued by Director, SGPGIMS respondent No.6 approached the Hon'ble Visitor assailing the said orders. Apart from the fact that they were never given opportunity of hearing prior to passing of the said orders also that there was no such condition laid down in advertisement No.22/2003-04 about requirement of domicile of State of U.P. or that domicile of other State would not be eligible and regarding that, both the orders were issued by incompetent authorities in as much as the Director and the Principal Secretary were not the appointing authorities as according to Section 11 of the Act, the Chief Secretary of U.P. is the President of SGPGIMS and Chairman of governing body and according to Regulation 2 President is the appointing authority for Assistant Professors.

10. The representation of respondent No.6 was duly considered and decided by the Visitor vide order dated 29.1.2019 setting aside the order of Director, SGPGIMS dated 15.9.2016 but no interference was shown in Government Order dated 19.10.2010 as the same was beyond the competence of the Visitor to set it aside. It has further been submitted that the order dated 15.10.2010 was also challenged by one Dr. Narayan Prasad, who was similarly situated and selected along with the respondent no.6 and who had also approached the Visitor and an order was passed in his favour on 6th April, 2018. The Government order dated 15/10/2010 was challenged before this Court in writ petition No.6785 of 2018 (S/S) by Dr. Narayan Prasad, as in his case also the Hon'ble Visitor had set aside only the order of Director SGPGIMS and 15.09.2016 and not the Government order dated 15/10/2010. The Single Judge of this Court vide judgment and order dated 09.05.2019 allowed the writ petition and set aside the Government order dated 15.10.2010 and 9.8.2018 and directed the respondents to provide all consequential benefits to the petitioner and that he will not be treated in ex-cadre service and will not ignore the petitioner in providing the benefits of seniority in service and other benefits and hold administrative post.

11. Sri Sandeep Dixit, learned counsel for the petitioner has urged that the order of Single Judge is not liable to be followed in the present case in as much as ex-facie rules of reservation applicable to SGPGIMS were not followed and respondent No.6 could not have been appointed against reserved vacancies of scheduled caste/Scheduled Tribe and, therefore prayed that the case of the petitioner may be considered ignoring the aforesaid judgment and order or in alternative declare the same as per incuriam as the same has been passed in ignorance of the well settled legal principles. He submits that the petitioner being next senior most faculty member is entitled to be appointed as Head of Department and may be given charge of the said post.

12. Sri S. K. Kalia, Senior Advocate has vehemently opposed the writ petition. He submits that the State Government considering various allegations with regard to appointment of the respondent no.6 and other similarly situated persons passed the Government Order dated 15.10.2010 declaring the respondent No.6 and 7 others

to be holding ex-cadre post. Subsequently, the SGPGIMS has issued the order dated 15.10.2016 in compliance of the government order dated 15.10.2010. The respondent no.6 came to know of the order dated 15.09.2016 declaring the post held by the petitioners to be ex-cadre post and had challenged the said order before Hon'ble Visitor, who after a detailed order dated 29.1.2010 allowed claim of the respondent no.6 and set aside the order dated 15.09.2016 passed by Director, SGPGIMS. He has further submitted that the Government Order dated 15.10.2010 was also challenged before this Hon'ble Court by similarly situated persons and the same has also been quashed by this Court in writ petition No.6785 of 2018 *(Narayan Prasad Vs. State of U.P. and others)* by means of the judgment and order dated 9.5.2019. It is stated that even the Special Appeal being Special Appeal No.254 of 2019 is pending consideration before Division Bench of this Court.

13. It is stated that at present the entire controversy has been laid to rest, and the Government order dated 15.10.2010 as well as the order of Director, SGPGIMS declaring the respondent no.6 to be holding ex-cadre post have been set aside, with the result that respondent no.6 is deemed to be holding the post within the cadre and being the senior most faculty member is duly entitled to be appointed as Head of Department in compliance of the decision taken by the respondents in this regard. This court was also informed that respondent No.6 has already taken over the head of Department Microbiology on 29.03.2023 and accordingly prayed for dismissal of the writ petition.

14. I have heard the counsel of the parties and perused the record. The petitioner by means of present writ petition seeking to lay claim of the Post of Head of Department Microbiology, SGPGIMS. In order to take over as Head of Department of Microbiology, he has also prayed that respondent No. 6 be declared to be holding ex-cadre post and hence not eligible to be appointed as Head of Department.

15. The appointment of respondent No.6 and other persons who were recruited in pursuance to the advertisement No. 22/2003-2004 were subjected to scrutiny at the State Government level, where after due consideration Government Order dated 15.10.2010 was issued. The State Government considered the fact that 8 of the persons recruited in the aforesaid recruitment were not domicile of the Uttar Pradesh and have been given the benefit of Reservation Act, 1994. After consultation with the Department of Personnel the said 8 persons so recruited their appointments were protected and were declared as holding ex-cadre post. The consequential order was passed by the Director SGPGIMS on 15/09/2016.

16. The order of the director SGPGIMS was challenged before the Hon'ble Visitor by respondent No.6 by filing a representation dated 05/12/2016 and also by another similarly situated person-Dr Narayan Prasad. The representation of respondent No.6 was allowed on 29/01/2019 and the order of the Director, SGPGIMS dated 15/09/2016 was set aside.

17. The Hon'ble Visitor was persuaded by the fact that the Advertisement No.22/2003- 2004 inviting applications for eligible persons with regard to the Department of Microbiology four posts were advertised which included

1 post for General category, 2 posts were reserved for Scheduled Caste and one for OBC. Respondent No. 6 is a person belonging to Scheduled Tribe and belongs to State of Manipur where Garo tribe is recognized as a Scheduled Tribe. The State government while holding that the respondent No. 6 could not have been granted the benefit of reservation in the category of scheduled tribe on the basis that in Uttar Pradesh Garo tribe is not recognized as a scheduled tribe.

18. In light of the aforesaid facts, the Hon'ble Visitor was of the view that out of the 4 post of Assistant Professors in the Department of Microbiology which were advertised, there was no post which was reserved for Scheduled Tribe, and, therefore, respondent No.6 could have been appointed only against the General category post and the order passed in this regard was not sustainable hence there was clear infirmity in the said order passed by the Director, SGPGIMS, and, therefore, set aside the order dated 15/09/2016.

19. The Government Order dated 15/10/2010 was challenged before this Court in writ petition No. 6785/2018 (SS) which was allowed by means of judgment and order dated 09/05/2019 after considering the following issues:-

a. the appointment of the petitioner was made in the year 2004 and after 12 years had passed since the appointment which was in accordance with law done by a duly constituted selection committee, and relying upon the judgment of the Supreme Court in the case of ***M.S Mudhol and another vs H.D. Halegkar and others passed in SLP no.16256 of 1992 and Mrs. Rakha Chaturvedi vs University of Rajisthan and others (1993)2 BLJR 854*** it was held at the SGPGIMS is bound by principle of estoppels and cannot be allowed to change its stand and take a U-turn. It was also held that the respondents have chosen to acquiesce to the appointment of the petitioner and it would be inequitable to make them suffer for the acts of the respondents.

b. Considering the orders dated 15/10/2010 and 09/08/2018 it was held that it is apparent on the face of it that the petitioner was not afforded any opportunity to file his defense and consequently the order is been passed in violation of principles of natural justice is not sustainable in law.

20. It is on these aforesaid facts that this Court is called upon to decide as to whether a writ can be issued in favour of the petitioner entitling him to take over the charge of the Head of Department of Microbiology. The petitioner can succeed in the present writ petition only when the respondent 6 is declared to be holding an ex-cadre post, and the validity of the Government Order dated 15/10/2010 as well as order dated 15/09/2016 passed by Director, SGPGIMS are upheld, otherwise admittedly respondent no.6 is senior to the petitioner having been appointed in 2004 viz a viz the petitioner who was appointed on 24/05/2013.

21. The Government Order dated 15/10/2010 has already been set aside by this court in writ petitions No. 6785/2018 and 32033 (SS) of 2018. Though the respondent no.6 has not challenged the said Government Order before this Court, but the benefit accruing as a consequence of setting aside of the said Government order cannot be denied to him in the present proceedings, and it cannot be argued that just because the petitioner has not

challenged the said order the benefit of the same cannot be granted to him. This aspect of the matter was considered by the Supreme Court in the case of state of ***Uttar Pradesh and others Vs Arvind Kumar Srivastava and others (2015) 1 SCC 347.***

22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:-

"22.2. However, this principle is subject to well-recognised exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

22.3. However, this exception may not apply in those cases where the judgment pronounced by the court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated persons. Such a situation can occur when the subject-matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma v. Union of India [K.C. Sharma v. Union of India, (1997) 6 SCC 721 : 1998 SCC (L&S) 226]). On the other hand, if the judgment of the court was in personam holding that benefit of the said judgment shall accrue to the parties before the court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence.

23. The Government order dated 15/10/2010 was also challenged by Dr Able Lawrance by filing writ petition being writ petition No. 32033(SS) of 2018 which was also allowed in terms of the judgement dated 09/05/2019 passed in writ petition No. 6785 (SS) of 2018.The extension of benefit of the Judgment passed in writ petition No. 6785 (SS) of 2018 even to by Dr Able Lawrance clearly indicates that this Court was of the view that the judgement dated 09/05/2019 applies to all the persons affected by government order dated 15/10/2010, and therefore when the same has been set aside, it covers the case of respondent No.6 also, and it is not necessary for every individual to approach court to seek a similar declaration. This Court is also conscious of the fact that SGPGIMS has itself accepted the verdict of this Court dated 09/05/2019 and prepared a common seniority list for all the professors including the names of persons affected by government order dated 15/10/2010.

24. In the present case as soon as respondent no.6 came to know about the order dated 15/09/2016 he challenged the same before the Hon'ble Visitor, who had set aside the same by order dated 29/01/2019. On the other hand, Government Order dated 15/10/2010 was

also set aside by this Court. With regard to the fact as to whether the judgement of this Court would apply or not to respondent no.6, this Court was of the considered view that the judgement of the single judge passed in writ petitions No. 6785/2018 and 32033 (SS) of 2018 would also apply to him as firstly, the order dated 15/10/2010 was a common order with regard to all the 8 persons who were selected in pursuance to the advertisement No. 22/2003-2004, on common ground. The grounds considered by the Hon'ble Single judge of this Court even cover the case of respondent No.6 in as much as no opportunity of hearing was granted before passing of the said order, and more importantly the said order became final and was duly accepted by the government as well as the SGPGIMS. Though a Special Appeal has been filed at the behest of the private individual namely Dr Devendra Gupta being Special Appeal No. 254 of 2019, and subject to the outcome of the said Special Appeal, the issue has become final between the Government and SGPGIMS on one hand and all the 8 persons who were affected by the order dated 15/10/2010 on the other. The SGPGIMS has further in compliance of the judgement dated 29/01/2019 of this Court issued a common seniority list of all the professors of the SGPGIMS which also includes respondent no.6 and others who were affected by the Government Order dated 15/10/2010.

25. Therefore, from the aforesaid facts the dispute pertaining to the appointment of respondent No. 6 and other similarly situated persons has been decided as both the orders namely 15/10/2010 and 15/09/2009 are no longer in existence. The Hon'ble Visitor as well as this Court set aside the orders holding the respondent No. 6 and other similarly situated persons as having been appointed on ex-cadre posts. The respondents have also accepted the verdict of this Court as well as the order passed by the Visitor, and subject to the decision in the Special Appeal which is pending consideration before this Court, the issue is no longer alive issue, and the petitioner cannot be permitted to agitate and raise the said issue for the 1st time after the lapse of 19 years from the date of the appointment of respondent no. 6, or after the substantial length of time after his / her own appointment which was made in the year 2013.

26. Considering the submission of the counsel of the petitioner that the judgement dated 29/01/2019 passed in writ petition No. 6785/2018 be declared *per-incuriam*, this Court is of the considered view that the said judgement cannot be subjected to review or its validity questioned in the present writ petition. Another reason for not accepting the contention on the petitioner is the fact that the Government Order dated 15/10/2010 is not under challenge in the present proceedings, and hence there is no occasion for this Court to test the validity of the said Government order or the precedential value of a previous judgment quashing the said Government order.

27. Had the validity of the Government order dated 15/10/2010 been under challenge in the present writ petition, then only this Court would have an occasion to consider various grounds raised and legal provisions in its support, to consider its validity, but the said question does not arise in the present case in absence of challenge to the same. A Bench of any court is bound to follow the decision of another coordinate Bench of equal strength to maintain judicial propriety. The

judgement of the Single Judge can be set aside only by a Division Bench in special appeal or by the Supreme Court in appeal against the said order and accordingly the arguments of the petitioner in this regard are rejected.

28. This Court is also of the considered view that the petitioner has never assailed the order of the Hon'ble Visitor or the judgement of this Court dated 19/05/2019 and, therefore, in absence of the challenge to the same, relief as prayed cannot be granted to the petitioner. In any view of the matter when the order of the Hon'ble Visitor is still holding field and has not even been subjected to any challenge before any forum, there is no reason to deny respondent No.6 the benefit of the said order. It is for the same reason that this Court is not going into the detailed submissions made by counsel for the petitioner with regard to the applicability of U.P. Public Servants (Reservation for Scheduled Castes, Scheduled Tribes and Other Backwards Classes) Act, 1994 while assailing the appointment of respondent No. 6, apart from the fact that a Special Appeal assailing the order of Hon'ble Single Judge is pending consideration, where all these arguments may be considered.

29. Another reason for not interfering with the decision of the SGPGIMS in appointing respondent No. 6 as Head of Department (Microbiology) is that the dispute regarding his appointment and selection was under consideration at various levels for the last 19 years, and such dispute cannot be allowed to continue endlessly, and a quietus has to be given to the dispute at some stage. Permitting the petitioner to continue to agitate the dispute is neither in public interest nor in the interest of SGPGIMS nor the teaching faculty. The petitioner was aware of this situation since the date he joined the Department of Microbiology but chose to remain silent and only when the issue pertaining to appointment on the post of Head of Department (Microbiology) has gain momentum, he has chosen to stake his claim. Had he been serious with regard to the challenge of appointment of respondent no. 6 as an Assistant Professor, he could have done so within a reasonable period of time after his appointment in 2013. He having remained a silent spectator, will be deemed to have acquiesced to the order of Hon'ble Visitor as well as Judgment of this Court dated 09/05/2019 and, hence, cannot be permitted to agitate this dispute at his convenience when the post of Head of Department is about to fall vacant.

30. This Court has also been informed that respondent no. 6 has already taken over as Head of Department of Microbiology.

31. For the aforesaid reasons, this Court is not inclined to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India in favour of the petitioner, and subject to the decision of the Division Bench in Special Appeal No. 254 of 2019, the writ petition is **dismissed**.

(2023) 4 ILRA 1151
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.02.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 3372 of 2002

Shikha Abrol ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Dr. L.P. Mishra

Counsel for the Respondents:
C.S.C., Pradeep Tiwari

Civil Law - Service Law - Probation - Petitioner was appointed to the post of Stenographer and placed on probation. She successfully completed her probation period, which was never extended. After more than 5 years of service, a termination order was passed. Held: If, under the statute, the probation period cannot be extended, the appointment is deemed confirmed upon the expiration of the probation period. Since the petitioner's probation period was not extended, she is considered to have successfully completed it. As per service rules, when an employee continues in the post beyond the maximum probation period without an explicit confirmation order, they cannot be deemed to remain on probation by implication. This is because service rules prohibit extending the probation period beyond the fixed limit. In such cases, it can be inferred that the employee has been confirmed in their post by implication. Executive instructions cannot override statutory rules. (Paras 20, 21)

Writ Petition allowed. (E-5)

List of Cases cited:

1. Jaswant Singh Pratap Singh Jadeja Vs Rajkot Municipal Corporation & ors.; (2007) 10 SCC.

2. Rajinder Singh Chauhan & ors. VS St. of Har. & ors.; (2005) 13 SCC 179.

3. Heera Lal Vs St. of U.P. & ors., (2011) 29 LCD 1.

4. Netrapal Singh Vs Chandra Pal Singh & ors., (2013) 2 ESC 535.

5. Vinod Kumar Vs St. of U.P. & ors.; (2011) 29 LCD 103.

6. Smt. Vandana Gangwar Vs St. of U.P. & ors.; (2011) 2 UPLBEC 1299.

7. Dr. Vishwajeet Singh & ors. Vs St. of U.P. & ors.; 2009 (2) ESC 1387 (All) (DB).

8. National Fertilizers Ltd. & ors. Vs Somvir Singh; (2006) 5 SCC 493.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Dr. L.P. Mishra, learned Senior Counsel assisted by Sri Naveen Shukla, learned counsel for the petitioner, learned ACSC for respondent No.1 and Sri Pradeep Tiwari, learned counsel for respondent No.2.

2. The present writ petition has been filed challenging the order dated 22.06.2002 passed by respondent No.2 contained as Annexure-1 to the writ petition with further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondents to allow the petitioner to continue in service in the establishment of respondents as Stenographer with all service benefits notwithdstanding the impugned order dated 22.06.2002.

3. Factual matrix of the case is that a communication was made to the District Employment Exchange, Lucknow for making the names of eligible candidates on the post of Stenographer in the establishment of Directorate of Sainik Kalyan Evam Punerwas, U.P., Lucknow and the candidature was sought from district level offices i.e. Zila Sainik Kalyan Evam Punerwas Offices.

4. The selection was held and 12 candidates including the petitioner appeared and on the basis of written examination, short-hand, typing test and

interview, the petitioner was recommended for appointment on the post of Stenographer by the selection committee on 23.12.1996. On the recommendation made by the selection committee, the Deputy Director submitted a note on 27.12.1996 before respondent No.2 clearly stating that the post was to be filled up through a candidate belonging to General Category.

5. An appointment letter was issued to the petitioner and in pursuance thereof, she joined as Stenographer on 01.01.1997 and was placed under probation. She successfully completed the probation period, which was never extended. After a period of more than 5 years of working, a notice was issued to her on three grounds:

a) the vacancy was determined and requisition was sent to District Employment Exchange and notice of the vacancy was also pasted on the notice board of the Directorate.

b) As per rules of reservation, this vacancy was to be filled up through scheduled caste reserved category and rules of reservation was not followed.

c) the prescribed eligibility for appointment to a clerical post i.e. experience of 5 years working in army service was not possessed by the petitioner.

6. The said show cause notice dated 18.05.2002 was replied by the petitioner on 17.06.2002 stating that it was to be ascertained at the official level before making petitioner's appointment. However, without considering the petitioner's reply, order of termination was passed on 22.06.2002.

7. Submission of learned Senior Counsel for the petitioner is that the order of termination vitiates on 3 grounds:

a) under the rules, there is no provision to issue advertisement inviting application from open market. For reference, Rule 5 of the applicable rules is being quoted below:

परिशिस्ट "ख"

[नियम ५ (घ) (२) देखिए।

नैत्यक श्रेणी के लिपिकों के पदों पर नियुक्ति के निमित्त चयन के लिए छटनी किए गए कर्मचारियों और भूतपूर्व सैनिक कर्मचारियों के श्रेणियां:

१) सेवायोजक विभाग के भूतपूर्व कर्मचारी,

२) प्राक्षिक (रिजर्विस्ट्स) तथा सेना निवृत वैतनिक

३) खाद्य तथा रसद विभाग के भूतपूर्व कर्मचारी,

४) सहायता तथा पुनर्वासन विभाग के भूतपूर्व कर्मचारी,

५) अन्य सरकारी विभागों के भूतपूर्व कर्मचारी,

६) विस्थापित स्वर्णकार ।

b) in reference to Rule 5, Rule 15 was prescribed for procedure on direct recruitment, which is being quoted below:

परिशिस्ट "घ"

[नियम १५ (१) के नीचे की टिप्पड़ी देखिए।

प्रतियोगिता परीक्षा में बैठने के लिए आवेदन पत्र प्रस्तुत करने की प्रक्रिया :

१) सचिव निकटतम सेवायोजन कार्यालय को रिक्तियों की सूचना देगा।।

२) सेवायोजन कार्यालय के प्राधिकारी यह जानकारी देने के लिए कि कितनी रिक्तियां भरी जानी हैं, स्वयं सामान्य कार्यवाही करेंग

३) अभ्यर्थी अपने आवेदन-पत्र सम्बंधित सेवायोजन कार्यालय के माध्यतम से सचिव को प्रस्तुत करेंगे, जो आवेदन पत्र सेवायोजन कार्यालय के माध्यम से प्रस्तुत नहीं किए जायेंगे उन पर विचार नहीं किया जायेगा।

४) सेवायोजन कार्यालय आवेदन पत्र कि परिनिरीक्षा करेगा और उपयुक्त अभ्यर्थियों के आवेदन पत्रसचिव के पास भेजेगा।

५) सेवायोजन कार्यालय द्वारा भेजे जाने वाले आवेदन पत्रों की संख्या उपलब्ध रिक्तियों की संख्या के चार गुने से कम न होगी; किन्तु प्रतिबन्ध यह है कि अभ्यर्थियों कि संख्या रिक्तियों की संख्या के चार गुने से काम हो तो भी आवेदन पत्र भेजे जायेंगे।

६) सेवायोजन कार्यालय सचिव को उन अभ्यर्थियों के नाम और विवरण भी भेजेगा, जिनके आवेदन पत्र अप्रसारित न किए जायें और जिसके साथ आवेदन पत्र अप्रसारित न करने के कारण भी दिए जायेंगे।

७) यदि सचिव यह समझे कि किसी ऐसे अभ्यर्थी की, जिसका आवेदन पत्र सेवायोजन कार्यालय द्वारा - रोक लिया गया हो, उन कारणों से, जो अभिलिखित किए जायेंगे, परीक्षा में बैठने की अनुज्ञा दी जानी चाहिए तो ऐसे अभ्यर्थी को परीक्षा में बैठने की अनुज्ञा दी जाएगी, किन्तु प्रतिबन्ध यह है कि इस प्रकार अनुज्ञात अभ्यर्थियों की संख्या रिक्तियों की कुल संख्या के १० प्रतिशत से अधिक न होगी।

c) in regard to appointment on the post of Stenographer, परिशिस्ट "घ" is relevant consideration for the said purpose, which has already been quoted above.

8. In the light of aforesaid rules, submission of learned Senior Counsel for the petitioner is that there are 4 posts, therefore, the reservation rules will not be made applicable and the process of selection of General Category candidate is correct and does not suffer from any infirmity or illegality. In case against 4 vacancies reservation is permitted of the scheduled caste and scheduled tribes, it will exceed 21% and there shall be 25%, therefore, the procedure of appointment against cadre strength of 4 vacancies without complying the reservation is correct.

9. His next submission is that the advertisement, as held in the impugned order, is not required to be published in the newspaper inviting applications from open market. In this regard, relevant rules have been quoted above, which does not lay down the procedure for making advertisement of the vacancy.

10. His last submission is that the appointment of the petitioner has been held to be in violation of Government Order dated 14.09.1989 (Anneuxre-5). In this regard, his submission is that the rules have been framed in exercise of power under Article 309 of the Constitution of India and a government order cannot over ride the provisions contained under the same. In support of his submissions, he placed reliance upon following judgments:

a) On the point of "after successful completion of probation, employee should deemed to be confirmed", he placed reliance upon following judgments:

i) Jaswant Singh Pratap Singh Jadeja Vs. Rajkot Municipal Corporation and others; (2007) 10 SCC.

ii) Rajinder Singh Chauhan and others Vs. State of Haryana & others; (2005) 13 SCC 179.

b) On the point that "reservation (Roster) for caste shall not be applicable if posts are less than five in number in cadre and that number of posts shall be determined individually for direct recruitment and promotional cadre", he placed reliance upon following judgments:

i) Heera Lal Vs State of U.P. and others; (2011) 29 LCD 1.

ii) Netrapal Singh Vs. Chandra Pal Singh and others; (2013) 2 ESC 535.

iii) Vinod Kumar Vs. State of U.P. and others; (2011) 29 LCD 103.

iv) Smt. Vandana Gangwar Vs. State of U.P. and others; (2011) 2 UPLBEC 1299.

c) On the point that "executive order cannot over ride the statutory provisions", he placed reliance upon following judgments:

i) Vijay Singh and others Vs. State of U.P. and others; (2004) 3 UPLBEC 2778.

ii) R.B. Dixit Vs. Union of India and others; (2005) 1 UPLBEC 83.

11. On the other hand, learned counsel for respondent No.2 submitted that the impugned termination order does not suffer from any infirmity or illegality and the same is just and valid. He submitted that the provisions of reservation against cadre strength of 4 vacancy is also applicable. In support of his submissions, he placed reliance upon following judgments:

i) Dr. Vishwajeet Singh and others Vs. State of U.P. and others; 2009 (2) ESC 1387 (All) (DB).

ii) National Fertilizers Ltd. and others Vs. Somvir Singh; (2006) 5 SCC 493.

12. He further submitted that the person belonging to army having 2 year's experience was required to be appointed against the said vacancy, therefore, the impugned order of termination is a just and valid one.

13. Learned ACSC has also adopted the same arguments, as has been advanced by learned counsel for respondent No.2.

14. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as law reports cited by learned counsel for the parties.

15. While entertaining the writ petition, this Court passed an interim order on 27.06.2002 corrected vide order dated 04.07.2002, which is being quoted below:

"All the respondents are represented by learned Chief Standing Counsel.

As prayed counter affidavit may be filed by the next date.

List this matter in the 1st week of August, 2002.

It has been submitted by the learned counsel for the petitioner that petitioner was appointed in the year 1996 and she has completed probation period and without any complaint of any kind, she is continuing in service. It has been further submitted that after giving a show cause notice, without any further detailed enquiry, giving opportunity to the petitioner to participate therein, the impugned order has been passed.

In view of the aforesaid it is hereby provided as an interim measure that till further order of this court operation of the order dated 22-06-2002 (Annexure-1 to the writ petition) shall remain stayed and that will not be given effect to."

16. Vide aforesaid impugned order, the operation of the order dated 22.06.2002 contained as Annexure-1 to the writ petition was stayed with a further stipulation that it will not be given effect to. Meaning thereby, since 1997, the petitioner is discharging all duties and functions and has been paid salary and is on the verge of retirement.

17. To resolve the controversy involved in the matter, the judgments relied upon by learned counsel for the parties are being quoted below:

a) Judgments relied upon by learned Senior Counsel for the petitioner:

i) Jaswant Singh Pratap Singh Jadeja (Supra):

"11. Before, however, we embark upon the legal questions, we must notice that the appellant had not been confirmed in his services from 1999 to 2003. The power of Commissioner of Municipality to appoint a person on temporary basis is governed by the statutory rules. It has not been shown before the High Court or before us as to under what provisions of law the period of probation was extended from time to time. Applicability of the provisions of the Act is not in dispute. It may be true that such a contention was not raised before the High Court, but if under the statute, the period of probation could not have been extended, he will be deemed to have been confirmed on expiry of the period of probation."

ii) Rajinder Singh Chauhan and others (Supra) :

"11. The stand of the respondents was that the appellants were not confirmed employees. The appointment order of each of the appellants contains the stipulations which are as follows:

"1. Your appointment as Salesman is purely temporary.

2. During the period of probation, your services are liable to be terminated without giving any notice or assigning any reason.

3. You shall be governed by the terms and conditions contained in the Staff Service Rules of the Federation, amended from time to time."

This is a case where the period of probation is fixed having regard to Rule 4(b) read with Rule 10 as quoted above. Rule 10(6) no doubt provides that no employee shall be deemed to have been confirmed in the service unless specific order in this regard is issued. Relying on this provision, learned counsel for the fourth respondent submitted that there was no specific orders of confirmation and, therefore, the appellants should be deemed to have continued as probationers till the date of termination of their services. A similar stand was considered in Om Prakash Maurya v. U.P. Coop. Sugar Factories Federation. A Constitution Bench of this Court in State of Punjab v. Dharam Singh noted as follows:

"Where as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in the post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by

implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

12. In High Court of M.P. through Registrar and Ors. v. Satya Narayan Jhavar (2001 (7) SCC 161), this Court categorised the provisions for probation as follows:

"11. The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject-matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired."

In above view of the matter, the stand of the appellants that they were deemed to have been confirmed at the end of 24 months and they were permanent employees is in terra firma. 'Salesmen' belong to Class III of the category of permanent employees. The definition of "Probationer" given in Rule 4(b) fully supports the appellants' stand that the probation period shall not exceed 24 months in all. Therefore as was held in Om Prakash's case, Satya Narayan Jhavar's case and Dharam Singh's case (supra) the appellants inferentially have to be treated as permanent employees, and consequently the benefits under Rule 35(b) were available to them. But the same shall not be in addition to what is payable under Section 25-F. The amount which is higher of the two i.e. of Section 25-F or Rule 35(b) shall be paid to the appellants. If any amount has already been paid in terms of Section 25-F the same shall be adjusted while making the payment under Rule 35(L), which shall be made within three months. The appeal is allowed to the aforesaid extent. No costs."

iii) Heera Lal (Supra):

"27. However, even assuming that one such post can exist by applying the rule of necessity and the principle of rounding off, the rule of reservation of 21%

in less than five posts cannot be implemented. Law is also acknowledged as a technical dress. The prescription of law therefore cannot be designed through an interpretive tool to make it look upside down. Neither the Government Order dated 8th March, 1973 or the subsequent orders nor the provisions of U.P. Act No. 4 of 1994 project and support any such proposition as advanced on behalf of the State. The mathematical calculation prohibits anything further, and so do the legal principles as noticed above. The game of digits and numbers cannot be taken further even by employing the intuitive mind of the great mathematician Ramanujam nor can such a view be made possible through the best of forensic legacy of law.

28. The rule of roster and the concept of a running account of the roster therefore would commence only if there are five or more posts for extending the benefit of 21% reservation in favour of the scheduled caste category. A numerically less strength figure, below the required number, would therefore not allow the roster to be operated, as a roster is there to implement the rule of reservation and not a tool to create reservation. As noticed in the judgments of the Apex Court that in the event of any any conflict between the percentage of reservation and the applicability of the roster, the former would prevail. Thus, in no event can the percentage of reservation be inflated or enhanced by the illusionary or imaginative application of the rule of roster. If such interpretation as suggested by the State is given then the same would amount to a non-constructive existence of a miscalculated proof in the words of the famous German Mathematician Leopold Kronecker (1823-91). In legal terms this would violate the mandate of the constitution and in cases of promotion it would not be in conformity with the same."

iv) Netrapal Singh (Supra):

"8. The learned Single Judge by the Judgment dated 30.6.2009 allowed the aforesaid Civil Misc. Writ Petition No.33002 of 2008 and quashed the said order dated 16.6.2008 passed by the District Inspector of Schools, Saharanpur. The learned Single Judge, further directed the District Inspector of Schools, Saharanpur to accord approval in respect of the promotion of the Petitioner-respondent No.1 from Class-IV post to Class-III post in the institution in question. The Respondent No.5-appellant (Netra Pal Singh) thereafter filed the present Special Appeal.

14. The Full Bench decision of this Court lays down that either in cases of promotion or direct recruitment, the rule of reservation providing for 21 per cent reservation to Scheduled Castes under the U.P. Act No. 4 of 1994 as applicable to the aided educational institutions cannot be pressed into service where the number of posts in the cadre is less than five.

15. In the present case, as noted above, there are only three posts in the cadre of Assistant Clerk. Therefore, in view of the above Full Bench decision, there could not be any reservation for Scheduled Castes in respect of the vacant post falling in promotional quota in the institution in question. The order dated 16.6.2008 passed by the District Inspector of Schools, Saharanpur was therefore, not in accordance with law. The learned Single Judge has rightly quashed the said order dated 16.6.2008."

v) Vinod Kumar (Supra):

"2. The appellant herein was respondent no.6 in the writ petition filed by one Anand Prakash. In the petition, the issue was in respect of validity of

promotion of the appellant and the order passed by the District Inspector of Schools approving his appointment. The judgment of the learned Single Judge, after recording a finding that there were only three posts of Class-III, and considering the Full Bench judgment of this Court in Heera Lal v. State of U.P. & ors. 2010 (6) ADJ 1 (F.B.):2011 (29) LCD1 held that there could be no reservation unless the number of posts is more than five, and quashed the order dated 21.06.2010 granting approval to the appellant's appointment. The learned Judge has also issued a direction to the Managing Committee of the institution to act strictly as per the parameters provided under Regulation 2(2) of Chapter III of the U.P. Act No.II of 1921, preferably within next three months from the date of presentation of a certified copy of the order.

5. In that view of the matter, insofar as percentage of reservation is concerned, the law could be as declared by the Full Bench of this Court in Heera Lal (Supra). The observations made by the Division Bench in the case of Dr. Neeraj Shukla (supra) as relied on by Sri Khare would, therefore, be of no avail to the appellant.

6. In the light of above, in our opinion, there is no merit in the appeal, which is accordingly dismissed."

vi) Smt. Vandana Gangwar (Supra):

"4. A supplementary counter affidavit has been filed by the District Inspector of Schools dated 18.11.2006. From Annexure-1 to the supplementary counter affidavit as well as the facts on record, it is an admitted position that there are eight sanctioned posts of Lecturer, 50% of the same are required to be filled by way of promotion which would work out to four. It is further admitted on record that on the date Shyama Devi Sharma expired i.e. 15.6.1995, there were seven lecturers actually working in the institution including Shayama Devi Sharma. Out of seven persons, three had been appointed by direct recruitment and one post was vacant, meaning thereby that the vacancy which was occurred due to death of Shyama Devi Sharma, was required to be filled by way of promotion. It is against this vacancy that the petitioner had claimed promotion as Lecturer.

5. A Full Bench of this Court in the case of Heera Lal and others v. State of U.P. and others reported in (2010) 2 UPLBEC 1761 has held that for reservation being provided in favour of Scheduled Caste category, there must be at least five posts in the cadre concerned. The Full Bench has further explained that where the vacancies are required to be filled by promotion as well as direct recruitment, such number of posts have to be individually determined for each source of recruitment.

6. In view of the said Full Bench judgment, it has to be held that since there are only four posts within the promotion quota in the cadre of Lecturer in the institution, no reservation for Scheduled Caste category candidate can be provided. Consequently the reasons assigned in the impugned order fall to ground. The order impugned is therefore, quashed. Let the respondent No.3 (Joint Director of Education, Bareilly Region, Bareilly) reconsider the claim of the petitioner for regular promotion in accordance with the Act, 1982 preferably within eight weeks from the date a certified copy of this order is filed before him. All consequential action be taken accordingly."

vii) Vijay Singh and others (Supra):

"9. Similar view has been reiterated in Union of India v. Rakesh

Kumar, AIR 2001 SC 1877; Swapan Kumar Pal and Ors. v. Samitabhar Chakroborty and Ors., AIR 2001 SC 2353; Khet Singh v. Union of India, (2002) 4 SCC 380; Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr., (2003) 5 SCC 413; and Delhi Development Authority v. Joginder S. Monga, (2004) 2 SCC 297, observing that statutory rules create enforceable rights which cannot be taken away by issuing executive instructions.

22. In Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204; Union of India v. Naveen Jindal, (2004) 2 SCC 510; and State of Kerala v. Chandra Mohan, (2004) 3 SCC 429, the Apex Court held that executive instructions cannot be termed as law within the meaning of Article 13(3)(a) of the Constitution.

23. In M/s. Bisamber Dayal Chandra Mohan v. State of U.P. and Ors., AIR 1982 SC 33, the Hon'blc Supreme Court explained the difference in a statutory order and an executive order observing that executive instruction issued under Article 162 of the Constitution does not amount to law. However, if an order can be referred to a statutory provision and held to have been passed under the said statutory provision, it would not be merely an executive fiat but an order under the Statute having statutory force for the reason that it would be a positive State made law. So, in order to examine as to whether an order has a statutory force, the Court has to find out and determine as to whether it can be referred to the provision of the Statute.

30. In John Vallamattom and Anr. v. Union of India and Ors., AIR 2003 SC 2902, the Supreme Court held that Article 372 per force does not make a Pre-Constitutional statutory provision Constitutional. It merely makes a provision for the applicability and enforceability of Pre-Constitutional laws subject to the provisions of the provisions of the Constitution.

64. In the view of the above, we reach the inescapable conclusion that statutory rules cannot be set at naught by issuing executive instructions. But the facts of the instant case do no make the said proposition of law applicable at all. As herein the field is already occupied by the provisions of Act, 1861 which is in operation by virtue of the provisions of Article 313 of the Constitution, thus. Rules, 1972 could not be attracted at all. The Government Orders issued for fixing the maximum age for recruitment on subordinate police posts operate in an entirely different field and are not in conflict with the Rules, 1972. The case stands squarely covered by the Apex Court judgment in Chandra Prakash Tiwari (supra) and, thus, it is not possible for us to take any other view. The main submissions made by Mr. Chaudhary that Pre-Constitutional law stands abrogated altogether by commencement of the Rules, 1972, is devoid of any merit. Therefore; our answer to question No. 1 is that the field stood occupied on account of the provisions of Section 2 of the Act, 1961. The Legislature while enacting the provisions of Section 2 of Act, 1961 itself delegated the power to the statutory authorities to fix the eligibility including the age etc, The statutory authorities had performed their duties in exercise of the delegated powers from time to time without any deviation therefrom."

viii) R.B. Dixit (Supra):

"7. In the above hierarchy if there is conflict between a higher law and a lower law then the higher law will prevail. The executive instructions are part of the fourth layer in the hierarchy, which is at the lowest level, whereas an Act is part of

the second layer and the Statutes made under the Act are delegated legislation and hence part of the third layer. The letters dated 31.8.1998 and 30.3.1999 are only executive instructions and hence they belong to the fourth layer. Hence they are neither Act nor Statutes. Hence in our opinion the age of retirement of an employee of the Indian Institute of technology is 60 years and not 62 years vide Section 13(2). We, therefore, respectfully disagree with the decision in Raja Ram Verma's case.

8. The judgment in Raja Ram Verma's case (supra) is hereby overruled. The writ petition is consequently dismissed."

b) Judgments relied upon by learned counsel for respondent No.2:

i) Dr. Vishwajeet Singh and others (Supra):

"74. In 4 cadre posts, if one post is reserved for Scheduled Castes then reservation for Scheduled Caster be 25% which is impermissible. However, if one post is treated to be reserved for Other Backward Class then reservation for Other Backward Class shall be only 25% i.e. within 27% as prescribed under sub section (1) of Section 3. Thus, out of four posts, one post can be validly reserved for Other Backward Class. Now an example of five posts cadre is taken. Four five posts cadre, if one post is reserved for Scheduled Castes that will be 20% and will be within 21% as prescribed under sub-section (1) of Section 3. One post for Other Backward Class can also be very well reserved out of five cadre posts since it shall be within the 27% as prescribed. Thus, for giving reservation to Scheduled Castes and Other Backward Class, it is clear that there has to be five posts in a cadre. In the roster point, the first point which comes for Scheduled Tribes is at serial No.47. Thus, even according to roster, Scheduled Tribes can get reservation at the 47th post. The above view of ours is fully supported by the judgment of the Supreme Court in the case of R.S. Garg v. State of U.P. and others, (2006) 6 SCC 430. The facts of R.S. Garg case needs to be noted in some detail. In the aforesaid judgment, both the appellant and respondents were working as Assistant Directors. The appellant having been appointed in the year 1972 whereas the third respondent was appointed on 13.1.1987 on adhoc basis. There were six posts of Deputy Director of Factories in the State of U.P. out of which four posts were designated of Deputy Director of Factories (Administration), one as Deputy Director of Factories (Chemical) and one Deputy Director of Factories (Engineering). The post of Assistant Director of Factories was the feeder post. The Government converted the post of Deputy Director Factories (Chemical) to Dy. Director Factories (Administration). The third respondent was promoted as Deputy Director of Factories (Administration) as a reserved category candidate, which promotion was challenged in the Supreme Court. One of the grounds of challenge was that reservation to the post of Scheduled Castes was illegal and unjust by reason thereof percentage of reservation for promotion cannot be raised from 21 to 33%. The contention raised before the apex Court has been noted in paragraph 6 of the judgment to the following effect:

"6. The said writ petition had been dismissed by the impugned judgment. The contentions raised before the High Court as also before us, on behalf of the appellant are:

(i) The 3rd respondent was illegally appointed as Assistant Director of Factories as his services were regularized without referring the matter to the Public

Service Commission as was required by Rule 5(iii) of the 1992 Rules;

(ii) The order of promotion passed in favour of the 3rd respondent was male fide;

(iii) THe purported conversion of the post of Deputy Director of Factories (Chemical) to Deputy Director of Factories (Admn.) being contrary to the 1992 Rules and having been done with a view to favour the 3rd respondent, was illegal;

(iv) The 3rd respondent was not iligible to be promoted, as he did not complete 5 year's substantive service on the date of selection, i.e., in the year 1997 in terms of Rule 5(iii);

(v) Reservation to the post in favour of a Scheduled Caste was illegal and unjust by reason thereof the percentage of reservation in promotion would be raised from 21% to 33%.

(vi) The post of Deputy Director of Factories (Administration) has already been occupied by a candidate belonging to the reserved category, namely Shir Ghanshyam Singh."

ii) National Fertilizers Ltd. and others (Supra):

"Taking note of some recent decisions of this Court, it was held that the State does not enjoy a power to make appointments in terms of Article 162 of the Constitution of India. It further quoted with approval a decision of this Court in Union Public Service Commission v. Girish Jayanti Lal Vaghela & others [2006 (2) SCALE 115] in the following terms:

"The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."

It was clearly held:[Umadevi (3) case, SCC p. 35, para 41]

"These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment."

18. On perusal of aforesaid judgments, it is evident that if under the statute, the period of probation could not have been extended, the appointment will be deemed to have been confirmed on expiry of the period of probation.

19. In the case in hand, the petitioner has been granted appointment after following due procedure i.e. written examination, short-hand, typing test and interview and, thereafter, the petitioner was recommended for appointment on the post of Stenographer by the selection committee. Thereafter, on the recommendation made by the selection committee, the Deputy Director submitted a note before respondent No.2 clearly stating that the post was to be filled up

through a candidate belonging to General Category and, thereafter, appointment letter was issued to the petitioner and she was placed under probation period, which she completed successfully. While entertaining the writ petition, this Court granted an interim order on 27.06.2002, which was subsequently corrected vide order dated 04.07.2002 and in pursuance thereof, the petitioner is discharging all duties and functions and has been paid salary and is on the verge of retirement and if there was any discrepancy in the petitioner's appointment, as raised vide termination order dated 22.06.2002, it was to be ascertained at the official level before issuing appointment letter to the petitioner.

20. The appointment of the petitioner has been made in accordance with परिशिस्ट "ख" & परिशिस्ट "घ" of the applicable rules and her probation period has not been extended. Meaning thereby, she has successfully completed the probation period. The service rules fix a certain period of time beyond which the probationary period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in the post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication.

21. In the view of the above, this Court reaches to the inescapable conclusion that statutory rules cannot be set at naught by issuing executive instructions and the observations made in the case of **Dr. Vishwajeet Singh and others (Supra)** and **National Fertilizers Ltd. and others (Supra)** as relied upon by respondent No.2 would, therefore, be of no avail to the respondents. Therefore, the impugned order dated 22.06.2002 is liable to be quashed and is hereby quashed.

22. The writ petition succeeds and is **allowed**.

23. Consequences to follow.

(2023) 4 ILRA 1163
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.04.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ-A No. 5240 of 2017

Jagdish Narayan Katiyar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sanjay Kumar Srivastava, Prahant Chandra

Counsel for the Respondents:
C.S.C.

U.P. Government Servant (Discipline and Appeal) Rules, 1999, Rule 7(i) Rule 9(4) - Challenge to the punishment order of dismissal - In the present case, no date time and place was fixed by the enquiry officer. The documents relied upon by the enquiry committee in support of the charges was not proved, as no evidence was led to prove the same. The enquiry committee appointed by the disciplinary authority was dehors the Rules of 1999. There is no provision under the Rules of

1999 to appoint an enquiry committee. The entire enquiry as well as the disciplinary proceedings was vitiated. Considering the fact that the petitioner was presently 64 years of age and twice the orders was passed and second time, while passing punishment order, again the mandatory provision under Rules of 1999 were not followed by the enquiry officer/enquiry committee as well as the disciplinary authority, therefore, the request of the State to conduct denovo enquiry from the stage of giving reply to the charge sheet was refused. (Para 17, 22)

Writ Petition allowed. (E-5)

List of Cases Cited:

1. St. of U.P. & ors. Vs Saroj Kumar Sinha, AIR 2010 SC 3131

2. Jalaluddin Ansari Vs St. of U.P. & ors. Service Single No.5189 of 1995 Dt 9.5.2013

3. Ambika Prasad Srivastava Vs State Public Services Tribunal, Lucknow & ors. [2004(22) LCD 770

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

1. Heard Mr. Sanjay Kumar, Advocate assisted by Mr. Akshat Kumar, learned counsel for the petitioner and Ms. Vasudha Singh, Brief Holder and Mr. Rajiv Srivastava, learned Additional Chief Standing Counsel for the State.

2. By means of this writ petition, the petitioner has prayed for a writ of certiorari quashing orders dated 7.11.2016 and 15.11.2016, passed by respondents 2 and 3, contained in Annexures 1 and 2 to the writ petition.

A further writ of mandamus commanding respondents to reinstate the petitioner in service along with all consequential benefits of service including arrears of salary as also payment of current salary along with other benefit of service has also been prayed.

3. Brief facts of the case are that in the year 2009-2010, when the petitioner was posted as Senior Clerk in the office of Civil Hospital, Lingiganj, Farrukhabad, he was placed under suspension vide order dated 22.1.2010 on the charge of financial irregularities by Director (Administration), Medical & Health Services, U.P. Lucknow. Disciplinary proceedings were initiated against the petitioner under the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (In short, Rules of 1999). A charge sheet dated 6.7.2010 was issued by the enquiry officer whereby three charges were levelled against the petitioner. After receiving the charge sheet, the petitioner submitted his reply on 30.7.2010 denying all the three charges. Enquiry was completed by the enquiry officer and the respondent No.2, i.e. the Director (Administration) issued a show cause notice dated 12.1.2012 along with the copy of the enquiry report. Reply was sought from the petitioner which he gave on 28.1.2012 denying all the charges levelled against him. Punishment order of dismissal dated 13.4.2012 was passed by respondent No.2.

Against the dismissal order, an appeal was filed before the appellate authority, i.e. the Principal Secretary, Medical & Health, Government of U.P., Lucknow on 11.5.2012. The appeal was decided by way of dismissal, by respondent No.1 vide order dated 24.7.2013.

The punishment order dated 13.4.2012 and the appellate order dated 24.7.2013 were assailed before the State Public Services Tribunal by filing claim

petition No.854 of 2014 Jagdish Narayan Katiyar versus State of U.P. and others on two grounds, firstly, the petitioner has been falsely implicated in the aforesaid case and secondly, the departmental enquiry has not been conducted by the enquiry officer in accordance with Rules of 1999 and in violation of principle justice. The tribunal vide its judgment and order dated 1.7.2015 has allowed the claim petition and set aside the punishment order dated 13.4.20212 and the appellate order dated 24.7.2013, The matter was remanded to the respondents to conduct denovo enquiry from the stage of giving reply to the charge sheet. The operative part of the judgment is extracted below :

"उपरोक्त समीक्षा के प्रकाश में याची ही याचिका स्वीकार की जाती है। दण्डादेश दिनांक 27.04.2012/02.05. 2012 (संलग्नक संख्या- ए-1) एवं दिनांक 25.07.2013 (संलग्नक संख्या-ए-2) को निरस्त किया जाता जाता है तथा विपक्षीगण को निर्देश दिया जाता है कि वे इस निर्णय/ आदेश की प्रमाणित प्रतिलिपि प्राप्त होने के 15 दिनों के अन्दर याची के विरूद्ध नियमानुसार विभागीय कार्यवाही हेतु उसे निलम्बन की अवस्था में सेवा में तत्काल प्रभाव से पुर्नस्थापित करें साथ ही सेवा से पदच्युति की तिथि 27.04.2012/02.05.2012 से पुनर्स्थापित किये जाने की तिथि तक की अवधि को याची की निलम्बन कालवधि मानते हुए सेवा में निरंतरता प्रदान करें। उक्त विभागीय जांच कार्यवाही, चूंकि याची द्वारा आरोप पत्र का, उत्तर दिया जा चुका है इसलिए पुनः उससे उत्तर प्राप्त करने की कोई आवश्यकता नहीं है, के स्तर से प्रारंभ करके बचाय का समुचित अवसर प्रदान करते हुए और संबंधित समस्त अभिलेख उपलब्ध कराते हुए इस आदेश की प्रमाणित प्रति प्राप्त होने की तिथि से तीन माह में संपूर्ण जांच/ अनुशासनिक कार्यवाही विधिवत पूर्ण करें तथा पुनः की गयी जांच के निष्कर्ष के आधार पर याची के पारिणामिक सेवा लाभों / पैकवेजेज के संबंध में सकारण व मुखरित आदेश द्वारा पारित करना सुनिश्चित करें।

4. By the aforesaid order dated 1.7.2015, the respondents were directed to conclude the departmental proceedings within three months from the date of receipt of copy of the order of the tribunal. This order dated 1.7.2015 was assailed before this court in Service Bench No.17226 of 2016 State of U.P. and others versus Jagdish Narayan Katiyar and another. The writ petition was dismissed vide order dated 2.8.2016. However, further three months' time was granted to the petitioner State of U.P. to complete the enquiry.

5. It is in purported compliance of the judgment and order of the tribunal dated 1.7.2015 and the order dated 2.8.2016 passed by this Court, a four Member enquiry committee was constituted who after conducting enquiry submitted its report dated 24.10.2016. Consequently, the impugned punishment order contained in Annexure No.1 and the notice, Annexure No.2 have been passed.

6. It has been submitted by learned counsel for the petitioner that there is no provision in the Rules of 1999 to constitute enquiry committee. The language of Rules of 1999 is simple and the enquiry officer is to be appointed, and not a Committee. No date time and place of enquiry has been fixed. No enquiry ofifcer has been appointed. No show cause notice along with the enquiry report for the proposed

punishment order as mandated under Rule 9(4) of Rules of 1999 has been given to the petitioner. It is submitted that the impugned order has been passed in flagrant violation of principle of natural justice. In support of his contention, learned counsel has relied on judgment of Supreme Court in **State of U.P. and others versus Saroj Kumar Sinha,** AIR 2010 SC 3131 and the judgment and order dated 9.5.2013 passed by this Court in Service Single No.5189 of 1995 **Jalaluddin Ansari versus State of U.P. and others.**

It is submitted by the petitioner's counsel that this is the second time, deliberately, enquiry has not been conducted as per Rules of 1999 in spite of order passed by the tribunal vide its judgment and order dated 1.7.2015 only with a view to save the higher officers which is apparent from the letter written by the Chief Manager of SBI, Farrukhabad dated 25.3.2010 (Annexure No.10 to the writ petition) which confirms that the signatures of Drawing and Disbursing Authority on three cheques were found correct and no complaint has been received from the CMO office regarding forged payment of cheques from the captioned account. It is submitted that this device has been adopted by the disciplinary authority only to save the concerned Chief Medical Officer and Deputy C.M.O. and deliberately on the second time, enquiry has been conducted dehors the rules.

7. Learned Standing counsel for the State opposed the petition.

8. The petitioner is a Class-III employee of the State Government and his service conditions are governed by Rules of 1999. Rule 3 of Rules of 1999 provides minor and major penalty. Major penalty includes removal from service. Rule 7 of Rules of 1999 provides the procedure for imposing major penalty in which the enquiry shall be held. Rule 7 of Rules of 1999 is extracted below :

"7-Procedure for imposing major penalties- Before imposing any major penalty on a Government Servant, an inquiry shall be held in the following manner:

(i) The Disciplinary Authority may himself inquiry into the charges or appoint an Authority Subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The Facts constituting the misconduct on which it is proposed to take action shall be reduced in the from of definite charge or charges to be called charge -sheet. The charge-sheet shall be approved by the Disciplinary Authority :

Provided that where the Appointing Authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary, as the case may be, of the concerned department.

(iii) The charge farmed shall be so precise and clear as to give sufficient indication to the charged Government Servant of the facts and circumstances against him. The proposed documentary evidences and the name of the witnesses proposed to prove the same along with oral evidence, if any, shall be mentioned in the charge-sheet

(iv) The charged Government Servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file written statement on the

specified date, it will be presumed that he has none to fumish and inquiry officer shall proceed to complete the inquiry ex-parte

(v) The charge-sheet, along with the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government Servant personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served in aforesaid manner, the charge- sheet shall be served by publication in a daily newspaper having wide circulation :

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charge Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government Servant appears and admits charges, the Inquiry Officer shall submit his report to the Disciplinary Authority on the basis of such admission.

(vii) Where the charged Government Servant denies the charge the Inquiry Officer shall proceed to call the witnesses proposed in the charge-shoot and record their oral evidence in presence of the charge Government Servant who shall be given opportunity to cross- examine such witnesses. After recording the aforesaid evidences, the Inquiry officer shall call and record the oral evidence which the charged Government Servant desired in his written statement to be produced in his defence

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness

(viii) The inquiry officer may summon any witnesses to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental inquiries (Enforcement of Attendance of witnesses and production of documents) Act 1976

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Goverment Servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in charged Government Servant. the charge-sheet in absence of the charged government servant.

(xi) The disciplinary Authority, if it considers if necessary to do so, may by an order appoint a Government Servant or a legal practitioner to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government Servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the Presenting officer appointed by the Disciplinary Authority is a legal practitioner of the disciplinary Authority having regard to the circumstance of the case so permits :

Provided that the rule shall not apply in following cases:

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the Disciplinary Authority is satisfied, that for reason to be

recorded by it in writing, that it is not reasonably practicable to held an inquiry in the manner provided in these rules, or

(iii) Where the Governor satisfied that, in the interest of the security of the state, it is not expedient to hold an inquiry in the manner provided in these rules."

9. A perusal of Rule 7(i) of Rules of 1999 shows that the disciplinary authority either may himself inquire into the charges or appoint an authority subordinate to him as the inquiry officer to inquire into the charges. As said above, no enquiry officer as mandated under Rule 7(i) has been appointed in this case; instead a four Member Committee has been appointed for which there is no provision. Rule 7(iv) and (v) mandates providing list of witnesses and their statements to be served upon the charged government servant personally or through registered post.

Rule 7(vii) provides that where the charged government servant denies the charges, the enquiry officer shall proceed to call the witnesses proposed in the charge sheet and record their oral evidence in presence of the charged government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidences, the Inquiry officer shall call and record the oral evidence which the charged Government Servant desired in his written statement to be produced in his defence.

10. Admittedly, along with the charge sheet, the proposed documentary evidence and the name of the witnesses proposed to prove the charges along with the oral evidence has not been given in this case which is evident from perusal of the charge sheet. Admittedly, no oral enquiry has been conducted. As no witnesses were proposed in the charge sheet, consequently, no witnesses were called by the enquiry officer to prove the charges. The petitioner has also not been called for recording his oral evidence. In sum and substance, no oral hearing at all has been conducted.

Sub Rule (x) further provides that even if the charged government servant does not appear on the date fixed in the enquiry or any stage of the proceeding in spite of the service of the notice on him, Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged government servant.

11. In this case, admittedly, no date time and place was fixed for enquiry. The enquiry appears to have been done in flagrant violation of Rule 7 of Rules of 1999.

12. Even after submission of enquiry report, Rule 9 (4) of Rules of 1999 provides that in case the disciplinary authority having regard to its findings on all or any of the charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub rule (2) to the charged govt. servant and require him to submit his representation if he so desires within a reasonable specified time. This mandatory requirement under Rule 9(4) has also not been adhered to.

13. The Supreme Court in the case of Saroj Kumar Sinha (supra) has held that the Enquiry officer acts in a quasi judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the

evidence presented by the department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. Relevant portion from the judgment is reproduced as under :

"A bare perusal of the aforesaid sub-Rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the Government servant despite notice of the date fixed failed to appear that the enquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the enquiry officer to record the statement of witnesses mentioned in the charge sheet. Since the Government servant is absent, he would clearly lose the benefit of cross examination of the witnesses. But nonetheless in order to establish the charges the department is required to produce the necessary evidence before the enquiry officer. This is so as to avoid the charge that the enquiry officer has acted as a prosecutor as well as a judge. Enquiry officer acting in a quasi judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

14. In this case, admittedly, no oral evidence has been examined. Copy of the documents has neither been provided to the petitioner nor the same has been proved by leading oral evidence, hence could not have been taken into consideration to conclude that the charges have been proved against the petitioner.

15. In Jalaluddin Ansari's case (supra), this Court has also held that the oral enquiry is must and without leading oral evidence, guilt could not have been proved, relying on the documentary evidence. Relevant paragraphs of the judgment are extracted below :

"In State of Uttar Pradesh and others v. Saroj Kumar Sinha (supra) the Hon'ble Apex Court has observed that under Rule 7 (x), it is provided as under:-

"(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge- sheet in absence of the charged Government servant."

27. A bare perusal of the aforesaid sub-Rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the Government servant despite notice of the date fixed failed to appear that the enquiry officer can

proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the enquiry officer to record the statement of witnesses mentioned in the charge sheet. Since the Government servant is absent, he would clearly lose the benefit of cross examination of the witnesses. But nonetheless in order to establish the charges the department is required to produce the necessary evidence before the enquiry officer. This is so as to avoid the charge that the enquiry officer has acted as a prosecutor as well as a judge.

28. An enquiry officer acting as a quasi judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/ Government. His function is to examine the evidence presented by the department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

In Abdul Salam's case (supra) Division Bench of this court has also held as under:-

"15. The principles of natural justice demand that an application for summoning a witness by the delinquent officer should be considered by the enquiry officer. It was obligatory on the part of the enquiry officer to pass an order in the said application. He could not refuse to consider the same. It is not for the Railway Administration to contend that it is for them to consider as to whether any witness should be examined by it or not. It was for the enquiry officer to take a decision thereupon. A disciplinary proceeding must be fairly conducted. An enquiry officer is a quasi-judicial authority. He, therefore, must perform his functions fairly and reasonably which is even otherwise the requirement of the principles of natural justice."

In the case of Roop Singh Negi Versus Punjab National Bank, while emphasizing the importance of principles of natural justice in the matter of departmental enquiry, the Hon'ble Apex Court has observed as under:

"14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence.

15. We have noticed here-in-before that the only basic evidence whereupon reliance has been placed by the Enquiry Officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. Appellant being an employee of the bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had

indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the Enquiry Officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left."

In the case of Smt. Rajwati Sharma Versus U.P. State and others, a Division Bench of this Court, in which one of us (Justice Pradeep Kant) was a member, while emphasizing the need to hold a full fledge departmental enquiry even in case where the charged employee had admitted in his statement the loss of certain files which were in his possession, observed as under:

"12.The employee in the instant case, only made a statement of fact, in his reply, about the loss of 14 files. Since the files were misplaced,there could not have been any denial of the said fact by any person, including the charged employee. The question was, whether Shri Krishna was responsible for the loss of file or that he was guilty of any misconduct. It is also possible that in case, enquiry had been held, circumstances might have come to the fore, establishing, that even though the files were misplaced which were supposed to be in the custody of the deceased employee but even then there was some valid defence or mitigating circumstances for not awarding of major punishment or on finding that no fault could be attributed to him, he might have been exonerated.

In the case of Govind Lal Srivastava versus State of U.P. and others, a Division Bench of this Court, in which one of us (Justice Pradeep Kant) was a member, has observed as under:

"12. It is cardinal principle of law that in a domestic enquiry the charges levelled against the delinquent officer have to be proved by the department itself, that too from the material on record and if necessary, by adducing evidence. In doing so, it is obligatory on the enquiry officer to give opportunity to the delinquent officer to controvert, rebut such evidence or to adduce such evidence, which may falsify or belie the case of the department. In nutshell the delinquent officer has a right to demolish the case of the department or prove his innocence, but in no case the delinquent officer is required to disprove the charges before they are put to proof by the enquiry officer through agency of the department. The letter issued by the erstwhile enquiry officer only says that the petitioner if intends to have a personal hearing, may appear on 20.10.1992 before him. It is difficult to understand as to what the enquiry officer meant by saying personal hearing, whether it included the right to adduce evidence, right of cross-examination and whether it also indicated that any witness would be examined on that date or documentary evidence, which is on record or the record would be looked into and in what respect personal hearing would be done. It is always essential in any proceedings where right of defence or onus of establishing a charge is involved, clear orders and intimation about the date, time or place and the purpose for which the date has been fixed, should be given by the officer, who is holding the enquiry. The delinquent would be hardly knowing as to what reply and what additional facts, he should mention before the enquiry officer, when charges are not being said to be proved and even before the steps being taken for proving the charges. It is only when the charges are sought to be proved that the delinquent has a right to controvert and rebut the same.

13.The procedure of domestic enquiry need not be detailed by us, but it is established principle of law that an enquiry commences when a charge sheet is issued, a reply is required to be submitted by the delinquent officer, the delinquent is at liberty to ask for the documents in case the documents are mentioned in the charge sheet but the copies of the same have not been annexed with the charge sheet, or the documents, on which the charges are likely to be proved and in case copy of some documents can not be supplied then opportunity of inspection of such documents has to be provided. Opportunity of inspection of documents should be provided in a manner so that the charged officer has free access to the record and for which date, time and place has to be fixed. It is only after the aforesaid stages are over, the reply is submitted by the delinquent officer and on receipt of the reply, if the enquiry officer finds that the charges are denied or in other words, they are not accepted, obligation lies upon the enquiry officer to proceed with the enquiry. Even mere non-submission of the reply to the charge sheet or not asking for opportunity of producing witness or evidence would not in itself be sufficient to hold that opportunity was not availed by the delinquent, though given. The enquiry officer, on the date, time and place which is to be fixed by him and intimated to the delinquent officer, has to proceed with the enquiry by first asking the department to prove the charges by adducing such evidence, which may be necessary for the purpose and reply upon the documents, which may be relevant and thereafter has to afford an opportunity to the delinquent to cross-examine the witnesses so adduced or to produce any witness or adduce any evidence in rebuttal. The delinquent officer also has a right to show to the enquiry officer that the evidence, which is sought to be relied upon, is either in admissible or hearsay or could not be relied upon for any other valid reason. Of course, if enquiry officer, after receipt of the reply fixes date, time and place and informs the same to the delinquent for appearing and participating in the enquiry but the delinquent even then does not appear, the enquiry can be proceeded in his absence, which may though be an ex-parte enquiry but would not be vitiated on the ground that opportunity was not given or if opportunity was given the same was not availed of, by the delinquent. In a case like this where ex-parte enquiry is to be conducted, the enquiry officer is not still absolved of getting the charges proved from the evidence/material on record.

In the case of Ambika Prasad Srivastava versus State Public Services Tribunal, Lucknow and others, the Division Bench of this Court, in which one of us (Justice Pradeep Kant) was a member, while emphasizing the importance of principles of natural justice in the departmental enquiry held as under:

"In view of the admitted fact that no opportunity was afforded to the petitioner to participate in the enquiry and he was not informed about the date, time and place for holding the enquiry nor was supplied the documents which were demanded by him, and the enquiry report was based simply on the reply submitted by the petitioner, we find that the view taken by the Tribunal otherwise, is palpably erroneous. The entire proceedings are vitiated for violation of principles of natural justice and not affording opportunity to the petitioner."

It is not such a case where no oral evidence was required as the guilt could not have been proved by relying upon the documents alone. If the witnesses were

not required to be examined in support of the charges, even then it was incumbent upon the enquiry officer to have fixed the date, time and place after submission of the reply to the charge-sheet by the delinquent for holding oral enquiry in order to appreciate the evidences filed in support of the charges in presence of the delinquent employee and call upon the department to prove the alleged charges. There is no denial about the fact that such exercise was not done by the enquiry officer in the present case.

In view of the above, I am of the considered opinion that the departmental enquiry conducted against the petitioner, on the basis of which, the punishment of dismissal from service was awarded, was not held in accordance with law as propounded by the Hon'ble Apex Court as well as this Court as discussed above. There is clear violation of rules of natural justice.

In view of the discussions made above writ petition is allowed. The dismissal of the petitioner is set aside. The petitioner was of the age of 49 years as mentioned in the writ petition when this writ petition was filed in the year 1995. He must have attained the age of superannuation about 9 years back. I do not find it proper case where liberty can be given for initiating fresh enquiry. I accordingly direct that the petitioner shall be paid all the retiral dues and 50 per cent salary for the period he remained dismissed from the service till the date of superannuation within 90 days from the date of production of a certified copy of this order. While holding so I rely upon the law laid down by the Hon'ble Apex Court in the case of Life Insurance Corporation of India and another v. Ram Pal Singh Bisen, (2010) 4 SCC 491 and a Division Bench of this Court in Ambika Prasad Srivastava v. State Public Services Tribunal, Lucknow and others [2004 (22) LCD 770]. "

16. In another judgment in **Ambika Prasad Srivastava versus State Public Services Tribunal, Lucknow and others** [2004(22) LCD 770, a Division Bench of this Court has held that the the entire proceedings are vitiated due to violation of principles of natural justice and not affording opportunity to the petitioner. In that case, the petitioner was not informed about the date, time and place for holding enquiry nor was supplied the documents which were demanded by him, and the enquiry report was based simply on the reply submitted by the petitioner.

17. Admittedly, in the present case, no date time and place was fixed by the enquiry officer. The documents relied upon by the enquiry committee in support of the charges have also not been proved as no evidence was led to prove the same. The enquiry committee appointed by the disciplinary authority was also dehors the Rules of 1999. There is no provision under the Rules of 1999 to appoint an enquiry committee. The entire enquiry as well as the disciplinary proceedings are vitiated.

18. Before parting with the judgment, this court has taken notice of the fact that while passing the impugned order, the disciplinary authority has though held that the charges against the petitioner have been proved, however, instead of passing removal order has contemptuously relied on earlier enquiry report dated 22.1.2011 and the punishment order dated 13.4.2012 which was already set aside by the tribunal. The respondent No.2 has again passed the impugned order in a very casual manner and in flagrant violation of principles of

natural justice as also judgment of the tribunal dated 1.7.2015.

19. At this stage, Mr. Rajiv Srivastava, learned Addl. Chief Standing Counsel, assisted by Ms. Vasudha, Brief Holder has prayed that it is a matter of financial embezzlement and hence one more opportunity may be given to the State to conduct denovo enquiry in the matter from the stage the petitioner had submitted reply to the charge sheet.

20. The learned counsel for the petitioner has opposed the prayer made by learned State Counsel and submitted that the petitioner has retired from service. Presently, he is 64 years of age. The suspension order was passed in the year 2010. The tribunal has already given sufficient opportunity to the State to conduct denovo enquiry vide its judgment and order dated 1.7.2015 and remanded the matter. It is submitted that the respondent even after the opportunity having been granted by the tribunal has casually conducted the enquiry and has passed punishment order to the detriment of the petitioner. The petitioner because of callous attitude of respondent No.2 who has wilfully not conducted proper enquiry as per Rules of 1999 twice, on the second time has passed order of punishment , again in defiance of Rules of 1999. It is thus submitted that keeping in view the age of the petitioner and conduct of respondent No.2 on two occasions, the prayer for denovo enquiry is liable to be refused.

In support of his contention, learned counsel has relied on judgment in Ambika Prasad Srivastava and Jalaluddin Ansari (supra). It is submitted that denovo enquiry was refused in those cases and against the judgment of Jalauddin Ansari(supra), the State has filed special appeal No.160 of 2014 decided on 28.3.2014 State of U.P. versus Jalaluddin Ansari, only on limited ground that they may be permitted for denovo enquiry. However, the Division Bench vide its judgment and order dated 28.3.2014 has refused the State to do so because of the adequate reasons having been given by Hon'ble Single Judge regarding conduct of the enquiry officer and the fact that the petitioner of that case had retired from service. The order dated 28.3.2014 (supra) is extracted below :

"This special appeal challenges the order dated 09.05.2013, passed by Hon'ble Single Judge in Writ Petition No.5189 (S/S) of 1995 filed by the respondent-Jalaluddin Ansari against the order of dismissal from service.

Learned Standing Counsel appearing for the appellants challenges the order impugned in this special appeal on the sole ground that the Hon'ble Single Judge while allowing the writ petition and quashing the order of dismissal from service of the respondent-Jalluddin Ansari has not given any liberty to the appellants to proceed with the inquiry afresh from the stage it was found to be vitiated. Hence, the impugned order needs modification to the extent of permitting or keeping it open to the appellants to proceed with the inquiry.

On perusal of the impugned order passed by Hon'ble Single Judge, it would transpire that for not granting liberty the Hon'ble Single Judge has given adequate reasons to which we express our agreement.

Accordingly, no interference in this Special Appeal is warranted. It is hereby dismissed. This special appeal challenges the order dated 09.05.2013, passed by Hon'ble Single Judge in Writ Petition No.5189 (S/S) of 1995 filed by the

respondent-Jalaluddin Ansari against the order of dismissal from service."

21. It is next submitted that the petitioner in the present case was placed under suspension on 22.1.2010. He remained under suspension till passing of the judgment by the tribunal on 1.7.2015. He submits that in spite of direction of the tribunal to reinstate the petitioner in service, the petitioner was never reinstated and he was kept out of service and again on the second occasion, the suspension order has been passed. The petitioner is out of service since 2010. On these grounds, it is prayed that the request of the State for denovo enquiry may be refused.

Learned counsel further submits that the petitioner is entitled to at least 50% back wages in the light of the judgment of Supreme Court in Life Insurance Corporation of India and another vs. Ram Pal Singh Bisen (2010)4 SCC 491 and the judgment and order passed by this court in Ambika Prasad Srivastava vs. State Public Services Tribunal, Lucknow and others [2004(22) LCD 770] as also in the case of Jalaluddin Ansari (supra).

22. On due consideration to the submission advanced by the parties' counsel, the judgment(s) referred to herein above and considering the fact that the petitioner is presently 64 years of age and twice the orders have been passed and second time, while passing punishment order, again the mandatory provision under Rules of 1999 have not been followed by the enquiry officer/enquiry committee as well as the disciplinary authority, therefore, the request of the State to conduct denovo enquiry from the stage of giving reply to the charge sheet is refused.

23. The petition stands allowed. The impugned orders dated 7.11.2016, passed by Director (Administration), Medical & Health Service, U.P. Lucknow and order dated 15.11.2016, passed by Chief Medical Officer, Farrukhabad are quashed. The writ petitioner has already attained the age of superannuation. As observed above, it is not proper that it may be opened for the respondent to conduct denovo enquiry. It is directed that the petitioner shall be paid all the retiral due and 50% salary for the period he remained dismissed from service till the date of his superannuation within three months of production of a copy of this order.

(2023) 4 ILRA 1175
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.04.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Writ-A No. 8335 of 2022
And
Writ-A No. 7022 of 2022

Desh Raj Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Meenakshi Singh Parihar, Deepak Singh

Counsel for the Respondents:
C.S.C.

Civil Law - Service Law – Recruitment - Public Examination - *Constitution of India, Articles 14, 16* - Selection for public employment must be fair, impartial, and in

accordance with recruitment rules and the mandates of Articles 14 and 16 of the Constitution of India. Systematic irregularities, corruption, and malpractices vitiate the selection process, violating the equality clause enshrined in Articles 14 and 16. Any recruitment process for public posts must be beyond suspicion and malpractice. If the process undermines sanctity and fairness, it becomes vitiated and ought to be cancelled. (Para 46)

Civil Law - Service Law - Recruitment - *Irrigation Department Ziledars' Services Rules, 1963* - *Ziledari Qualifying Examination, 2018* - Petitioners challenged the cancellation of the examination results and the order to conduct a fresh examination for promotion to the post of Ziledar, arguing that it would cause grave injustice to those candidates who did not engage in malpractice and qualified on merit. *Held*: The three-member committee responsible for the examination was found guilty of large-scale corruption and allowing systematic irregularities. Disciplinary proceedings were initiated, and an FIR was lodged against them. Reports indicated no way to separate candidates involved in malpractice from the others, with serious deficiencies undermining the legitimacy of the examination. Therefore, the government's decision to cancel the entire examination was neither irrational nor arbitrary. (Para 50)

Writ Petition dismissed. (E-5)

List of Cases cited:

1. Sachin Kumar & ors. Vs Delhi Subordinate Services: (2021) 4 SCC 631

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

1. Heard Sri H.G.S. Parihar, learned Senior Advocate assisted by Ms Meenakshi Singh Parihar, learned counsel appearing for the petitioners and Sri Ramesh Kumar Singh, Additional Advocate General assisted by Sri P.K. Khare, learned Additional Chief Standing Counsel appearing for the State.

2. Present writ petitions have been filed in respect of the result of "Ziledari Qualifying Examination 2018" held as per Irrigation Department Ziledars' Services Rules, 1963 (hereinafter referred to as "Rules, 1963') declared on 26.11.2018 for promotion from amongst confirmed Seench Paryavekshak working in the Irrigation and Water Resources Department fulfilling the eligibility condition as prescribed under Rule 6 of the Rules, 1963 i.e. one should be confirmed Seench Paryavekshak and should have continuously worked as Seench Paryavekshak, having 7 years substantive services and should qualify the examination as prescribed under Rule 15 of the Rules, 1963.

3. Vide office orders dated 06.08.2018 and 24.10.2018 issued by the Engineer-in-chief, Head of Department, Irrigation and Water Resources, a three members Examination Committee was constituted to conduct "Ziledari Qualifying Examination, 2018" as per Rules, 1963. Result of the said examination was declared on 26.11.2018.

4. Several complaints were received regarding gross and systematic irregularities and large scale corruption with respect to said Qualifying Examination. Several reports in this regard were published in newspapers and on social media. The complaints, that were received, were primarily with respect to the malpractice and corruption in the examination such as demanding illegal gratification and acceptance of bribe from

various candidates in order to pass them in the qualifying examination.

5. Engineer-in-chief, Head of Department, Irrigation and Water Resources considering these complaints and reports wherein sanctity, fairness and transparency of the examination process became doubtful and a casualty, on 29.11.2018 constituted an enquiry committee.

6. There were several complaints against one of the members of the examination committee, namely Raj Kumar Gangwar, Deputy Revenue Officer, Kanpur Division.

7. Enquiry committee submitted its report on 24.01.2019 to the Engineer-in-Chief and the allegations regarding gross irregularities, malpractices and corruption in the "Ziledari Qualifying Examination, 2018" were found to be true. Sri Raj Kumar Gangwar member of the examination committee was placed under suspension.

8. It appears that another two members committee headed by Sri Har Prashad, Chief Engineer submitted its report to the Engineer-in-chief on 15.02.2019 in respect of gross irregularities, malpractices and corruption in conducting the "Ziledari Qualifying Examination, 2018".

9. Considering these two enquiry reports, which would make very sanctity and fairness of the examination suspect, result dated 26.11.2018 of the "Ziledari Qualifying Examination, 2018" was cancelled by the Engineer-in-chief, Head of Department, Irrigation and Water Resources, Government of U.P. vide office order dated 26.07.2019.

10. The Engineer-in-chief vide letter dated 02.09.2019 submitted the enquiry report dated 15.02.2019 to the State Government recommending disciplinary proceedings against the Chairman and Members of the Examination Committee who were responsible in conducting the "Ziledari Qualifying Examination, 2018".

11. The State Government vide order dated 19.02.2020 decided to suspend and initiate disciplinary proceedings under Rule 7 of the U.P. Government Servant (Disciplinary and Appeal) Rules, 1999 against Sri Rameshwar Kumar Mishra, Chairman, Ramraj and Raj Kumar Gangwar, members of the examination committee regarding corruption, gross irregularities which had adversely affected the sanctity, validity and fairness of the examination.

12. Several Seench Paryavekshaks filed writ petition being Writ A No.1965 of 2021, Dharmendra Kumar & Ors vs State of U.P. & Anr before this Court at Allahabad with following prayers:

"(a) a writ, order or direction in the nature of mandamus commanding and directing the respondents to hold the qualifying examination for promotion on the post of Ziledar forthwith at the earliest as provided in Rule 2 of the Appendix B of the Service Rules, 1963.

(b) a writ, order or direction in the nature of mandamus to any other relief which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case;

(c) Award costs of the writ petition to the petitioner throughout."

13. The petitioners in the said writ petition had made reference to the order

dated 26.07.2019 whereby the result of the "Ziledari Qualifying Examination, 2018" was cancelled and, therefore, they prayed for direction for conducting a fresh examination.

14. Coordinate Bench of this Court vide order dated 25.03.2021 disposed of the said writ petition directing the respondents to conduct the qualifying examination for promotion on the post of Ziledar within three months period, provided that there would be no other impediment, and in case petitioners would be found fit for promotion, necessary benefits may be provided to them.

15. This said writ petition came to be filed after the result of the Qualifying Examination 2018 dated 26.11.2018 was cancelled vide order dated 26.07.2019.

16. It is important to take note of the fact that the petitioners in Writ A No.1965 of 2021 did not challenge the order dated 26.07.2019 cancelling the result of the "Ziledari Qualifying Examination, 2018" and they confined the prayer for holding the examination for promotion.

17. Another writ petition being Writ Petition No. 20603(SS) of 2020 was filed by 31 candidates before this Court at Lucknow Bench impugning the order dated 26.07.2019 cancelling the result of the "Ziledari Qualifying Examination, 2018". Despite the order dated 25.03.2021, which was brought to the notice of this Court during the course of hearing of the petition, Coordinate Bench of this Court having taken note of the order dated 25.03.2021 allowed the said writ petition vide judgment and order dated 05.08.2021 on the ground that the order dated 26.07.2019 cancelling the qualifying examination did not record a finding that it was not possible to distinguish the cases of tainted from untainted and there was possibility that all them would have got the benefit of wrongs. It was held that the order dated 26.07.2019 was passed in ulterior disregard to principles of natural justice and without consideration that the most of the candidates did not get benefited of malpractice adopted by the member of the selection committee. Coordinate Bench of this court allowed the writ petition and issued a direction to the respondents to reconsider the claim of the petitioners and other selected candidates for grant of promotion on the post of Ziledar after holding a fresh full-fledged enquiry. Operative part of the order would read as under:-

"16. The writ petition succeeds and is allowed with a direction to the respondents to reconsider the claim of the petitioner and other selected candidates for the grant of promotion on the post of Ziledar by holding a fresh full-fledged enquiry to examination and merit of the each and other candidates applied for selection and record specific finding in regard to influence/ mal-practice adopted by one of the members of the selection committee and in case the candidates are found involved in such practice an appropriate and speaking order be passed after affording opportunity of hearing to the petitioners and other candidates of the selection proceeding. The said exercise shall be completed within four months from the date of production of a certified copy of this order.

17. Needless to say that in case the petitioners are found to be genuine candidates after passing the order as directed by this Court, they shall be granted promotion on the post of Ziledar immediate

thereafter. The selection proceeding directed by this Court shall continue after the exercise as directed by way of this order."

18. In compliance of the said order 05.08.2021 passed by this Court, an enquiry committee was constituted by the Engineer-in-chief vide order dated 12.01.2022 to segregate tainted and untainted candidates, who had participated in the qualifying Examination, 2018. Sri Prabhat Kumar Dubey Superintending Engineer was appointed as Chairman of the said committee.

19. A modification application was moved by the Engineer-in-chief and Head of Department, Irrigation and Water Resources Department, Government of U.P. in Writ A No.1965 of 2021 wherein a direction was issued for holding examination within a period of 3 months bringing it to the notice of the Court the judgment and order dated 05.08.2021 passed in Writ Petition No.20263(SS) of 2020.

20. Result of the aforesaid modification application is not known, however, in the counter affidavit, it is said that the said application is still pending.

21. Enquiry committee constituted in pursuance of the judgment and order dated 05.08.2021 passed in Writ Petition No.20263(SS) of 2020 gave its reports dated 29.06.2022 and 08.07.2022 to the Engineer-in-Chief, Head of Department, Irrigation and Water Resources Department, Government of U.P.

Relevant findings in the enquiry report dated 29.06.2022 are as under:-

- 02 अभ्यर्थियों की लिखित परीक्षा की अंकतालिका एवं उत्तर पुस्तिका के प्रथम पृष्ठ में दर्ज अंकों में भिन्नता है,

- 77 अभ्यर्थियों की उत्तर पुस्तिकाओं के प्रथम पृष्ठ पर अंकित कुल प्राप्तांक एवं हल किये गये प्रश्नों के प्राप्तांको के योग में भिन्नता थी,

- 20 अभ्यर्थियों की उत्तर पुस्तिकाओं में पाया गया कि प्रश्नों हेतु निर्धारित पूर्णांक से अधिक नम्बर दिये गये थे,

- 12 अभ्यर्थियों की उत्तर पुस्तिकाओं में एक प्रश्न को 02 बार हल किया गया और उन्हें मूल्यांकित किया गया,

- 181 अभ्यर्थियों की उत्तर पुस्तिकाओं में कई उत्तरित प्रश्नों का मूल्यांकन नहीं किया गया है।

- 220 अभ्यर्थियों की उत्तर पुस्तिकाओं के प्रश्नों में प्राप्तांकों में धनात्मक अथवा ऋणात्मक परिवर्तन पाया गया, जो एक बहुतायत संख्या है।"

22. The committee was of the opinion that considering the mass and systematic irregularities in the examination process no segregation of tainted and untainted candidates would be possible. Whole sanctity and validity of the examination had been violated, therefore, the result was vitiated.

The conclusion arrived at by the enquiry committee in its report dated 29.06.2022 reads as under:-

" निष्कर्ष : प्रमुख अभियन्ता कार्यालय द्वारा उत्तीर्ण घोषित अभ्यार्थियों की सूची एवं जिलेदारी अर्ह परीक्षा आयोजन समिति-2018 द्वारा तैयार किये गये। परीक्षाफल (लिखित परीक्षा एवं साक्षात्कार की अंकतालिका) का मिलान, साक्षात्कार की सदस्यवार अंकतालिका एवं परीक्षाफल मिलान, लिखित परीक्षा की अंकतालिका एवं उत्तर पुस्तिकाओं के प्रथम पृष्ठ पर अंकित किये गये अंको का मिलान, उत्तर पुस्तिकाओं के प्रथम पृष्ठ पर अंकित कुल अंक एवं हल प्रश्नों के प्राप्तांकों के जोड़ (टेबुलेशन) का मिलान, पूर्णांक से अधिक प्राप्तांक वाले हल प्रश्न, दो बार मूल्यांकित प्रश्न में पायी गयी त्रुटियों के आधार पर त्रुटियुक्त एवं त्रुटिरहित उत्तर पुस्तिकाओं वाले अभ्यर्थियों को क्रमशः TABLE-A एवं TABLE-B में दर्शाया गया है। अनेक उत्तर पुस्तिकाओं में मूल्यांकन हेतु अवशेष हत प्रश्न (टबल संख्या-5) पाये गये है। इस स्थिति में समिति किसी भी अन्तिम निष्कर्ष पर पहुँचने में असमर्थ है।"

23. In the meantime, a contempt petition being Contempt Application No.804 of 2022 alleging non compliance of the order dated 05.08.2021 passed in Writ Petition No.20263(SS) of 2020 was filed. A notice was issued in the said contempt petition and under the pain of the contempt, Engineer-in-chief in the Department of Irrigation and Water Resources, Sri Ashok Kumar Singh vide Order Nos.1500 and 1506 dated 21.07.2022 cancelled the order dated 26.07.2019, which was already set aside by this Court vide order dated 05.08.2021, and vide order dated 21.07.2022 declared the result of "Ziledari Qualifying Examination, 2018".

24. A compliance affidavit came to be filed by then Engineer-in-chief on 25.07.2022, which led to the dismissal of the contempt application vide order dated 25.07.2022.

25. It is relevant to take note of the fact that the State Government vide order dated 16.02.2022 directed the Engineer-in-chief to submit proposal for further proceedings in reference to the judgment and order dated 05.08.2021 passed in Writ A No.20263(SS) of 2020.

26. The Engineer-in-Chief without seeking any prior approval from the State Government unauthorizedly and ignoring the direction issued by the State Government vide order dated 16.02.2022 under the pain of the contempt, issued the order dated 21.07.2022 for declaring the result of untainted candidates. Engineer-in-chief also did not consider the entire facts and finding recorded in the enquiry report dated 29.06.2022 and 08.07.2022 regarding gross and systematic irregularities, and malpractices in entire process of examination including evaluation of the answer sheets, thereby seriously affecting sanctity, validity and fairness of the examination.

27. Sri Ashok Kumar Singh retired from service within 9 days from the date of issuing order dated 21.07.2022. Sri Mushtaq Ahmad had taken over the charge of the post of Engineer-in-chief on 01.08.2022.

28. The petitioner filed second contempt application being Contempt No.2017 of 2022 (Saurabh Tripathi & Ors vs Mushtaq Ahmad) arraying Sri Mushtaq Ahmad as opposite party alleging non compliance of the judgment and order dated 05.08.2021. On 05.11.2022, the contempt court passed the following order:-

"Heard Shri H.J.S. Parihar, Advocate assisted by Shri Shashank Singh, learned counsel for the applicant and Shri Sunil Bajpayee, learned Additional Chief Standing Counsel for the opposite party.

Shri Sunil Bajpayee, learned Additional Chief Standing Counsel has placed written instruction, dated 14.11.2022 and requested for four weeks time to file affidavit of compliance.

The aforesaid prayer is hereby rejected.

List this case on 28.11.2022.

In the meantime, opposite party shall file affidavit of compliance, failing which, opposite party shall appear in person before this Court on the date fixed for framing of charge."

29. Before passing the said order in the contempt petition, the Government vide orders dated 24.08.2022 and 09.09.2022 asked for explanation that under what circumstances result of qualifying examination was declared illegally and the

Government was not consulted before issuing the order dated 21.07.2022 declaring the result of the tainted and ineligible candidates.

30. Considering the enquiry reports dated 29.06.2022 and 08.07.2022, the judgment and orders dated 05.08.2021 passed in Writ Petition No.20263(SS) of 2020 and 25.03.2021 passed in Writ A No.1965 of 2021, impugned decision has been taken vide order dated 25.11.2022 cancelling the result of "Ziledari Qualifying Examination, 2018" and also holding fresh qualifying examination for the purposes of promotion to the post of Ziledars. Said examination was to be held on 20-25.12.2022, and the examination already held on 21.10.2022 in compliance of the order dated 25.03.2022 passed in Writ A No.1965 of 2021 and declare the result of both the examination on 16.01.2023. However, because of the interim order, said direction has not been carried out.

31. Record of the "Ziledari Qualifying Examination, 2018" has been submitted before this Court including the result and the enquiry reports.

32. From perusal of the record it would be evident that gross and systematic llegality and irregularities has been committed in the "Ziledari Qualifying Examination, 2018", which had impacted the very sanctity and fairness of the examination and have resulted the vitiation of the result of "Ziledari Qualifying Examination, 2018". A brief summary of the illegalities and regularities as mentioned in the impugned order, is reproduced as under:-

"उपरोक्त तथ्यों के विवेधन, परीक्षण एवं परिशीलन से विदित है कि जिलेदारी अर्हकारी परीक्षा--2018 के सम्पादन से लेकर अब तक जो भी कार्यवाहियां की गयी है, उससे स्पष्ट है कि मामले में व्यापक स्तर पर अनेक गम्भीर प्रकृति की अनियमिततायें की गयी है, जिनका विवरण निम्नवत है : -

(1) परीक्षा समिति द्वारा सम्मिलित सभी 490 अभ्यर्थियों का साक्षात्कार लिया गया, जबकि इनमें से तत्समयं मात्र 318 अभ्यर्थी ही लिखित परीक्षा में अर्हकारी न्यूनतम निर्धारित 50 प्रतिशत अंक ही प्राप्त कर सके थे अर्थात परीक्षा समिति द्वारा 172 अनुतीर्ण अभ्यर्थियों का नियमों के विपरीत साक्षात्कार लिया गया।

(२) प्रारम्भिक जॉच (मुख्। अभियन्ता (कार्मिक-7/8) की अध्यक्षता में गठित 02 सदस्यीय समिति) में मात्र 76 शिकायतकर्ताओं की उत्तर पुस्तिकाओं की जॉच में ही अभ्यर्थियों के प्राप्त योग में अन्तर, उत्तर के मूल्यांकन न किया जाना तथा एक ही प्रश्न के अलग-अलग उत्तर अंकित होने पर भी समान अंक दिया जाना जैसी गम्भीर अनियमिततायें कारित किया जाना तथा परीक्षा परिणाम प्रभावित होना जॉच आख्या में पाया गया था, जिसके फलस्वरूप प्रमुख अभियन्ता एवं विभागाध्यक्ष की अध्यक्षता में गठित समिति द्वारा सर्वसम्मति से घाषित परीक्षा परिणाम को आदेश दिनांक 26.07.2019 द्वारा निरस्त किया गया।

(3) परीक्षा में भ्रष्टाचार एवं विश्व लिये जाने विषयका सोशल मीडिया में वीडियो का वायरल होना, समाचार पत्र में खबर प्रकाशित होने से परीक्षा की शुचिता एवं पारदर्शिता प्रतिकूल रूप से प्रभावित हुई।

(4) जिलेदारी अर्हकारी परीक्षा-2018 की परीक्षा एवं मूल्यांकन में पायी गयी गम्भीर अनियमितताओं के लिए विनिर्दिष्ट परीक्षा समिति के अध्यक्ष संहित दोनों सदस्यों के विरुद्ध शासन के उच्चतम स्तर से एफ०आई०आर० दर्ज कराये जाने, उन्हें निलंबित कर अनुशासनिक कार्यवाही के आदेश/निर्देश जारी किये गये हैं। समिति के अध्यक्ष श्री रामेश्वर कुमार मिश्रा एवं सदस्य श्री रामराज के विरुद्ध, संस्थित अनुशासनिक कार्यवाहियों में शासन द्वारा भिन्न मत के आधार पर आरोप प्रमाणित पाते हुए उनके अभ्यावेदन मांगे गये हैं, जबकि एक अन्य सदस्य श्री राजकुमार गंगवार के विरुद्ध मुख्यालय स्तर पर अनुशासनिक कार्यवाही प्रचलित है।

(5) मा० उच्च न्यायालय, इलाहाबाद द्वारा रिट याचिका संख्या-1965 / 2021धर्मेन्द्र कुमार व अन्य बनाम उ०प्र० राज्य व अन्य में पारित आदेश दिनांक 25.03.2021 में जिलेदारी अर्हकारी परीक्षा को पुनः कराये जाने के आदेश दिये गये।

(6) मा० उच्च न्यायालय खण्डपीठ, लखनऊ द्वारा रिट याचिका संख्या-20263(एस.एस.)/2020 हेतराम व अन्य में पारित आदेश दिनांक 05.08.2021 के अनुपालन / अनुक्रम में गाठित SEGREGATE कमेटी की जॉच रिपोर्ट में पाया गया कि :

- 02 अभ्यर्थियों की लिखित परीक्षा की अंकतालिका एवं उत्तर पुस्तिका के प्रथम पृष्ठ में दर्ज अंको में भिन्नता है,

- 77 अभ्यर्थियों की उत्तर पुस्तिकाओं के प्रथम पृष्ठ पर अंकित कुल प्राप्तांक एवं हल किये गये प्रश्नों के प्राप्तांको केटो में भिन्नता थी,

- 20 अभ्यर्थियों की उत्तर पुस्तिकाओं में पाया गया कि प्रश्नों हेतु निर्धारित पूर्णांक से अधिक नम्बर दिये गये थे,

- 12 अभ्यर्थियों की उत्तर पुस्तिकाओं में एक प्रश्न को 02 बार हल किया गया और उन्हें मूल्यांकित किया गया,

- 181 अभर्यर्थियों की उत्तर पुस्तिकाओं में कई उत्तरित प्रश्नों का मूल्यांकन नहीं किया गया है।

- 220 अभ्यर्थियों की उत्तर पुस्तिकाओं के प्रश्नों में प्राप्तांको में धनात्मक अथवा ऋणात्मक परिवर्तन पाया गया, जो एक बहुतायत संख्या है।

(7) परीक्षण में यह तथ्य भी उद्घाटित हुआ कि परीक्षा समिति द्वारा उत्तर पुस्तिकाओं के मूल्यांकन से पूर्व कोई मॉडल अन्सर (उत्तर कुंजी) नहीं बनाया गया था, जिसके फलस्वरूप उत्तरित फल के मूल्यांकन हेतु कोई एकरूपता नहीं रही एवं गलत उत्तरों पर भी नम्बर दिये गये, एक ही प्रश्न के भिन्न-भिन्न उत्तर होने के उपरान्त भी उन्हें पूरे अंक दिये गये।"

33. In the contempt application, copy of the impugned order dated 25.11.2022 was filed with an affidavit. The contempt Court vide order dated 28.11.2022 directed the Chief Secretary of the State to file his affidavit posting the matter for 16.12.2022.

34. In compliance of the said order, personal affidavit of Chief Secretary was filed in the contempt proceedings. Contempt Court was not satisfied with the personal affidavit of the Chief Secretary, and posted the matter on 23.12.2022 for framing of the charge. On 23.12.2022 the contempt Court framed following charges:-

"8. In view above facts and circumstances, following charge is framed against the respondent/contemnor under Section 12 of the Contempt of Courts Act, 1971.

"Why the respondent/contemnor, Mr. Mushtaq Ahmad, Engineer-in-Chief/Head of Department of Irrigation and Water Resources, U.P., Lucknow be not punished for willfully flouting the order of the writ Court dated 05.08.2021 passed in Writ Petition (S/S) No. 20263 of 2020, by not giving promotion to the applicants on the post of Ziledar, even after filing of the affidavit of compliance dated 25.07.2022 in earlier Contempt Application No. 804 of 2022; as also passing of the order dated 25.11.2022, by which, the order dated 21.07.2022 passed by the then Engineer-in-Chief of the Department (declaring the result of 335 selected candidates in pursuance of the order of the writ Court dated 05.08.2021), has been recalled despite the prayer having been made by the learned Additional Chief Standing Counsel to comply the order of the writ Court on the basis of respondent/contemnor's written instructions dated 14.11.2022."

9. List this case on 23.01.2023 for order on sentence.

10. On the next date, respondent/contemnor shall appear before this Court. In the meantime, respondent/contemnor may file response on the point of sentence."

35. Against the orders dated 21.12.2023 and 23.12.2023, a contempt appeal being Contempt Appeal No.1 of 2023 has been filed.

36. Vide order dated 23.01.2023 in the Contempt Appeal No.1 of 2023 taking note of the fact that writ petition arising out of the order dated 25.11.2022 is pending and whether the competent authority has jurisdiction to nullify the previous order passed on 21.07.2022 or not, is subject matter of consideration in the writ petition, and the matter has to be decided on its merit, the Division Bench permitted the contempt proceedings to go on. However, final order so passed should not be acted upon without seeking leave of the court.

37. Relevant part of the order dated 23.01.2023 would read as under:

"Sri Ramesh Kumar Singh, learned Additional Advocate General assisted by Shri Pankaj Khare and Shri Prashant Singh Atal has submitted that the learned Single Judge in the present case is proceeding with the contempt proceedings notwithstanding the fact that the act complained of, is simultaneously sub-judice before this Court in Writ Petition No. 8335 of 2022. It is thus submitted that in a situation where the pending writ petition, if it entails the consequence for dismissal, the initiation of contempt proceedings arising out of the same order would be a nullity and outside the domain of the jurisdiction of the contempt court and he has also placed reliance upon the judgment reported in (2006) 5 SCC 399.

It is undisputed that the writ petition arising out of the order dated 25.11.2022 is pending. As to whether the competent authority has a jurisdiction to nullify the previous order passed on 21.07.2022 or not is a subject matter of consideration in the writ proceedings and the matter has to be decided on its own merit.

In the circumstances of the case, we hereby permit the contempt proceedings to go on, however, the final order so passed may not be acted upon without seeking leave of the Court.

We also expect the pending writ petition to be brought to its logical conclusion in the meantime.

The State Government is expected to co-operate in the adjudication of writ proceedings and the alleged contemnor in the contempt proceedings without showing any indolence.

List this appeal after six weeks alongwith the status of contempt proceedings."

38. Considering the enquiry reports in respect of the gross and systematic irregularities, corruption and malpractices in the examination, which had impacted the very sanctity, validity and fairness of the whole examination process which had led the vitiation of the result, this Court vide order dated 06.04.2023 passed the following order:-

"1. Heard Mr. H.G.S. Parihar, learned Senior Advocate, assisted by Ms Meenakshi Singh, Advocate for the petitioners as well as Mr. Ramesh Kumar Singh, learned Senior Advocate/Additional Advocate General, assisted by Mr. P.K. Khare, learned Chief Standing Counsel, for respondents - State Authorities.

2. Mr. Anil Grag, Principal Secretary, Irrigation Department, is present to assist the Court. He submits that if this Court permits for holding an integrated examination for all the vacancies, which are existing till today, the Department will conduct the examination and publish its result within a period of next 45 days. He further submits that to ensure fairness and integrity of the examination, a five members committee, consisting engineer-in-chief, (project), engineer-in-chief (design & planning), chief engineer (level-i) and two superintending engineers would be constituted, which would supervise the entire process of the examination. It is further submitted that two special secretaries in the Department of Irrigation would be appointed as special observers so that the examination is conducted in a free, fair and impartial manner, and there would be no further litigation in respect of any irregularity in examination. It is further stated that the State is not siding with anyone, but it is only concerned to ensure the fairness and integrity of the examination.

3. It is stated that one more petition (Writ - A No. 7022 of 2022), on the same subject matter, is pending.

4. On the joint request, let this matter be put up/listed tomorrow i.e. 07.04.2023 at 2.15 p.m. for further hearing along with Writ - A No. 7022 of 2022."

39. Sri H.G.S. Parihar, learned Senior Advocate assisted by Ms. Meenakshi Singh Parihar, learned counsel appearing for the petitioners has submitted that impugned order dated 25.11.2022 whereby earlier select list dated 21.07.2022 has been cancelled, is illegal, arbitrary and is in violation of the judgment and order dated 05.08.2021 passed by this Court in Writ Petition No.20263(SS) of 2020.

40. It has been further submitted that this Court has held in the judgment and order dated 05.08.2021 passed in Writ Petition No.20263(SS) of 2020 that exercise of separating tainted and untainted candidate was completed and, thereafter the order dated 21.07.2022 was passed declaring the result of untainted candidates and on the basis of affidavit filed by the then Engineer-in-chief, contempt proceedings were dropped. Impugned order is not only against the judgment and order dated 05.08.2021 but it is also against the order dated 25.07.2022 whereby the contempt proceedings were dropped.

41. It has been further submitted that fresh examination would result in grave injustice to the candidates, who did not indulge in any malpractice and could qualify the examination on merit. Several candidates would have crossed the age bar and several candidates have got retired since the result of the examination was declared in the year 2019. He, therefore, has submitted that the impugned order is liable to the set aside and the petitions be allowed.

42. On the other hand, Sri Ramesh Kumar Singh, learned Senior Advocate and Additional Advocate General appearing for the State-respondents has submitted that Sri Ashok Kumar Singh, then Engineer-in-chief had no authority and power to pass the order dated 21.07.2022, 10 days before the date of his retirement to avoid contempt proceedings. Since, the order dated 21.07.2022, was illegal and without jurisdiction and against the enquiry reports, which categorically mentioned the gross and systematic irregularities, large scale corruption and malpractice, such order is not liable to be acted upon and, therefore, the Government has taken a conscious decision to conduct fresh examination giving opportunity to all the eligible candidates to participate in the examination, in order to ensure that and the selection is made totally on the basis of merit without any blemish in conducting the exam.

43. It has been, therefore, submitted that no promotion has been made in pursuance of the "Ziledari Qualifying Examination, 2018", therefore, no-one is prejudiced. It has been further submitted that it is always open to the appointing authority to cancel the examination, even if the result is declared to make appointment if it is found that the entire examination is vitiated. In the present case, two successive enquiry reports have enlisted gross irregularities, malpractices and corruption in conducting the examination whereby impacting very sanctity, legality and fairness of the examination which had vitiatesd the result, such a result should not be acted upon. Fairness and transparency of the selection process is hallmark of the

governance and is requirement under Articles 14 and 16 of the Constitution of India. If there is material which would demonstrate that fairness of the examination was violated and the result was vitiated, it is not in the interest of anyone to give effect to the said result.

44. It has been further submitted that there are two divergent judgments of this Court. This Court at Allahabad vide judgment and order dated 25.03.2021 directed for holding fresh examination whereas the order dated 05.08.2021 passed by this Court at Lucknow in Writ Petition No.20263(SS) of 2020 directed for separating the tainted and untainted candidates. The successive enquiry reports would suggest that it would not be possible to separate tainted and untainted candidates looking at the gross and systematic irregularities and corruption in the examination. He, therefore, has submitted that order dated 21.07.2022 passed by the then Engineer-in-chief, who retired 9 days thereafter, to avoid contempt proceedings, being without jurisdiction cannot be directed to be acted upon. This Court is required to decide the case afresh on merit. It has been submittd that the Government has taken a correct decision in accordance with constitutional mandate under Articles 14 and 16 of the Constitution of India and, therefore, the same should be allowed to be acted upon.

45. I have considered the submissions of learned Senior Advocate appearing for the petitioners and learned A.A.G. for the State-respondents.

46. Selection for public employment must be fair, impartial and in accordance with the provisions of recruitment rules and the mandate of Articles 14 and 16 of the Constitution of India. If there are systematic irregularities, corruption and malpractices, selection process would get vitiated as it would be in violation of the equality clause as enshrined in Articles 14 and 16 of the Constitution of India.

47. If the recruitment process has resulted violation of sanctity and fairness of the process itself, such a recruitment process gets vitiated and ought to be cancelled. Irregularities enlisted hereinabove have been found in successive enquiry reports. The three members committee, which was responsible for conducting the examination, have been found to have indulged in large scale corruption and allowed systematic irregularities and malpractices in the examination. Not only disciplinary proceedings have been directed to be initiated against the members of the examination committee but the FIR has also been directed to be lodged against them.

48. In my view, result of such an examination cannot be given effect to as it would amount to putting premium on gross and systematic irregularities, malpractices and corruption committed in conducting the examination. This Court should ensure that the recruitment process is fair, impartial and as per the mandate of statutory prescription and equality clause as enshrined under Articles 14 and 16 of the Constitution of India. Any recruitment process to public post should be beyond any suspicion and any malpractice. Corruption in public employment would be against the constitutional goal of Equality of status and of opportunity, a goad enshrined in the preamble of the Constitution. Recruitment has to be fair, transparent and accountable, if there are

irregularities and malpractices and illegality in the recruitment process, it would undermine very legitimacy of the recruitment process.

49. A fair and reasonable process of selection to public posts subject to the norm of equality of opportunity under Article 16(1) is a constitutional requirement. A fair and reasonable process is a fundamental requirement of Article 14 as well. Where the recruitment to public employment stands vitiated as a consequence of systemic fraud or irregularities, the entire process becomes illegitimate. Large scale irregularities including those which have the effect of denying equal access to similarly circumstanced candidates would erode credibility of the selection process.

50. In the present case, as the reports of the committees would suggest that there was no possibility to segregate the candidates, who had indulged in malpractices and deficiencies of serious nature found in the enquiries which had impacted the very legitimacy of the entire examination process, therefore, decision of the Government to cancel the entire examination cannot be held to be irrational or arbitrary.

51. The Supreme Court in the Case of **Sachin Kumar & Ors vs Delhi Subordinate Service : (2021) 4 SCC 631** in para 35 and 55 had held that a fair and reasonable process of selection to posts subject to the norm of equality of opportunity under Article 16(1) of the Constitution of India is a constitutional requirement.

Para 35 and 55 of the aforesaid judgment would read as under:-

"35. In deciding this batch of SLPs, we need not reinvent the wheel. Over the last five decades, several decisions of this Court have dealt with the fundamental issue of when the process of an examination can stand vitiated. Essentially, the answer to the issue turns upon whether the irregularities in the process have taken place at a systemic level so as to vitiate the sanctity of the process. There are cases which border upon or cross over into the domain of fraud as a result of which the credibility and legitimacy of the process is denuded. This constitutes one end of the spectrum where the authority conducting the examination or convening the selection process comes to the conclusion that as a result of supervening event or circumstances, the process has lost its legitimacy, leaving no option but to cancel it in its entirety. Where a decision along those lines is taken, it does not turn upon a fact-finding exercise into individual acts involving the use of malpractices or unfair means. Where a recourse to unfair means has taken place on a systemic scale, it may be difficult to segregate the tainted from the untainted participants in the process. Large-scale irregularities including those which have the effect of denying equal access to similarly circumstanced candidates are suggestive of a malaise which has eroded the credibility of the process. At the other end of the spectrum are cases where some of the participants in the process who appear at the examination or selection test are guilty of irregularities. In such a case, it may well be possible to segregate persons who are guilty of wrongdoing from others who have adhered to the rules and to exclude the former from the process. In such a case, those who are innocent of wrongdoing should not pay a price for those who are actually found to be involved in irregularities. By segregating the

wrongdoers, the selection of the untainted candidates can be allowed to pass muster by taking the selection process to its logical conclusion. This is not a mere matter of administrative procedure but as a principle of service jurisprudence it finds embodiment in the constitutional duty by which public bodies have to act fairly and reasonably. A fair and reasonable process of selection to posts subject to the norm of equality of opportunity under Article 16(1) is a constitutional requirement. A fair and reasonable process is a fundamental requirement of Article 14 as well. Where the recruitment to public employment stands vitiated as a consequence of systemic fraud or irregularities, the entire process becomes illegitimate. On the other hand, where it is possible to segregate persons who have indulged in malpractices and to penalise them for their wrongdoing, it would be unfair to impose the burden of their wrongdoing on those who are free from taint. To treat the innocent and the wrongdoers equally by subjecting the former to the consequence of the cancellation of the entire process would be contrary to Article 14 because unequals would then be treated equally. The requirement that a public body must act in fair and reasonable terms animates the entire process of selection. The decisions of the recruiting body are hence subject to judicial control subject to the settled principle that the recruiting authority must have a measure of discretion to take decisions in accordance with law which are best suited to preserve the sanctity of the process. Now it is in the backdrop of these principles, that it becomes appropriate to advert to the precedents of this Court which hold the field.

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55. L. Nageswara Rao, J. held that the view of the Division Bench of the High Court was unsustainable and observed : (A Kalaimani case [State of T.N. v. A Kalaimani, (2021) 16 SCC 217 : 2019 SCC OnLine SC 1002] , SCC para 14)

"14. In the instant case, the Board initially conducted an inquiry on its own regarding the allegations pertaining to manipulation of the OMR answer sheets. The Board found that a few people benefited due to the tampering of the OMR answer sheets. On a deeper scrutiny sufficient material was found against 196 persons who were beneficiaries of the fraud in the alteration of marks. The Board was convinced that there were chances of more people being involved in the manipulation of marks for which reason a decision was taken to cancel the entire examination. A bona fide decision taken by the Board to instill confidence in the public regarding the integrity of the selection process could not have been interfered with by the High Court. Sufficiency of the material on the basis of which a decision is taken by an authority is not within the purview of the High Court in exercising its power of judicial review. More material is being unearthed in the investigation and several people have been arrested. The investigation is in progress."

The Court noted that candidates who had a chance of being selected and appointed as lecturers in Government Polytechnic Colleges on the basis of the results of the written examination may be inconvenienced "but a serious doubt entertained by the Board about the magnitude of the manipulation of the examination has to be given due weightage". The judgment of the High Court was accordingly set aside."

52. The Supreme Court has summarized the law in respect of cancelling the examination where there has

been systematic nature of irregularities and deficiencies, which would cast serious doubts on legitimacy of entire recruitment process.

Para 64 to 66 of the said judgment would read as under:-

"64. We find on the basis of the record that there is substance in the submission which has been urged by the ASG. The complaints in regard to the recruitment process related both to the Tier I and Tier II examinations. The complaints were carefully analysed by the first Committee and as noted earlier serious irregularities were found. The irregularities were not confined to acts of malpractice or unfair means on the part of a specific group of persons. On the contrary, the report of the Committee found deficiencies of a systemic nature which cast serious doubts on the legitimacy of the entire process of recruitment involving both the Tier I and Tier II examinations. The Order of the Deputy Chief Minister dated 23-12-2015 did not differ with the conclusions of the first Committee. In fact, the said order refrained from commenting on the findings of the first Committee. All that the Deputy Chief Minister's order directed was the narrowing of the scope of further investigation to one of the irregularities, that is, impersonation. In directing that a verification be carried out on whether any of the candidates in the zone of selection had been guilty of impersonation, the Deputy Chief Minister's order did not wipe out the irregularities in the entire examination process. It is not possible to accept the submission that after ordering a verification on impersonation, nothing further remained to be done and that there could be no further rejection of the sanctity of the process on the basis of the report of the first Committee. It is quite possible that the Deputy Chief Minister directed a further investigation into the allegations of impersonation only to lend credibility to the ultimate decision which he would take. Mr Patwalia has made a strenuous effort to read from the explanation submitted by Dsssb, urging that as many as three IAS officers and other officers who had appended their signatures to the explanatory note provided a justification to the defence that the Tier I and Tier II examinations did not suffer from flaws. It must be noted that the conduct of Dsssb and its officials was itself under a cloud. Their explanation could by no means be regarded as conclusive or binding upon the authorities of Gnctd. The Deputy Chief Minister in recommending that the entire process be cancelled emphasised the systemic nature of the violations which had taken place. These violations may or may not involve all of the candidates within the ultimate zone of selection but that in our view is beside the point for the simple reason that the gravamen of the charge in the present case is not in regard to the taint which attaches to a specific group of persons but to the sanctity of the recruitment process as a whole. The precedents of this Court sufficiently demonstrate that when the credibility of an entire examination stands vitiated by systemic irregularities, the issue then is not about seeking to identify the candidates who are tainted. In the present case, as we have seen, there was a basic denial of equal access to the Tier I examination. The nature of the allegations which were found to be substantiated upon a careful examination by the first Committee showed that the credibility of the process itself had been eroded. In such a situation, where a decision is taken by the Government to cancel the entire process, it cannot be held to be irrational or arbitrary, applying the

yardstick of fair procedure and proportionality to the decision-making process.

65. During the course of his submissions, Mr P.S. Patwalia has sought to provide explanations for each of the systemic irregularities pointed out by the first Committee, including the drastic reduction in the number of candidates who appeared for the Tier I examination, non-issuance of hard copies of admit cards, shortlisting of candidates belonging to a certain geographical area, lack of randomisation in the examination centres, among others. In response to this, the learned ASG has pointed out that while assessing whether the recruitment process has been compromised, the factors (or irregularities) must be looked at cumulatively to ascertain whether they are sufficiently grave to cancel the recruitment. We find ourselves in agreement with the learned ASG. So long as there is sufficient basis to contend that mass-scale irregularities have occurred, this Court need not indulge in a roving inquiry to rule out all possible explanations and alternative scenarios where such irregularities would be justified.

66. Recruitment to public services must command public confidence. Persons who are recruited are intended to fulfil public functions associated with the functioning of the Government. Where the entire process is found to be flawed, its cancellation may undoubtedly cause hardship to a few who may not specifically be found to be involved in wrongdoing. But that is not sufficient to nullify the ultimate decision to cancel an examination where the nature of the wrongdoing cuts through the entire process so as to seriously impinge upon the legitimacy of the examinations which have been held for recruitment. Both the High Court and the Tribunal have, in our view, erred in laying exclusive focus on the report of the second Committee which was confined to the issue of impersonation. The report of the second Committee is only one facet of the matter. The Deputy Chief Minister was justified in going beyond it and ultimately recommending that the entire process should be cancelled on the basis of the findings which were arrived at in the report of the first Committee. Those findings do not stand obliterated nor has the Tribunal found any fault with those findings. In this view of the matter, both the judgments of the Tribunal and the High Court are unsustainable."

53. In view thereof, I find decision of the Government is as per the mandate of the Constitution and goal as set out in the preamble of the Constitution, therefore, it is not required to be interfered with.

54. With the aforesaid discussion, the present writ petition is **dismissed**. No costs.

55. The respondents are directed to conduct the examination and publish its result within a period of next 60 days from today. To ensure fairness, sanctity and integrity of the examination, a five members committee, consisting of Engineer-in-Chief, (project), Engineer-in-Chief (Design & Planning), Chief Engineer (Level-I) and two Superintending Engineers would be constituted, which would supervise the entire process of the examination. Two Special Secretaries in the Department of Irrigation and Water Resources should be appointed as Special Observers so that the examination is conducted in a free, fair and impartial manner, and there would be no further litigation in respect of any irregularity in the examination as noted in the order dated

06.04.2023 extracted hereinabove. The State is not siding with anyone, but it is only concerned to ensure the fairness, sanctity and integrity of the examination for which the tainted result of the examination has been cancelled.

(2023) 4 ILRA 1190
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.04.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 13842 of 2021

Dr. Rakesh Kumar Sharma ...Petitioner
Versus
Chancellor, Chaudhary Charan Singh University & Ors. ...Respondents

Counsel for the Petitioner:
Chandra Bhushan Pandey, Asim Kumar Singh

Counsel for the Respondents:
C.S.C., Avneesh Tripathi, Subhash Bisaria

Civil Law - Service Law - *Chaudhary Charan Singh University, Meerut – Qualification for the Post of Associate Professor in Education* - Statute 11.03.01 was inserted into the Statutes of the University through a State Government Notification dated 03.12.2013, in accordance with S. 50(6) of the U.P. State Universities Act, 1973 - The *National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2014*, promulgated on 28.11.2014, prescribes the minimum eligibility qualifications for appointment to the post of Associate Professor under Clause 6.2 B. Clause 6.2 B (iv) of NCTE Regulations, 2014 uses the word 'or' between the words 'UGC' and 'State Government' i.e. *'Any other qualifications prescribed by UGC like NET qualification or length of professional teaching experience as per UGC or state government norms for the positions of Professor and Associate Professor'* - While the UGC Regulations, 2010 require candidates to have a minimum of eight years of teaching experience, including at least three years of experience at the M.Ed. level, the State Government's First Statutes (Statute 11.03.01) require a minimum of eight years of teaching or research experience, without any specific requirement of M.Ed. level teaching experience. In the present case, the petitioner fulfilled the requisite qualifications as per the Statute 11.03.01 of the First Statutes of the University. However, the Chancellor held that the petitioner did not meet the qualifications for appointment as he lacked the specific three years of M.Ed. level teaching experience required under UGC Regulations. Held: The petitioner fulfilled the qualifications as per the norms set by the State Government and was eligible for appointment as an Associate Professor in the Faculty of Education of the University. (Para 26)

Allowed. (E-5)

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Om Prakash Shukla, J.)

1. Heard Sri Chandra Bhushan Pandey and Ms. Akansha Rajput for the petitioner, Sri Himanshu Suryavanshi for the Chancellor, Chaudhary Charan Singh University, Meerut [here-in-after referred to as '**the University**'], learned State Counsel representing the State authorities and Subhash Bisaria, learned Counsel representing the authorities of the University.

2. Though service of this petition upon respondent No.6, as reported vide

office note dated 01.10.2021 is sufficient, however neither the respondent No.6 nor anyone representing her is present.

3. By instituting these proceedings under Article 226 of the Constitution of India, the petitioner assails the validity of an Order dated 03.03.2021 passed by the Hon'ble Chancellor of the University, whereby the Reference made under Section 68 of the U.P. State Universities Act, 1973 (here-in-after referred to as '**the Act, 1973**') by the respondent No.6 challenging the appointment of the petitioner on the post of Associate Professor in Education in the University has been allowed and he has been held to be ineligible for appointment ot the post in question. The Hon'ble Chancellor has further directed the Executive Council of the University which is the Appointing Authority of the Teachers in the University to take further action. Pursuant to the said order of the Hon'ble Chancellor dated 03.03.2021, the Executive Council in its resolution passed on 15.03.2021 has terminated the services of the petitioner on the post of Associate Professor in the University. The petitioner has also challenged the order of relieving dated 16.0.2021 which has been passed pursuant to the resolution of the Executive Council of the University dated 15.03.2021.

4. The sole issue for consideration before this Court in this case is, as to whether in terms of the Rules regulating the appointment on the post of Associate Professor in the University, the petitioner was possessed with the minimum eligibility or not.

5. An Advertisement bearing No.2/20217 was issued by the University inviting applications for recruitment to various teaching posts in the University including the post of Associate Professor in Education, which was unreserved. Clause - 5 of the advertisement stipulated that the qualification for recruitment to the posts as advertised shall be as per the First Statutes of the University as amended by the Government Notification dated 12.12.2013 (This date is wrongly mentioned. As a matter of fact, the date of the Government Notification is 03.12.2013). Clause 5 further provides that details of qualification and other relevant provisions for recruitment are given at page - 2 to 4 of the advertisement and further that the University reserves the right to amend qualification as per the latest laws in force. Clause - 5 of the Advertisement is extracted here-in-below:-

"5. Qualifications are as per First Statutes of Chaudhary Charan Singh University, Meerut and as amended by U.P. Govt. Notification No.377/Sattar--2013-16(114)/2010 dated 12.12.2013. Details of qualifications and other relevant provisions for recruitment are given on page 2 to 4. University reserves the right to amend the qualifications as per latest laws enforced."

6. Power to appointment Teachers in the Universities is vested in the Executive Council of the University as per the provisions contained in Section 21(vii) of the Act, 1973. In terms of Section 49 of the Act, 1973, the Statutes can be framed for providing the minimum qualification and experience for the appointment of Teachers of the University and also those of affiliated and associated Colleges. Section 50 of the Act, 1973 provides the procedure for framing the First Statutes of the University. As per the Scheme of the Act, 1973, the power to frame, amend, vary or

rescind the First Statutes is primarily vested in the Executive Council of a University, however, Sub-Section (6) permits the State Government to make certain Statutes on certain subjects with the assent of Hon'ble the Chancellor. Sub-Section (6) of Section 50 of the Act, 1973 provides that the State Government may make new or additional Statutes or amend or repeal the Statutes in order to implement the decision taken by it in the interest of learning, teaching and research or for the benefit of the Teachers, students or other staff on the basis of any suggestion or recommendation of the University Grants Commission or the State or National Education Policy with regard to the qualification of Teachers etc. In such an eventuality, the State Government may require the Executive Council to make new or additional Statute or may amend or repeal the same within the specified period and if the Executive Council of the University fails to comply with such requirement of the State Government, the Government itself may, with the assent of the Hon'ble Chancellor, make new or additional Statute or repeal the same.

7. In exercise of the powers conferred on the State Government under Section 50 (6) of the Act, 1973, the State Government issued a Notification with the assent of Hon'ble the Chancellor on 03.12.2013, whereby certain Statutes were framed and were ordered to be made part of the First Statutes of the Universities. Qualification for appointment of Teachers and other cadres in the Universities and Colleges is given in the said Statutes framed by the State Government vide Notification dated 03.12.2013 and the First Statute 11.01 (c) provides that so far as the appointment in Faculty of Education in the Universities is concerned, the norms/regulations formulated in consultation with National Council of Teacher Education (here-in-after referred to as '**NCTE**') shall be applicable. Newly framed 11.01 (c) of the First Statutes inserted vide Government Notification dated 03.12.2013 is extracted here-in-below:-

"11.01 COVERAGE (new)
For teachers in --
(a) ... ...
(b) ... ...
(c) the Faculty of Education, the norms/regulations formulated in consultations with National Council of Teacher Education;

8. According to Statute 11.02.07 the Ph.D Degree is mandatory for appointment as Associate Professor. Statute 11.02.07 is also extracted here-in-below:-

"11.02.07 The Ph.D Degree shall be a mandatory qualification for --
(a) the appointment of Professor/Librarian and for promotion as a Professor/Librarian.
(b) the candidates to be appointed as Associate Professor/Deputy Librarian through direct recruitment."

9. Statute 11.03.01 prescribes the general eligibility criteria for appointment as Associate Professor, according to which the candidate applying for appointment to the post of Associate Professor should be possessed of a Master's Degree with at least 55% marks alongwith minimum eight years experience of teaching and/or research. It further prescribes that research work should be evidenced by a published work and minimum of five publications as books and/or research/policy papers should be to the credit of a candidate desirous of being appointed as Associate Professor. It also provides that the candidate should also

have minimum Academic Performance Indicator (API) and such a candidate should have contributed to educational innovation and designed new curricula and courses etc. Statute 11.03.01 of the First Statutes inserted by the Government Notification dated 03.12.2013 is also extracted here-in-below:-

"11.03.01 General Eligibility Criteria for an Associate Professor/Deputy Librarian

(a) Good academic record with a Ph.D Degree in the concerned/allied/relevant disciplines.

(b) A Master's Degree with at least 55% marks (or an equivalent grade in a point scale wherever grading system is followed).

(c) A minimum of eight years of experience of teaching and/or research in an academic/research position equivalent to that of Assistant Professor/Lecturer/Assistant Librarian in a University, College or Accredited Research Institution/industry excluding the period of Ph.D. research with evidence of published work and a minimum of 5 publications as books and/or research/policy papers.

(d) Contribution to educational innovation, design of new curricula and courses, and technology - mediated teaching learning process with evidence of having guided doctoral candidates and research students.

(e) A minimum score as stipulated in the Academic Performance Indicator (API) based Performance Based Appraisal System (PBAS), set out in Tables I to VI of Appendix-H."

10. Accordingly, in terms of the provisions contained in Clause - 5 of the Advertisement read with the relevant Statutes as introduced in the First Statutes of the University by means of the Government Notification dated 03.12.2013, a candidate desirous of being appointed as Associate Professor in the University in the Faculty of Education should be possessed of the norms, as per the Regulations formulated in consultation with the National Council of Teacher Education (NCTE).

11. We will now examine as to what are the Regulations regarding eligibility for appointment as Associate Professor in the University framed by the NCTE. The NCTE by means of a Notification dated 31.08.2009 promulgated 'Teacher Education [Recognition Norms & Procedure] Regulations, 2009 [here-in-after referred to as 'NCTE Regulations, 2009'] Clause 4 (2) of an Appendix 5 appended to NCTE Regulations, 2009 prescribes the qualification for teaching posts including the post of Associate Professor, according to which a candidate desirous of being appointed as Associate Professor in the University should have a Master's Degree in the concerned subject and in the Faculty of Education, he should have Master's Degree in Education and B.Ed. to his credit with minimum 55% marks. He should also have a Ph.D. Degree in Education and in addition to the said educational qualification, the candidate should have at least eight years teaching experience in University department of Education or a College of Education with minimum three years at M.Ed. level and he should also have published works in his area of specialization. The qualification prescribed by the NCTE Regulation, 2009 for appointment to the post of Associate Professor is extracted here-in-below:-

"Reader/Associate Professor

(i) Master's Degree in Arts/ Humanities/ Sciences/ Commerce and M.Ed. each with a minimum of fifty five percent marks or its equivalent grade

OR

M.A. (Education) and B.Ed. each with a minimum of fifty five percent marks

(ii) Ph.D in Education and

(iii) At least eight years of teaching experience in University department of education or College of Education of which a minimum of three years at the M.Ed. level and published work in his area of specialization."

12. Thus as per the NCTE Regulation, 2009, apart from the educational qualification, a candidate seeking his appointment to the post of Associate Professor in the Education should have eight years total teaching experience, out of which he should be possessed of three years teaching experience at the M.Ed. level. That would mean that a candidate having five years experience of teaching Education at undergraduate level and three years experience of teaching at post-graduate level will be qualified to be considered for appointment. Similarly, if a candidate has altogether eight years experience of teaching at M.Ed. level, he will also be qualified for being considered for appointment to the post of Associate Professor. However, in a situation, where a candidate though has eight years teaching experience but he lacks minimum three years of teaching experience at M.Ed. level, he shall not be eligible for appointment to the post of Associate Professor.

13. The NCTE Regulation 2009 were however superseded by National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2014 [here-in-after referred to as '**NCTE Regulations 2014**'] which were promulgated by means of a Notification dated 28.11.2014. As per the qualification prescribed in NCTE Regulations, 2014 as promulgated on 28.11.2014 for the post of Associate Professor, a candidate should have a post-graduate degree with 55% marks; he should have a post-graduate degree in Education/M.A. Education with 55% marks. In case, the appointment is sought in Education Department, he should also have a Ph.D. Degree in Education. Alongwith such educational qualifications, the candidate seeking his appointment to the post of Associate Professor should also have any other qualification prescribed by UGC, like NET qualification or length of teaching experience as per UGC or State Government norms for the position of Associate Professor.

14. Clause 6.2 B of NCTE Regulations, 2014, which prescribes minimum eligibility qualification for appointment to the post of Associate Professor, is extracted here-in-below:-

"6.2 Qualifications

B. Professor and Associate Professor

(i) Postgraduate degree with minimum 55% marks in the discipline relevant to the area of specialisation.

(ii) Postgraduate degree in Education (M.Ed./M.A. Education) with minimum 55% marks.

(iii) Ph,D. degree in Education or in the discipline relevant to the area of specialisation.

(iv) Any other qualifications prescribed by UGC like NET qualification or length of professional teaching experience as per UGC or state government norms for the positions of Professor and Associate Professor."

15. Thus, there is a clear departure in NCTE Regulations, 2014, so far as the eligibility criteria for appointment to the post of Associate Professor is concerned from the eligibility criteria as can be found in NCTE Regulations, 2009. NCTE Regulations, 2009 only prescribe that the candidates should have eight years teaching experience of which minimum of three years at M.Ed. level teaching experience is required, whereas NCTE Regulations, 2014 clearly stipulate that qualification prescribed by UGC or State Government should be requisite qualification for determining the eligibility criteria for appointment to the post of Associate Professor. As already observe above, in terms of Clause - 5 of the advertisement and also in terms of the Statutes inserted in the First Statutes of the Meerut University vide notification dated 03.12.2013, the eligibility qualification for appointment to the post of Associate Professor in the University in the Faculty of Education is in terms of the norms or Regulations framed by NCTE. The advertisement was issued in the year 2017 and accordingly, it is the NCTE Regulations, 2014 which was in vogue at that time and hence, so far as the determination of eligibility for appointment to the post of Associate Professor in the Faculty of Education in the University is concerned, a candidate's eligibility is to be determined on the basis of the prescriptions available in NCTE Regulations, 2014. The provisions contained in Clause 6.2 B (iv) of NCTE Regulations, 2014 thus assume significance, so far as question relating to determination of eligibility condition of the petitioner for appointment to the post of Associate Professor in the University in the Faculty of Education is concerned. The said provision has already been extracted above and what is most important to note is that the said provision as occurs in Clause 6.2 B (iv) of NCTE Regulations, 2014 uses the word 'or' between the words 'UGC' and 'State Government'.

16. Thus, a bare reading and perusal of the prescription available in Clause 6.2 B (iv) of the NCTE Regulations, 2014 makes it abundantly clear that a person fulfilling qualification as prescribed either by UGC or by the State Government will be eligible for being considered to be appointed on the post of Associate Professor. In this case, thus, the question which now arises is as to whether the petitioner fulfills the norms as prescribed by the UGC or does he fulfill the norms prescribed by the State Government, so far as the determination of his eligibility for appointment to the post in question is concerned.

17. We have already noticed that in terms of provisions of contained in Clause - 5 of the advertisement and the First Statutes notified by the State Government vide notification dated 03.12.2013, a candidate desirous of seeking appointment to the teaching post in Faculty of Education in the University should fulfill the criteria to be determined in consultation with the NCTE. We have also observed above that the advertisement was issued in the year 2017, as such so far as prescription regarding qualification for appointment to the post of Teacher as available in NCTE Regulations, 2009 are concerned, they are not applicable; rather, it is the prescription available in NCTE Regulations, 2014 which are applicable. The norms set out by the UGC are available in Regulations on minimum qualification for appointment of Teachers and other academic staff in the Universities and Colleges and measures for maintenance of standards in Higher Education 2010, which was published in

the Official Gazette of India on 30.06.2010 [here-in-referred to as **'UGC Regulations, 2010'**]. As per clause 4.4.7 B (ii), a candidate seeking appointment to the post of Associate Professor should have a Master's Degree or Master's Degree in Education and B.Ed each with 55% marks and further, he should have Ph.D. qualification.

18. In addition to the aforesaid educational qualifications, UGC Regulations, 2010 also require that the candidates should have at least eight years teaching experience in University department of Education or College of Education with a minimum experience of three years at M.Ed. level and further that the candidate should have published work to his credit in the relevant area of specialization. The provisions of Regulation 4.4.7 B (ii) of UGC Regulations, 2010 are reproduced here-in-below:-

"4.4.7. QUALIFICATIONS PRESCRIBED FOR FACULTY POSITIONS IN THE REGULATIONS OF NCTE

B. QUALIFICATIONS FOR M.Ed. COURSE

(ii) ASSOCIATE PROFESSOR:

(i) A Master's Degree in Arts/ Humanities/ Sciences/ Commerce and M.Ed. each with a minimum of 55% marks (or an equivalent grade in a point scale wherever grading system is followed), OR

M.A. (Education) and B.Ed. each with a minimum of 55% marks (or an equivalent grade in a point scale wherever grading system is followed);

(ii) Ph.D in Education and

(iii) At least eight years of teaching experience in University department of education or College of Education, with a minimum of three years at the M.Ed. level and has published work in the relevant area of specialization."

19. From a comparative examination of the provisions contained in UGC Regulations 2010 and the First Statutes inserted by State Government's Notification dated 03.12.2013, what we notice is that so far as the appointment to the post of Associate Professor is concerned, the UGC Regulations, 2010 require that the candidates should have eight years teaching experience, out of which minimum three years teaching experience should be at M.Ed. level, whereas the First Statutes, as inserted by the Government Notification dated 03.12.2013, provide that the candidates should have minimum eight years teaching experience or Research (Statute 11.03.01 of the First Statutes of the University). Thus, the distinction between these provisions, the first prescribed by the UGC Regulations, 2010 and the other prescribed by Notification by the State Government's Notification dated 03.12.2013, is that the UGC Regulations prescribe three years minimum experience of teaching at M.Ed. level, whereas no such stipulation is available in the Statute 11.03.01 of the First Statutes introduced by the State Government's Notification dated 03.12.2013.

20. We have already noticed that Regulation 6.2 B (iv) of NCTE Regulations, 2014 clearly provides that the candidates should either possess of the experience as prescribed by the UGC or by the State Government. That would simply mean that if a candidate possesses the requisite experience as per the prescription available in UGC Regulations 2010, he shall be eligible for being considered for

appointment to the post of Associate Professor and a candidate who possesses requisite experience as prescribed by the State Government shall also be eligible. It is to be noticed at this juncture that the First Statutes which were inserted by way of amendment in the First Statutes of the University were made as per the notification dated 03.12.2013 issued by the State Government in exercise of the powers conferred upon the State Government under Section 50 (6) of the Act, 1973. Thus the First Statutes inserted by means of Government Notification dated 03.12.2013 are the norms prescribed by the State Government. Accordingly, if we plainly construe the provisions contained in Regulation 6.2 B (iv) of NCTE Regulations, 2014, what we find is that if a candidate desirous of seeking appointment to the post of Associate Professor in the Faculty of Education of the University fulfills the requisite experience as prescribed by the First Statute promulgated by the State Government vide Notification dated 03.12.2013, he shall also be eligible for being considered for appointment on the post of Associate Professor.

21. So far as the present case is concerned, there is no dispute between the partis that the petitioner did fulfill the requisite experience of having worked as a Teacher for more than eight years, as per the Statute 11.03.01 of the Statutes inserted, by means of Government Notification dated 03.12.2013. Thus, admittedly, the petitioner fulfilled the norms laid down by the State Government which in our considered opinion, fulfills the requirement of Regulation 6.2 B (iv) of NCTE Regulations, 2014.

22. We may reiterate that occurrence of the word 'or' between the words 'UGC' and the 'State Government' in clause 6.2 B of NCTE Regulations, 2014 makes it abundantly clear that a candidate fulfilling the requisite teaching experience, as per the prescription of the UGC as also as per the norms set-out by the State Government is to be held to be eligible for being considered for appointment on thepost of Associate Professor.

23. We have already recorded a finding that Statute 11.03.01 which was inserted in the Statutes of the University is the norm prescribed by the State Government for the reason that the said Statute was inserted by means of State Government's Notification dated 03.12.2013 for which the State Government is statutorily empowered under Section 50(6) of the Act, 1973.

24. In view of the aforesaid, we have no ambiguity in our mind that the petitioner did fulfill the requisite qualification for being appointed on the post of Associate Professor in the Faculty of Education in the University and he was thus rightly appointed on the post in question.

25. Coming to the impugned order dated 03.03.2021 passed by the Hon'ble the Chancellor, we may observe that the only reason indicated by Hon'ble the Chancellor for holding that the petitioner did not fulfill the requisite qualification for being considered for appointment to the post of Associate Professor is that though he did have eight years teaching experience, however, he did not have three years experience of teaching at M.Ed. level. However, Statute 11.03.01 of the First Statutes inserted by means of State Government Notification dated 03.12.2013 appears to have lost sight of by Hon'ble the

Chancellor while passing the order impugned before us, dated 03.03.2021.

26. There is no dispute that the relevant First Statute as also the advertisement provided that minimum qualification shall be determined in terms of the Regulations framed in consultation with the NCTE. It is also not in dispute that the NCTE Regulations 2014 are applicable for the reason that the advertisement in this case was issued in the year 2017. The relevant Regulation of NCTE Regulation, 2014, namely, Regulation 6.2 B (iv) has already been discussed above, which uses the word **'or'** and thus, any candidate fulfilling the requisite qualification prescribed either by the UGC or by the State Government, in our considered opinion, will have the minimum eligibility for being considered for appointment to the post of Associate Professor in the Faculty of Education in the University.

27. For the reasons aforesaid, we are convinced that the order dated 03.03.2021 passed by the Hon'ble Chancellor is not sustainable.

28. Accordingly, the writ petition is **allowed**. The order dated 03.03.2021 passed by the Hon'ble Chancellor, as is contained in Annexure No.1 to the Writ Petition, is hereby quashed.

29. Consequential resolution of the Executive Council of the University dated 15.03.2021, so far as it relates to the petitioner, is also hereby quashed. We also quash the relieving order dated 16.03.2021 passed by the Registrar of the University as is contained in Annexure 3 to the Writ Petition.

30. The Petitioner thus shall be permitted to join his duties as Associate Professor in the Faculty of Education in Chaudhary Charan Singh University, Meerut forthwith.

31. There will, however, be no order as to costs.

(2023) 4 ILRA 1198
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.04.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 14890 of 2021

Ramakant Mihir ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Alok Mishra

Counsel for the Respondents:
A.S.G., Sharad Dwivedi

A. State Bank of India Officers Service Rules, Section 67(h) - *Disciplinary Proceedings* - *Compulsory Retirement* - *Double Jeopardy* - Repeated misconduct by an employee can itself constitute misconduct. Reference to a charge proved in a prior disciplinary inquiry to demonstrate that the delinquent employee is a habitual offender does not attract the principle of double jeopardy. The imposition of a previous penalty on the petitioner is relevant when considering punishment in subsequent disciplinary proceedings. *(Para 14)*

B. State Bank of India Officers Service Rules, Section 67(h) - *Disciplinary Proceedings* - *Compulsory Retirement* - When a person is employed in the banking business, they are duty-bound to perform with utmost honesty and sincerity. Any infraction leading to the misappropriation of funds amounts to serious misconduct,

as it strikes at the root of banking operations and erodes customer trust. In this case, the petitioner was found guilty of misappropriation of funds on two separate occasions, having failed to credit customer funds to the bank's accounts and not voluntarily refunding the money. There was no denial of the petitioner's involvement in both acts of misconduct. Held: The punishment of compulsory retirement is neither disproportionate nor excessive, given the petitioner's repeated misconduct. *(Para 20)*

Dismissed. (E-5)

List of Cases cited:

1. Central Industrial Security Force v. Abrar Ali, (2017) 4 SCC 507

2. Divisional Controller, KSRTC v. A.T. Mane, (2005) 3 SCC 254

3. Chairman and Managing Director, United Commercial Bank & ors. Vs P.C. Kakkar, (2003) 4 SCC 364

4. State Bank of Bikaner & Jaipur Vs Nemi Chand Nalwaya, (2011) 4 SCC 584

5. Deputy General Manager (Appellate Authority) & ors. Vs Ajai Kumar Srivastava, (2021) 2 SCC 612

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

1. The petitioner has assailed the order of compulsory retirement dated 05.05.2017 which has been imposed as a measure of punishment pursuant to the disciplinary proceedings initiated against him. The appeal preferred against the said order on 28.06.2017 has also been rejected vide order dated 26.07.2017. Both the orders i.e. 05.05.2017 and 26.07.2017 have been assailed in the present writ petition.

2. The facts of the case and brief are that the petitioner while working at the Cash Counter in the State Bank of India, Girijapuri Branch (hereinafter referred to as the Bank) was served with a charge sheet on 16.03.2005 where the allegation against him was that he had accepted an amount of ₹ 5000/- from one customer namely Raj Narayan for depositing the same in his account No.5104. The petitioner discharging the duties of a Cashier accepted the said amount, and made an endorsement in the passbook of the customer but did not enter the said deposit, and no entries were made in Bank's official records, and similarly another amount of ₹ 500 was accepted from a customer and not accounted by him in the Bank's books. The petitioner was issued charge-sheet on 16.3.2005 and disciplinary proceedings were conducted and vide order dated 9.3.2006 the petitioner was awarded compulsory retirement with superannuation benefits from service. In the appeal preferred by the petitioner the order of punishment was modified vide order dated 12.6.2006 to stoppage of 4 increments for 4 years with cumulative effect. It has been recorded that a lenient and compassionate view has been taken by the appellate authority as the petitioner has an unmarried daughter and 3 minor children and further an opportunity was given to the petitioner to show improvement in his conduct and reform himself.

3. The petitioner was again subjected to disciplinary proceedings and a charge-sheet was given on 28.07.2016 containing 3 charges. The first charge related to not crediting to customer's account the amount received by him, and only when the customer complained about the non-credit of the amount, it was refunded to him. The second charge related to the earlier punishment granted to the petitioner for the misconduct committed by him where he

was given stoppage of 4 increments for 4 years with cumulative effect and it was stated that he had been given an opportunity to show improvement in his functioning but has committed similar irregularity again.

4. In the disciplinary proceedings which resulted in the impugned punishment order dated 5.5.2017, according to charge no.1 one Pradeep Kumar, a savings Bank account holder, deposited cash of ₹ 34,000/- over the counter on 26.06.2015. The acknowledgement receipt was issued to the customer but the petitioner retained the cash without crediting the savings account of the customer. It is only when the customer made complaint against the petitioner that he returned the money to the customer on 10/07/2015. The disciplinary authority held that the charge No.1 was proved, and with regard to charge No.2 he returned a finding that the officer was given opportunity to show improvement when previously committed similar act of misconduct, however he has committed similar act of misconduct and imposed penalty in terms of 67 (h) of the State Bank of India Officers Service Rules of compulsory retirement upon the petitioner by means of impugned order dated 05/05/2017. The appeal against the said order of punishment was also rejected by the appellate authority by means of order dated 26/07/2017.

5. The petitioner has challenged the punishment order as well as the appellate order on the ground that previously, the petitioner having been punished by means of order dated 09/03/2006 and again on the same charges has been punished and accordingly the order of punishment is illegal and arbitrary in as much as it suffers from vice of double jeopardy as a person cannot be punished again for the same charge on which he has been punished earlier and also that the punishment imposed is excessive.

6. Sri Sharad Dwivedi, learned counsel for the respondents, supporting the impugned orders has submitted that on the previous occasion in the year 2005 when the petitioner was working at the Cash Counter in the Girijapuri Branch was alleged to have received ₹ 5000 and ₹ 500 from the customers and did not credit them in the books of the accounts of the Bank. In the disciplinary enquiry conducted against the petitioner all the charges were found to be proved. The petitioner was awarded punishment of compulsory retirement by the disciplinary authority, the appellate authority taking a lenient view of the matter, imposed the punishment of stoppage of 4 increments for 4 years, with the condition *"Please note that should a whiff of inappropriate behaviour be observed about you in future, no further mercy will be shown. This will also be recorded in your service sheet"*. He submits that only a reiteration of the previous disciplinary proceedings have been made in the charge-sheet, and the same charge was not required to be proved in the present enquiry, but provided only a reference to his previous conduct, as it was material for the purposes of imposing the punishment. With regard to the quantum of punishment, he submitted that the petitioner being an employee of the Bank was supposed to show full sincerity, honesty and faithfulness towards the customers, and defalcation of the funds of the customers is a very serious misconduct as it affects the credibility and reputation of the Bank. In the present case, charge sheet was given to the petitioner stating that he has admittedly received the amount from the customers

but did not make necessary entries in the Bank records, nor did he inform any higher official of the Bank, and refunded the money only when complaint was made after substantial length of time, and consequently for the repeated misconduct, the punishment of compulsory retirement has been imposed which is not disproportionate and consequently has opposed the writ petition.

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

8. The first ground canvassed by the petitioner in assailing the impugned order of compulsory retirement is that he is being punished twice for the same offence, and hence the impugned order is hit by the vice of double jeopardy. Previously, the petitioner was charge-sheeted by means of order dated 16/03/2005 and charge number (i) and (ii) were as follows:-

"(i) श्री राज नारायण जो कि शाखा में बचत खाता धारक हैं, ने उनको रू.5,000/– अपने बचत खात संख्या 5104 में जमा करने हेतु दिये थे किन्तु उन्होंने उक्त राशि उनके बचत खाते में जमा किए बिना उनकी पासबुक में अनुचित रूप से प्रविष्टि कर दी

(ii) श्रीमती गोमती देवी ने अपना बचत खाता खोलने हेतु रू0 500/– उनको दिये उन्होंनें श्रीमती गोमती देवी का खाता शाखा में नहीं खोला तथा श्रीमती गोमती देवी को फर्जी बचत पास बुक सौप दी''

9. The customers, who were affected by the conduct of the petitioner, had made a complaint to the Bank making allegations against him for receiving the money and issuing a receipt for the said amount but the same was never entered in the books of accounts of the Bank. Though subsequently after the complaint, the amount was returned back to the customers, but the enquiry officer found both charges to be proved and it was established that the petitioner had acted malafidely with the intention of defrauding the customers of the Bank, and no satisfactory explanation could be given by him for his conduct and accordingly the disciplinary authority had imposed a punishment of compulsory retirement with superannuation benefits. While deciding the appeal, the appellate authority took a lenient view of the matter considering the fact that the petitioner had an ailing mother of 62 years, one daughter of marriageable age, and 3 minor children, and consequently reduced punishment to stoppage of 4 increments for 4 years cumulatively, with a condition that *"Please note that should a whiff of inappropriate behaviour be observed about you in future, no further mercy will be shown. This will also be recorded in your service sheet"*.

10. Subsequently, when the petitioner was posted as Customer Assistant at Fatehpur, Barabanki Branch from 19/07/2011 to 19/09/2015 he was given chargesheet on 28/07/2016 with the first charge that he did not credit to the customers' account the amount received by him for being so credited. The customer made a complaint, and only then the petitioner refunded the amount to him. Charge No. 2 stated that previously also have been punished for similar charges and plenty of compulsory retirement was given to him with stoppage of 4 increments for 4 years cumulatively by the appellate authority, and despite being given an opportunity to show improvement in his functioning and conduct, again committed similar irregularities/ mistake.

11. The petitioner after due inquiry has been awarded with the punishment of compulsory retirement, and the appeal preferred by him against the order of punishment has also been rejected which

orders have been impugned in the present petition.

12. The issue to be decided is as to whether the charge no.2 in the chargesheet dated 26/07/2016 pertaining to the punishment imposed upon the petitioner in the previous disciplinary proceedings, would amount to punishing the petitioner for the same charge again?

13. To decide this question one will have to go into both the charges themselves. In the year 2005 when the petitioner was working at the cash counter in the Girijapuri branch he was alleged to have received ₹ 5000 and ₹ 500 from the customers and did not enter them in the books of the Bank for which he was punished, and the condition was also imposed which was recorded in his service sheet *"that should a whiff of inappropriate behaviour observed about you in future, no further mercy will be shown"*. In the year 2015, again disciplinary proceedings were initiated against him in charge No. 2 is as follows:-

"for similar charges indicating malafides on your part, penalty of compulsory retirement in terms of Para 6(c) of memorandum of settlement dated 10/04/2002, was imposed upon you by the disciplinary authority vide order dated 09/03/2006, which was committed to stoppage of 4 increments for 4 years with cumulative effect by the appellate authority. You, therefore giving an opportunity to however, you again committed similar to regular mistake indicating malafides on your part."

14. The perusal of the above charge clearly indicates that the petitioner has committed the similar misconduct again despite having been warned in the previous disciplinary proceedings of 2005 not to repeat any such misconduct in the future, failing which no mercy would be shown. The charge is clearly distinct from the charge included in the previous disciplinary enquiry. The present charge involves a separate misconduct which has arisen because of the petitioner indulging in a similar misconduct subsequently. This aspect would further be clear when we see that the previous misconduct was not required to be proved in the subsequent disciplinary proceedings. Had the previous charge been also proved in the subsequent enquiry, the principle of double jeopardy would come to the defence of the delinquent employee, but a repeated act of misconduct, by an employee may itself be a misconduct, and mention of a charge having been proved in previous disciplinary inquiry, to bring home the charge that the delinquent employee is habitual offender, would not attract principle of double jeopardy. The fact of previous penalty imposed upon the petitioner will be relevant for imposing punishment in the subsequent disciplinary proceedings. The question whether the previous misconduct of an employee can be taken into consideration in the subsequent disciplinary proceedings is no longer *res-integra* and has been concluded by the Supreme Court in the case ***Central Industrial Security Force v. Abrar Ali, (2017) 4 SCC 507*** where it has been held:-

"Charge 3 was that the respondent had become habitual in committing indiscipline and disorderliness. A reference was made to two major penalties of deduction of pay and one minor punishment of reduction of seven days' salary earlier. The disciplinary authority found that the respondent did not

improve in spite of being punished earlier. The High Court agreed with the contention of the respondent and held that a fresh enquiry cannot be initiated into a misconduct for which a delinquent had already suffered a penalty. The High Court found that any penalty imposed under Charge 3 would amount to double jeopardy. We disagree with the finding of the High Court as we are of the view that the respondent was not being tried again for previous misconduct. As the respondent did not improve in spite of being punished earlier and had become habitual in indiscipline and disorderliness, the disciplinary authority rightly found Charge 3 as proved. The desirability of continuance of the respondent was considered on the basis of his past conduct which does not amount to double jeopardy. In any event, past conduct of a delinquent employee can be taken into consideration while imposing penalty. We are supported in this view by a judgment of this Court in Union of India v. Bishamber Das Dogra [Union of India v. Bishamber Das Dogra, (2009) 13 SCC 102 : (2010) 1 SCC (L&S) 212] , held as follows : (SCC p. 111, para 30)

"30. ... But in case of misconduct of grave nature or indiscipline, even in the absence of statutory rules, the authority may take into consideration the indisputable past conduct/service record of the employee for adding the weight to the decision of imposing the punishment if the facts of the case so require."

15. With regard to argument of the learned counsel the petitioner that the impugned order suffers from double jeopardy, is not made out and is accordingly rejected.

16. The next ground urged by learned counsel for the petitioner is with regard to the quantum of punishment. While imposing the penalty it has been taken into account that the nature of misconduct pertains to financial misappropriation by the petitioner who was an employee of the Bank, where financial discipline, honesty and sincerity are of foremost attributes for the employees. Any breach of the aforesaid attributes would be a misconduct, more serious in the Banking business where customers entrust the Bank with hard earned money, and the job requires all employees to maintain high standards of financial discipline. In the case of ***Divisional Controller, KSRTC Vs. A.T.Mane, 2005 (3) SCC 254*** it has been held as under:-

"12. Coming to the question of quantum of punishment, one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment, on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration. In our opinion, when a person is found guilty of misappropriating corporation's fund, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal."

17. The Hon'ble Supreme Court in the case of ***Chairman and Managing Director, United Commercial Bank and others Vs P.C. Kakkar, 2003 (4) SCC 364*** held as under:-

"A Bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the Bank is required to

take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the Bank. As was observed by this Court in Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik (1996 (9) SCC 69), it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a Bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct. The charges against the employee were not casual in nature and were serious. These aspects do not appear to have been kept in view by the High Court."

18. The respondents, on the other hand, have vehemently submitted that there was loss of confidence in the petitioner, and consequently the punishment meted out to him is not harsh. In the case of ***State Bank of Bikaner and Jaipur Vs. Nemi Chand Nalwaya, 2011 (4) SCC 584*** it has been held as under:-

"8. When a court is considering whether punishment of `termination from service' imposed upon a Bank employee is shockingly excessive or disproportionate to the gravity of the proved misconduct, the loss of confidence in the employee will be an important and relevant factor. When an unknown person comes to the Bank and claims to be the account-holder of a long inoperative account, and a Bank employee, who does not know such person, instructs his colleague to transfer the account from "dormant" to "operative" category (contrary to instructions regulating dormant accounts) without any kind of verification, and accepts the money withdrawal form from such person, gets a token and collects the amount on behalf of such person for the purpose of handing it over to such person, he in effect enables such unknown person to withdraw the amount contrary to the Banking procedures; and ultimately, if it transpires that the person who claimed to be account holder was an imposter, the Bank can not be found fault with if it says that it has lost confidence in the employee concerned. A Bank is justified in contending that not only employees who are dishonest, but those who are guilty of gross negligence, are not fit to continue in its service."

19. In the case of ***Deputy General Manager (Appellate Authority) and others Vs. Ajai Kumar Srivastava , 2021 (2) SCC 612*** Hon'ble Supreme Court has held as under:-

"42. Before we conclude, we need to emphasize that in Banking business absolute devotion, integrity and honesty is a sine qua non for every Bank employee. It requires the employee to maintain good conduct and discipline and he deals with money of the depositors and the customers and if it is not observed, the confidence of the public/depositors would be impaired. It is for this additional reason, we are of the opinion that the High Court has committed an apparent error in setting aside the order of dismissal of the respondent dated 24th July, 1999 confirmed in departmental appeal by order dated 15th November, 1999."

20. A perusal of the aforesaid judgments would indicate that when a person is employed in banking business, he

is duty bound to discharge his duties with utmost honesty and sincerity and any infraction leading to misappropriation of funds would amount to a very serious misconduct as such an action may strike at the root of Banking business and the faith of the customers will be impaired. In the present case, undoubtedly on two separate occasions the petitioner was found to have indulged in misappropriation of funds. In the year 2005 after conclusion of the disciplinary proceedings he was found guilty and punished and was categorically asked not to repeat the same misconduct. Despite the aforesaid punishment meted out to him the petitioner again indulged in act of misconduct and misappropriation of funds in 2015 which has led to the impugned punishment order. There is no denial of the involvement of the petitioner in both the above acts of misconduct.

21. The only defence taken by the petitioner is that he was not aware of the law. We have noticed that the petitioner is employed in banking business since more than one and half decades, and such defence that he was not aware of the legal principles and law is not believable nor is a valid defence. In the present case, we have noticed that the petitioner deliberately did not credit the money received from the customers in the books of account of the Bank and it is only after complaint was made by the customers that such amount was refunded, which clearly indicates that his intention was not bonafide but a deliberate attempt to defraud the customers. This observation is based upon the fact that during this period neither had he voluntarily refunded the money to the customers, nor had he informed any higher official of the Bank about such incident in case it was under any mistaken belief of fact. In the aforesaid circumstances, the punishment of compulsory retirement is clearly not disproportionate or excessive considering the repeated misconduct by the petitioner.

22. In view of the above, this Court is of the considered opinion that the punishment awarded to the petitioner is in consonance with the misconduct committed by him and, hence, does not require any interference by this Court. The petition is bereft of merits and is accordingly **dismissed**.

(2023) 4 ILRA 1205
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.03.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

P.I.L. No. 210 of 2023

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

Counsel for the Petitioner:
In Person

Counsel for the Respondents:
C.S.C., C.S.C.

Constitution of India, Article 27 - *Freedom as to payment of taxes for promotion of any particular religion* – The petitioner sought the quashing of the Government Order/Letter dated 10.03.2023. By the said Government Order/Letter, the State Government issued directions to celebrate, between 29th and 30th March 2023, the occasions of Ashtami and Shri Ram Navami. Held: The impugned Government Order/Letter does not contain any provision for payment to

priests in a temple or to anyone else associated with temple activities. Rather, the amount is to be paid to the performers/artists who may be performing on such occasions. The Government Order does not provide for any state activity relating to the maintenance or propagation of any religion or religious denomination. Under Article 27 of the Constitution of India, what is not permissible is the specific apportionment of tax proceeds for the payment of expenses promoting or maintaining any particular religion or religious denomination. However, the payment of honorarium by the State to artists/performers at programs, even if organized at temple sites or fairs during Shri Ram Navami, does not constitute state involvement in the propagation of any religion or religious denomination. It is simply a secular activity of the State, which may also involve publicizing the developmental works undertaken by the State. (Para 22, 23)

Dismissed. (E-5)

List of Cases cited:

1. The Commissioner, Hindu Religious Endowments, Madras Vs Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282

2. Praful Goradia Vs U.O.I. , (2011) 2 SCC 568

3. St. of Guj. & anr. Vs Islamic Relief Committee, Gujarat & ors., (2018) 13 SCC 687

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Om Prakash Shukla, J.)

1. This Public Interest Litigation Petition has been filed by a practicing lawyer of this Court praying for quashing of a Government Order/Letter dated 10.03.2023 issued by the Principal Secretary of the State Government in the department of Tourism which is addressed to all the Divisional Commissioners and the District Magistrates in the State of Uttar Pradesh.

2. By the impugned Government Order/Letter, the State Government has issued certain directions to celebrate, between 29th and 30th March, 2023, the occasion of Ashtami and Shri Ram Navami. The directions issued in the said Government Order/Letter are as follows:-

(i) By taking a special drive, participation of women and girls in the programmes be ensured and functions relating to chanting of Durga Saptshati/Devi Jagran/Devi Gayan be organized.

(ii) On the occasion of Ashtami and Shri Ram Navami, Akhand Ramayan Path be organized at main Shakti Peeth Temples to publicize human, social and national values amongst the general public and for the said purpose, committees be constituted at District, Tehsil and Development Block levels in each District.

(iii) The performers and Artists shall be selected and chosen in every district by a Committee to be chaired by the District Magistrate in co-ordination with Departments of Culture and Public Information of the State. The Programmes be organized commensurate to the glory of Ma Durga and in such programmes, the public representatives be invited while simultaneously ensuring participation of the people.

(iv) The programme is a State Level programme and hence on this occasion through the Department of Information, hoardings be put along with publicity in print media/social media about the developmental works and development of basic amenities by the Tourism

Department of the State Government at Shakti Peeths and Devi Temples.

(vi) At every site of the programme, the District Magistrate shall ensure sanitation, drinking water, security, lighting and laying of durries timely and the functions/ programmes shall be organized only after obtaining No Objection Certificates (NOC) from the authorities at the appropriate level.

(v) Information of all such programmes including address of the temples, photographs, GPS location and contact number of the Management of the temples etc. shall be furnished to the Department of Culture.

(vi) For the purposes of giving honorarium to the Artists/ Performers in such programmes, the Department of Culture shall make available a sum of Rs.1,00,000/- (Rupees One Lakh Only) to the District Tourist and Culture Council of every district and rest of the arrangements shall be made by the district administration at its own level.

3. The reservation expressed by the petitioner, who appears in person in this Public Interest Litigation, is in relation to the instructions contained in the impugned Government Order/Letter, whereby financial aid has been ordered to be provided.

4. Heard the petitioner in person and Sri Amitabh Rai, learned Additional Chief Standing Counsel representing the State respondents.

5. It has been argued by the petitioner that the State Government while issuing impugned Government Order/Letter has issued instructions to organize celebrations of Shri Ram Navami in the temples and to provide financial aid at Block, Tehsil and District level. According to him, the said Government Order/Letter further contains a direction to the Pujaris of the temples to perform religious practices in the garb of reducing the negative energy in the Society. The submission further is that on the one hand, the impugned Order/letter provides financial aid for performing religious activities in the temples during Navratri, however, on the other hand, the State has not made any provision for Muslims during holy month of Ramzan which, this year, starts simultaneously with start of Shri Ram Navami and accordingly, in the views of the petitioner, such action on the part of the State is discriminatory. Shri Moti Lal Yadav, the petitioner in person further argues that Articles 25, 26, 27 and 28 of the Constitution of India protect every citizen of India from being compelled to pay any tax and prohibits State in participation of any religious authority. It has also been argued that Part - III and Part - IV of the Constitution of India cast a duty on the State Government to provide protection to every citizen while he follows/ propagates his religion. However, the Constitution does not make any provision for the State to propagate any particular religious activity.

6. Shri Yadav has also submitted that the impugned Government Order/Letter is beyond the administrative authority/functions of the State in terms of the provisions contained in List II and List III of Schedule VII of the Constitution of India and that the State cannot take shelter in the 'residuary power' clause as the same is available only with the Parliament and not with the State Legislative.

7. It has been further argued that the Parliament has consciously included the word 'Secular' in the Preamble of the

Constitution of India and as such, as per the Scheme of the Constitution of India, neither the State Government nor the Central Government can be permitted to propagate any religious activity, however, protection of religious activities of the people is moral and constitutional obligation of the State. The petitioner has further emphasized that the impugned Government Order/Letter has clearly violated Article 27 of the Constitution of India which enunciates Right of Freedom as to payment of taxes for promotion of any particular religion and forbids the State from compelling any person to pay any taxes, proceeds of which are specially used in payment of expenses for the promotion or maintenance of any religion or religious denomination.

8. On the basis of the aforesaid submissions and arguments made by the petitioner, it has been urged that the impugned Government Order/Letter being violative of the Constitutional Scheme, specifically Article 27 of the Constitution of India deserves to be quashed.

9. On the other hand, Sri Amitabh Rai, learned Counsel representing the State respondents has submitted that the instant Public Interest Litigation is highly misconceived for the reason that by issuing the impugned Government Order/Letter, the State Government is not seeking to propagate any religious activity. His submission is that it is the responsibility of the State to protect the cultural ethos of the society and on account of various cultural activities on the occasion of festivals a large number of tourists and devotees gather and participate which ultimately augments the State-revenue. It has also been stated by Shri Rai that various cultural heritages have been included in the list of Cultural Heritage maintained by United Nations Economic, Social and Cultural Organization (UNECSO) and such list maintained by UNESCO contains Yoga, chanting of Vedic Mantras, Durga Puja, Kumbh Mela, Ramlila, Sankirtana, Garba, Buddhist Chanting and Kalbelia. Shri Rai has further argued that making arrangement of sanitation, drinking water, security, light, sound and laying of Durries at such sites do not amount to propagation of religion. He has further submitted that the amount of Rs.1,00,000/- per district under the impugned Government Order/Letter, is to be paid not to the priests of the temples, but to the Artists/Performers through District Tourist and Culture Council.

10. In substance, submission of the learned State Counsel is that the impugned Government Order has been misread and misconstrued by the petitioner as the same does not contain any direction or instruction to promote any religious activity or propagate any religion. He, thus, submits that the instant Public Interest Litigation is liable to be dismissed at its threshold.

11. We have thoughtfully considered the submissions made by the respective parties.

12. Thrust of the argument of the petitioner is based on the provisions contained in Article 27 of the Constitution of India which is extracted here-in-below:-

"27. Freedom as to payment of taxes for promotion of any particular religion. -- *No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance*

of any particular religion or religions denomination."

13. The other argument raised by the petitioner is that by issuing the impugned Government Order/Letter, the State is indulging in propagation of a particular religion which in view of the Scheme of the Constitution and the State being a Secular State, is impermissible.

14. Article 27 of the Constitution of India mandates that no person can be compelled to pay any taxes which can be utilized for payment of expenses for promotion or maintenance of any particular religion or religious denomination.

15. Article 27 of the Constitution of India has been the subject matter of consideration by Hon'ble Supreme Court in the case of ***'The Commissioner, Hindu Religious Endowments, Madras vs. Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [AIR 1954 SC 282]'.*** The Constitution Bench of the Hon'ble Supreme Court comprising of Six Hon'ble Judges in the aforesaid case has held that what is not permissible under Article 27 of the Constitution of India is the specific apportionment of the proceeds of any tax in payment of expenses for promotion or maintenance of any particularly religion or religious denomination. Hon'ble Supreme Court further held that the reason underlying the provision is obvious and that India being a secular State and there being freedom of religion guaranteed by the Constitution, both to the individuals and to groups, it is against the policy of the Constitution to pay out of public funds and money for promotion or maintenance of any particular religion or religious denomination. Para - 50 of the judgment in the case of ***The Commissioner, Hindu Religious Endowments, Madras (supra)*** is relevant and is extracted here-in-below:-

"(50) In view of our decision on this point, the other ground hardly requires consideration. We will indicate, however, very briefly our opinion on the second point raised. The first contention, which has been raised by Mr. Nambiar in reference to article 27 of the Constitution is that the word "taxes", as used therein, is not confined to taxes proper but is inclusive of all other impositions like cesses, fees, etc. We do not think it necessary to decide this point in the present case, for in out opinion on the facts of the present case, the imposition, although it is a tax, does not come within the purview of the latter part of the article at all.

What is forbidden by the article is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The reason underlying this provision is obvious. Ours being a secular State and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups, it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination. But the object of the contribution under section 76 of the Madras Act is not the fostering or preservation of the Hindu religion or any denomination within it. The purpose is to see that religious trusts and institutions, wherever they exist, are properly administered. It is a secular administration of the religious institutions that the legislature seeks to control and the object, as enunciated in

the Act, is to ensure that the endowments attached to the religious institutions are properly administered and their income is duly appropriated for the purposes for which they were founded or exist. There is no question of favouring any particular religion or religious denomination in such cases. In our opinion, article 27 of the Constitution is not attracted to the facts of the present case."

16. **Examining the validity of Section 76 of Madras Hindu Religious and Charitable Endowments Act, 1951 (here-in-after referred to as the 'Act, 1951'), it has been observed by Hon'ble Supreme Court in the said case that Section 76 of the Act, 1951 was not the fostering or preservation of the Hindu Religion or any denomination; rather, the purpose of enacting Section 76 of the Act, 1951 was to see that Religious Trusts and Institutions are properly administered and that it is the Secular Administration of the religious institutions that the Legislature sought to control and object of the said provision was to ensure the endowments and religious institutions are properly administered and their income is duly appropriated for the purpose for which they exist.**

(Emphasis supplied by Court)

17. We may notice that by enacting Section 76 of the Act, 1951, the Legislature of the then Madras State had made compulsory for all religious institutions to pay annually to the Government a contribution not exceeding five percent of their income on account of services rendered by the Government and their Offices functioning under the said Act. The challenge was first considered by the Hon'ble Madras High Court which held that the provision for compulsory contribution available in Section 76 of the Act, 1951 came within the mischief of Article 27 of the Constitution of India. However, reversing the view of Hon'ble Madras High Court, the Constitution Bench of Hon'ble Supreme Court in the case of ***The Commissioner, Hindu Religious Endowments, Madras (supra)*** found that such amount payable under Section 76 of Act, 1951 to the Government was not to be appropriated to meet the expenses for promotion of united religion; rather, it was utilized for the secular administration of religious institutions. Thus, under the Scheme of our Constitution which will include operation of Article 27 of the Constitution of India as well, what is prohibited and forbidden is that the State will not indulge in any religious activity either for maintenance or for propagation of religion. However, so far as the secular activity relating to a religion is concerned, in our considered opinion, there does not appear to be any bar for the State to undertake such secular activity which may be essential for making the followers of a particular religion or religious denomination realize their right of freedom of conscience, practice, propagation or professing religion.

18. We need to clearly draw distinction between a **"religious activity"** leading to maintaining or propagating a particular religion or religious denomination and a **"secular activity"** undertaken by the State to provide for certain conveniences at religious gatherings.

19. As observed above, what is prohibited for the State is indulgence in religious activity or the activities

amounting to propagation of any religion or religious denomination and not a secular activity. When we examine the impugned Government Order/Letter dated 10.03.2023 issued by the State Government in the Department of Culture what we find is that the provision for spending Rs.1,00,000/- per district has been made not for any religious activity or for promotion of any religion or religious denomination; rather, the said amount has been provided for being paid honorarium to the performers/Artists who will be performing during the programmes through the District Tourist and Culture Council, as mentioned in the impugned Government Order/Letter.

20. It is also to be clearly noted that the State by issuing the impugned Government Order/Letter has not entrusted the said amount to anyone related to religious activity, such as, priest of a temple or anyone related with management of a temple. The amount of Rs.1,00,000/- has rather been entrusted with the District Tourist and Culture Council, that too, not to be appropriated for any religious activity, but to pay honorarium to the performers/Artists.

21. We also notice that one of the purposes for which the Government Order dated 10.03.2023 has been issued is to publicize different development works and development of basic amenities by the Tourist Department and other departments of the State Government at the temples. It is common knowledge that on the occasion of Navratri Puja/Shri Ram Navami, large number of gathering at temples take place and if the State is making a provision for putting up hoardings or adopting other publicity modes in print media for publicizing its developmental works, in our considered opinion, such an act of the State Government does not amount to propagation of any religion or religious denomination.

22. We are of the unambiguous opinion that payment of honorarium by the State to the Artists/Performers at the programmes, though organized at the site of the temples or Melas during Shri Ram Navami, does not amount to indulgence of the State in propagation of any religion or religious denomination. It is a simple secular activity of the State while it indulges in publicizing the developmental works undertaken by the State.

23. As observed above, the impugned Government Order/Letter does not make any provision for payment of any amount to any person, be it a Priest in a Temple or anyone else associated with the activities of the Temple; rather, the amount is to be paid to the performers/Artists who may be performing on such occasions. The Government Order, thus, in our opinion does not provide for any State activity relating to maintenance or propagation of any religion or religious denomination.

24. At this juncture, we may have a reference of a judgment of Hon'ble Supreme Court in the case of ***'Prfaull Goradia v. Union of India [(2011) 2 SCC 568]',*** wherein the constitutional validity of Haj Committee Act, 1959 which was replaced by the Haj Committee Act, 2002, was challenged on the ground of violation of Article 27 of the Constitution of India as well by stating that part of proceeds of the taxes being paid by the citizens was used for providing subsidy for Haj pilgrimage which is done by Muslims. Hon'ble Supreme Court did not agree with the submission based on Article 27 of the Constitution of India and not only

dismissed the writ petition but also observed that we must not be too rigid in such matters and must give some free play to the joints of the State machinery. Hon'ble Supreme Court further held that if a small part of tax collected is utilized for providing some conveniences or facilities or concessions to any religious denomination, that will not be violative of Article 27 of the Constitution of India.

25. Thus, if the State spends some money out of the taxes/revenue collected by it from the citizens and appropriates some amount for providing some conveniences or facilities to any religious denomination it will not be violative of Article 27 of the Constitution of India. While observing this, we have to always keep in mind that there exits a clear line of distinction between a secular activity and religious activity which may be undertaken by the State, like providing conveniences and facilities and indulgence of a State in maintenance and propagation of religion or religious denomination.

26. We may also make a reference to yet another judgment of Hon'ble Supreme Court in the case of ***State of Gujarat and another v. Islamic Relief Committee, Gujarat and others [(2018) 13 SCC 687].*** Dealing with a situation of damage, destruction and desecration of religious places and institutions in communal riots, Hon'ble Supreme Court repelled the submissions raised on behalf of the State that the State cannot be commanded to repair or restore the places of worship as any such act on the part of the State shall create a dent in the secular fabric of our society. Hon'ble Supreme Court further repelled the submissions made on behalf of the State that the expenditure in such a situation for repair and restoration of any place of worship is impermissible in view of Article 27 of the Constitution. Accordingly, a Scheme for such purpose was approved by Hon'ble Supreme Court which permitted the State to undertake repair and restoration of places of worship which were damaged, destructed and desecrated during communal riots.

27. For the reasons aforesaid, we find that the petitioner in this case has completely misread the provisions of Government Order/Letter dated 10.03.2023. We are, thus, not persuaded to interfere in the P.I.L. which is hereby ***dismissed***.

28. However, there will be no order as to costs.

(2023) 4 ILRA 1212
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.03.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ-A No. 1768 of 2013

Mukesh Kumar Yadav ...Petitioner
Versus
Union of India ...Respondent

Counsel for the Petitioner:
M.P. Raju, Gyanender Singh, Pt. Surya Kumar Awasthi, Sanjeev Kumar Pandey, Vimal Kumar Pandey

Counsel for the Respondent:
A.S.G., Ajay Kumar Singh, Nandita Bharti, Raj Kumar Singh, Rajeev Singh Chauhan

A. Civil Law - Termination of Probationer - Natural Justice - Constitution of India, Article 311 - Central Civil Services (Temporary Service) Rules, 1965, Rule

5(1) - Termination of temporary service - Services of a temporary government servant are liable to termination at any time by a notice in writing given by the appointing authority to the government servant. Protection under Article 311(2) of the Constitution of India is available to probationers and temporary employees in the event that a termination order is by way of punishment and is punitive or stigmatic in nature. The tests to determine whether, in substance, an order of termination is punitive are to see whether prior to the termination there was (a) a full-scale formal enquiry, (b) into allegations involving moral turpitude or misconduct, (c) which culminated in a finding of guilt. If all three factors are present, the termination is considered punitive irrespective of the form of the termination order. Conversely, if any one of the three factors is missing, the termination is non-punitive.

B. In this case, petitioner was appointed on temporary basis. His appointment order clearly stated that the petitioner's service was purely temporary and could be terminated at any time without assigning any reason, by giving him one month's notice. Petitioner, after his appointment, remained unauthorizedly absent, without intimation or permission, for 22 days within the initial three months of his service. He left the police line/camp without any prior intimation to his superior authorities. A one-month notice for termination of the petitioner's service was issued vide letter dated 30.11.2011, and the petitioner was terminated from service effective 31.12.2011 upon completion of the one-month notice period. Held : The termination order showed that it was a termination simpliciter. No charges were framed against the petitioner. The termination order was not stigmatic, and no punitive or penal consequences flowed from the termination order. Terminating the services of the petitioner, in the exercise of the employer's right to dispense with the services of an employee within the probation period, would not make an otherwise innocuous order of discharge or termination punitive in nature. (Para 14)

Dismissed. (E-5)

List of Cases cited:

1. Purushotam Lal Dhingra Vs U.O.I AIR 1958 SC 36

2. Chandra Prakash Shahi Vs St. of U.P. & ors. 2000 (5) SCC 152

3. V.P. Ahuja Vs St. of Pun. & ors. 2000 SCC (3) 239

4. U.O.I. & ors. Vs Mahaveer C. Singhvi 2010 SCC (8) 220

5. St. of Pun. & ors. Vs Sukhwinder Singh (2005) 5 SCC 569

6. Pavanendra Narayan Verma Vs Sanjay Gandhi P.G.I. of Medical Sciences & anr. (2002) 1 SCC 520

7. U.O.I. & anr. Vs K. Balakrishnan Kani 1990 (Supp) SCC 283

8. Champaklal Chimanlal Shah Vs U.O.I. 7 (1964) 5 SCR 190: AIR 1964 SC 1854

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

1. Heard Shri Sanjeev Kumar Pandey, learned Counsel for the petitioner as well as Ms. Alina Masoodi, Advocate holding brief of Shri Raj Kumar Singh, learned Counsel for the respondents.

2. Through this petition under Article 226 of the Constitution of India, the petitioner has challenged the order of termination dated 30.12.2011 passed by the Commandant, 91st Battalion, Group Kendra, Central Reserve Police Force, District Lucknow (opposite party no.4) contained as Annexure-1 to the writ

petition and the appellate order dated 14.11.2012 passed by the Inspector General of Police, Central Sector, Central Reserve Police Force, Lucknow (opposite party no.2) contained as Annexure-2 to the writ petition. The petitioner is also seeking a writ of Mandamus directing the opposite parties to reinstate him in service on the post of Constable with effect from the date of termination from service i.e. on 3.11.2012 with all consequential benefits.

3. The brief facts of the case are that the petitioner was appointed on the post of Constable by means of order dated 20.8.2011. This appointment order clearly stated that petitioner's service is purely temporary in nature and can be terminated at any time without assigning any reason by giving him one month notice. The petitioner was enlisted on a temporary basis as Constable w.e.f. 16.8.2011.

On 4.11.2011, at about 20:45 hours, the petitioner left the police line/camp without any prior intimation, notice and permission of his superiors/competent authority. The petitioner remained absent from 4.11.2011 till 25.11.2011 for 22 days and reported at his own convenience on 26.11.2011 at 09:00 hours. The petitioner, while reporting back on 26.11.2011 at 09:00 hours, has not provided any supporting documents along with his report dated "Nil' wherein he stated that he went to take care of his ailing father. Therefore, the petitioner's services were terminated in exercise of the provisions contained in Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965 by means of impugned order dated 30.12.2011 and prior to it, one month's notice was issued to him vide letter no.P.VIII.21/2011-EC-II dated 30.11.2011 through Deputy Commandant (Administration), GC,CRPF, Bijnore, Lucknow (U.P.).

Aggrieved by the afroresaid termination order dated 30.12.2011, the petitioner filed an appeal before the Appellate Authority, which was considered and was rejected being time barred by the Appellate Authority vide letter No. R.XIII.33/2012-CS-Adm-3 dated 14.11.2012.

Against the aforesaid termination order dated 30.12.2011 and appellate order dated 14.11.2012, the petitioner has filed the present petition.

4. Submission of learned counsel for the petitioner is that prior to terminating the services of the petitioner, no reason has been assigned. According to him, termination is a major penalty and it cannot be passed without giving opportunity of hearing and without holding an enquiry. Therefore, the impugned termination order dated 30.12.2011 is violative of Article 21 of the Constitution of India and also violative of Article 311 of the Constitution of India. His submission is that in case the termination order is not quashed, it will take away the right of livelihood of an employee. The impugned order has been passed *de horse* the principles of natural justice and it has also not been passed in accordance with relevant Rules. He also submitted that the Appellate Authority, while passing the impugned appellate order dated 14.11.2012, has also not considered the matter to the aforesaid effect.

5. Learned Counsel for the petitioner, in support of his contention, has relied upon the decisions of Hon'ble Supreme Court reported in AIR 1958 SC36, **Purushotam Lal Dhingra vs. Union of India;** 2000 (5) SCC 152, **Chandra Prakash Shahi vs. State of U.P. and**

others; 2000 SCC (3) 239, **V.P. Ahuja Vs. State of Punjab and others** and 2010 SCC (8) 220, **Union of India and others vs. Mahaveer C. Singhvi.**

6. *Per contra*, Ms. Alina Masoodi, learned counsel for the respondent/Union of India submits that as per the admitted position, the petitioner was a temporary employee and had barely completed 3 months of service as a Constable. Since the right exists under contract or service rules to terminate services of a probationer or a temporary employee, the employer in exercise of the said right, terminated the services of an employee. Since the petitioner was appointed on a temporary basis, which is evident by his appointment letter dated 20.08.2011, the employer or the competent authority had a right to terminate the services of the petitioner by giving him one month's notice. She has submitted that the petitioner's services were terminated from service in exercise of the provisions contained in Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965 w.e.f. 31.12.2011 after completion of the one month's notice period. In such circumstances, the motive operating on the mind of the employer is wholly irrelevant.

7. Learned Counsel for the respondents has further submitted that admittedly, no charges were framed against the petitioner; no stigmatic or punitive order was passed against the petitioner; no preliminary or departmental enquiry was conducted against the petitioner; and no punitive or penal consequences flowed from the order of termination. The order of termination was termination simplicitor to ensure that the petitioner could find other means of employment and not to bar him from any future prospects of employment. Thus, the impugned termination order is not stigmatic or punitive in nature.

8. Learned Counsel for the respondents has also submitted that the protection under Article 311(2) of the Constitution of India is available to probationers and temporary employee in the event that a termination order was by way of punishment and punitive and stigmatic in nature, which is not the present case. As per Rules, the competent authority, in the present case, had a right to terminate the services of the petitioner as long as he was a temporary employee and had not completed 3 years of service by giving him one month's notice period and this procedure was admittedly followed in the present case and his termination simplicitor has been passed pursuant to Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965 as well as his appointment order dated 20.08.2011.

9. It is next submitted that the distinction between temporary employees/probationers and permanent employees would be completely obliterated if protection afforded by Article 311 (2) of the Constitution of India is afforded to all. It is submitted that the whole purpose of probation and being a temporary employee is that it gives the superior authority the chance to judge the suitability of a temporary employee as to whether he meets all requirements of the job and he should be made permanent or not.

10. In support of his submission, learned Counsel for the respondents has relied upon the judgments of Hon'ble Supreme Court reported in (2005) 5 SCC 569, **State of Punjab and others vs. Sukhwinder Singh;** (2002) 1 SCC 520, **Pavanendra Narayan Verma vs. Sanjay**

Gandhi P.G.I of Medical Sciences and Another; 1990 (Supp) SCC 283, **Union of India and another vs. K.Balakrishnan Kani;** and (1964) 5 SCR 190: AIR 1964 SC 1854, **Champaklal Chimanlal Shah vs. Union of India.**

11. I have considered the arguments advanced by learned Counsel for the parties.

12. A perusal of the appointment order of the petitioner shows that the petitioner was appointed on temporary basis and his services were terminable at any time by giving him one month's notice. It is not in dispute that the petitioner, after his appointment, remained absent without any intimation or permission unauthorizedly from 4.11.2011 to 25.11.2011 for a period of 22 days within the initial three months of his service. He left the police line/camp without any prior intimation to his superior authorities and even when he reported back on 26.11.2011, no supportive documents along with his representation have been given by the petitioner. Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965 is extracted below:-

" 5. Termination of temporary service.

(1) (a) The services of a temporary Government servant shall be liable to termination at any time by a notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant;"

13. After the petitioner reported for duty on 26.11.2011 from his unauthorized absence, one month's notice for termination of service of the petitioner was issued vide letter dated 30.11.2011 to him and the petitioner was terminated from service w.e.f. 31.12.2011 on completion of period of one month's notice. The termination order dated 31.12.2011 is extracted below:-

(सेवा समाप्ति नोटिस)

केन्द्रीय सिविल सेवा (अ ाई नियमार ली 1965) के नियम के उप नियम (1) के साथ पठित केन्द्रीय रिजर्व पुलिस बल नियमावली 1938 के नियम 16 एवं परिशिष्ठ एक (10) के नीचे नोट-2 के अनुसरण में, मैं ज्ञानेन्द्र कुमार कनान्डेण्ट, ग्रुप केन्द्र, के०रि०पु०बल, लखनऊ (उत्त), इस ग्रुप केन्द्र के बल संख्या - 115182734 रिकूट (जी०डी०) मुकेश कुमार यादव को एतदद्वारा इस आशय का नोटिस देता है कि उसकी सेवाएं यह नोटिस जारी हो के तारीख से एक माह समाप्त होने की तारीख से समाप्त कर दी जाएगी।

14. A perusal of the impugned termination order shows that it is a termination simplicitor. No charges were framed against the petitioner. The termination order is not stigmatic or punitive. No preliminary or departmental enquiry has been conducted and no punitive or penal consequences flowed from the order of termination.

15. Hon'ble Supreme Court in the case of **State of Punjab and others vs. Sukhwinder Singh** (supra), in paragraphs 19 and 20, has held that superior authorities of the departments have to take work from an employee and they are the best people to judge whether an employee should be continued in service and made a permanent employee or not having regard to his performance, conduct and overall suitability for the job. The probationer is on test and a temporary employee has no right to the post. Relevant paragraphs 19 and 20 of the judgment are extracted below:-

"19. It must be borne in mind that no employee whether a probationer or temporary will be discharged or reverted, arbitrarily, without any rhyme or reason.

Where a superior officer, in order to satisfy himself whether the employee concerned should be continued in service or not makes inquiries for this purpose, it would be wrong to hold that the inquiry which was held, was really intended for the purpose of imposing punishment. If in every case where some kind of fact finding inquiry is made, wherein the employee is either given an opportunity to explain or the inquiry is held behind his back, it is held that the order of discharge or termination from service is punitive in nature, even a bona fide attempt by the superior officer to decide whether the employee concerned should be retained in service or not would run the risk of being dubbed as an order of punishment. The decision to discharge a probationer during the period of probation or the order to terminate the service of a temporary employee is taken by the appointing authority or administrative heads of various departments, who are not judicially trained people. The superior authorities of the departments have to take work from an employee and they are the best people to judge whether an employee should be continued in service and made a permanent employee or not having regard to his performance, conduct and overall suitability for the job. As mentioned earlier a probationer is on test and a temporary employee has no right to the post. If mere holding of an inquiry to ascertain the relevant facts for arriving at a decision on objective considerations whether to continue the employee in service or to make him permanent is treated as an inquiry "for the purpose of imposing punishment" and an order of discharge or termination of service as a result thereof "punitive in character", the fundamental difference between a probationer or a temporary employee and a permanent employee would be completely obliterated, which would be wholly wrong.

"20. In the present case neither any formal departmental inquiry nor any preliminary fact finding inquiry had been held and a simple order of discharge had been passed. The High Court has built an edifice on the basis of a statement made in the written statement that the respondent was habitual absentee during his short period of service and has concluded therefrom that it was his absence from duty that weighed in the mind of Senior Superintendent of Police as absence from duty is a misconduct. The High Court has further gone on to hold that there is direct nexus between the order of discharge of the respondent from service and his absence from duty and, therefore, the order discharging him from service will be viewed as punitive in nature calling for a regular inquiry under Rule 16.24 of the Rules. We are of the opinion that the High Court has gone completely wrong in drawing the inference that the order of discharge dated 16.3.1990 was, in fact, based upon the misconduct and was, therefore, punitive in nature, which should have been preceded by a regular departmental inquiry. There cannot be any doubt that the respondent was on probation having been appointed about eight months back. As observed in Ajit Singh and others etc. vs. State of Punjab and another (supra) the period of probation gives time and opportunity to the employer to watch the work ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserves a right to dispense with his service without anything more during or at the end of the prescribed period, which is styled as period of probation. The mere holding of preliminary inquiry where explanation is called from an employee would not make an otherwise innocuous order of discharge or termination of service punitive in nature.

Therefore, the High Court was clearly in error in holding that the respondent's absence from duty was the foundation of the order, which necessitated an inquiry as envisaged under Rule 16.24(ix) of the Rules".

16. In the case of **Union of India and another vs. K. Balakrishnan Kani (supra),** where the services of Peon in the Custom department on a temporary post were terminated after a couple of months of service under Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965, it was held that since there is no indication of any stigma in the order of termination, quotation of rule in the impugned termination order should have been taken as a sufficient reason and nothing more should have been looked for.

17. Likewise in the case of **Pavanendra Narayan Verma (supra),** Hon'ble Supreme court in paragraphs 21 and 22 held as under:-

"21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct (c) which culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.

22.The three factors are distinguishable in the following passage in Shamsher Singh v. State of Punjab (supra) where it was said:(SCC p. 851, para 64)

"64. Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection."

(Emphasis supplied)

18. So far as judgement of Purushotam Lal Dhingra (supra) is concerned, in that case, adverse remarks against the appellant in the confidential report were made and communicated to the appellant and thereafter he was punished by reducing in rank without any opportunity to show cause against the action proposed to be taken in that regard to him, then, it was held by Hon'ble Supreme Court that the order was invalid or non-compliance of provisions of Article 311 of the Constitution of India. The facts of this case is entirely different from the peculiar facts of the case in hand as herein, no remarks or stigma has been made in the impugned order of termination.

19. Likewise in the case of Chandra Prakash Shahi (supra), the termination preceeded by a preliminary enquiry in which appellant was found involved in incident of quarrel, hence it was held that termination was founded upon misconduct and, therefore, punitive. The facts of this case is also distinguishable from the present case.

20. In the case of **V.P. Ahuja (supra),** the impugned order was ex facie found to be stigmatic and also punitive. The order was passed on the ground that the appellant failed in discharging his duties administrively and technically. Then it was held that termination order could not have been passed without holding regular enquiry and the termination was held to be punitive, which is not the case in the present case.

21. Hon'ble Supreme Court in **Sukhwinder Singh (supra)** has held that the superior authorities of the department has to take work from employee and they are the best people to judge whether an employee should be continued in service and made a permanent employee or not. The probationer is on test and a temporary employee has no right to the post.

22. In the present case, the petitioner was on probation; he was appointed just three months' back; he was unauthorizedly absent from duty for a period of 22 days, therefore, the competent authority has rightly terminated the services of the petitioner under Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965 after giving one month's notice by a simplicitor order, which is neither punitive in nature nor stigmatic. Terminating the services of the petitioner in exercise of employer's right to dispense with the services of such employee within a period of probation, would not make an otherwise innocuous order of discharge or termination of service punitive in nature.

23. In view of the aforesaid, no interference is required in the impugned order of termination and impugned appellate order.

24. The petition being devoid of merit is **dismissed**.

(2023) 4 ILRA 1219
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Second Appeal No. 2019 of 1978

Gokul Ram & Ors. ...Appellant
Versus
Shiv Jokhan Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri S.L. Yadav, Sri P.K. Dubey, Sri Prabhat Kumar, Sri Siddharth Niranjan, Sri D.P. Singh(Sr. Adv.)

Counsel for the Respondents:
Sri Amish Kumar Srivastava, Sri Manish Dev Singh, Sri R.N. Singh, Sri S.N. Singh

A. Civil Law - Sale Deed by Natural Guardian - Voidable Sale Deed - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, S. 331 - Civil Court versus Revenue Court Jurisdiction - Civil Court had exclusive jurisdiction to decide the suit for cancellation of the voidable sale deed executed by natural guardian - Uttar Pradesh Tenancy Act, 1939, S. 9(1) - Hindu Women's Right to Property Act, 1937, S. 3(1) - United Provinces Hindu Women's Rights to Property (Extension to Agricultural Land) Act, 1942, Section 2 - U.P. Zamindari Abolition and Land

Reforms Act (U.P.Z.A. & L.R. Act), 1950, Ss. 4, 171 – U/s 9(1) of the Uttar Pradesh Tenancy Act, 1939, the rights of a sir-holder in agricultural land were governed by the personal laws of the deceased. S. 3(1) of the Hindu Women's Right to Property Act, 1937, provides that a Hindu widow can inherit her husband's property but only with a limited (life) interest. This right was extended to agricultural land by the 1942 Act. Upon the vesting of property u/s 4 of the U.P.Z.A. & L.R. Act on 01.07.1952, successors of a woman holding a life interest as a widow prior to the date of vesting is determined as per S. 171 of the U.P.Z.A. and L.R. Act. S. 171 was amended by Act No. XVI of 1953, and it added sisters' son among the list of successors.

B. In the present case, Deep Narain died issue-less on 18.08.1950. He was survived by his widow Phool Kumari, who inherited his interest in the disputed land. After the vesting of the property on 01.07.1952, Phool Kumari became the owner (bhoomidhar). A sale deed dated 18.02.1963 was executed by Smt. Jai Raji (Mst. Phool Kumari's sister), as guardian of her minor sons, for the property inherited from Phool Kumari. Minor sons, upon attaining majority, filed a suit for cancellation of the sale deed. Civil Court decreed the suit, holding that the sale deed was without any authority as the vendor, namely Smt. Jai Raji, never inherited the property in dispute. Appellant's case was that only the Revenue Court would have jurisdiction to hear the case. Held: The sale deed dated 18.02.1963 was voidable at the option of the minors. Sale deed could not be ignored by the Revenue Court. Civil Court had exclusive jurisdiction to decide the suit for cancellation of the said sale deed, and the Revenue Court could not make a declaration against it until such a challenge was raised. Only Deep Narain's sisters' sons would have inherit the property on death of Mst. Phool Kumari and not his sisters. (Para 14)

Dismissed. (E-5)

List of Cases cited:

1. Narendra Kumar Mittal & ors. Vs M/s. Nupur Housing Development Pvt. Ltd. & anr., 2019 (144) RD 785

2. Shri Ram & anr. Vs Ist Addl. Distt. Judge & ors.; (2001) 3 SCC 24

3. Ram Awalamb Vs Jata Shankar; AIR 1969 Allahabad 526

4. Ram Padarath & ors. Vs Second Addl. District Judge, Sultanpur & ors.; 1989 (1) AWC 290 (All).

5. Nangali Amma Bhavani Amma Vs Gopalkrishnan Nair; (2004) 8 SCC 785

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard learned counsel for the appellants and learned counsel for the respondents.

2. Present second appeal is filed against the judgment and decree dated 18.4.1978 passed by the IVth Additional District Judge, Jaunpur in Civil Appeal No.8 of 1978 affirming the judgment and decree dated 10.12.1973 passed in Original Suit No.222 of 1970.

3. The facts of the case, in brief, are that Sri Deep Narain was Sir holder of an agricultural land. He died issue-less on 18.8.1950 and, hence, the property was inherited by his wife Mst. Phool Kumari. Though there was a dispute with regard to the date of death of Mst. Phool Kumari, as plaintiffs-respondents claimed that date of death is 12.8.1954 while the defendants-appellants claimed that date of death is after 10.10.1954, but both the courts have given finding of fact that she died on 12.8.1954. The said finding is on the basis of a substitution application filed after the death of Mst. Phool Kumari in an earlier

proceeding before the High Court and, hence, is not disputed before this Court during course of arguments by the appellants.

4. Sri Deep Narain and Mst. Phool Kumari died issueless. Sri Deep Narain, late husband of Mst. Phool Kumar had three sisters, namely, Smt. Jai Raji, Smt. Subh Raji and Smt. Hub Raji. Two sons, namely, Shiv Jokhan and Faujdar were born of Smt. Jai Raji and her husband Raj Narain, Ram Samujh and Sumer Singh were born of Mst. Subh Raji and Hakim Singh was born of Mst. Hubraji. All of them were born before the death of Mst. Phool Kumari, i.e., before 12.8.1954. By a sale-deed dated 18.02.1963, Smt. Jai Raji alongwith her husband Raj Narain and Smt. Subhraji sold the property in dispute, on their own behalf and as guardian of their minor sons who were born by that time, which came by way of succession from Mst. Phool Kumari. Minor sons, Shiv Jokhan, Faujdar and Ram Samujh, on becoming major filed a suit before the Civil Court for cancellation of the said sale deed by Original Suit No.222 of 1970. The Civil Court decreed the suit holding that the sale deed was without any authority as none of the vendors namely Smt. Jai Raji, Mst. Subh Raji and Sri Raj Narain ever inherited the property in dispute. The Appellate Court thereafter affirmed the said finding and dismissed the appeal.

5. Learned counsel for the defendant-appellant in the said background has raised two substantial questions of law;

(i) whether the Trial Court and the Appellate Court have wrongly applied the law of succession; and

(ii) whether the suit is barred by Section 331 of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the U.P.Z.A. and L.R. Act) and it is only the Revenue Court that would have jurisdiction to hear the case.

6. So far as the issue of succession is concerned, there are two parts to it viz. (i) whether Phool Kumari could succeed her husband's Sir rights in an agricultural land and if the answer to the first part is affirmative then (ii) who would succeed Phool Kumari's interest after her death. Now coming to the first part, the death of Late Deep Narain took place on 18.8.1950 i.e. before coming into force of U.P.Z.A. and L.R. Act which was given assent by the President on 24.1.1951. Prior to the enactment of the U.P.Z.A. and L.R. Act, succession of rights of a Sir holder in an agricultural land was governed by Section 9(1) of the Uttar Pradesh Tenancy Act, 1939. Section 9(1) of the said Act reads,

*"**Section 9:** Succession to, and transfer of, sir right-*
(1) On the death of a sir-holder sir right shall not devolve except in accordance with the personal law to which the deceased was subject."

Thus rights of a Sir holder in an agricultural land shall devolve as per the relevant personal laws at that time. It is not disputed that Deep Narain died issueless and was survived by his widow Phool Kumari. At that time a Hindu widow could succeed her husband's rights in a property as per the Section 3(1) of the Hindu Women's Right to Property Act, 1937 (hereinafter referred to as the Act of 1937). However as per sub-section 3(3) such devolution shall be only be a life interest. Section 3(1) and 3(3) of the Act of 1937 reads,

*"**3. Devolution of property.-** (1) When a Hindu governed by the Dayabhag School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of subsection (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:*

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son:

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

.....

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

Thus a Hindu widow could succeed the property rights of her deceased husband, but the same was limited interest i.e., only a life interest. The Act of 1937 was a federal legislation and therefore agricultural land was out of its ambit as under the Government of India Act, 1935, only Provincial Government was competent to legislate on matters pertaining to agricultural lands. However, in 1942 the Provincial Government of United Provinces enacted the United Provinces Hindu Women's Rights to Property (Extension to Agricultural Land) Act, 1942 (hereinafter referred to as the Act of 1942) to also include agricultural land within the meaning of the word "property' in Section 3(1) of the Act of 1937. Section 2 of the Act of 1942 reads,

*"**2. Extension of Act XVIII of 1937 and Act XI of 1938 to Agricultural land. -** The term "property" in the Hindu Women's Rights to Property Act 1937, and Hindu Women's Rights to Property (Amendment) Act, 1938; shall include and shall be deemed always to have included agricultural land :*

Provided that where any person who, but for this Act, would have been entitled to any property, has been in possession or has made a transfer thereof, his possession till the commencement of this Act shall be deemed to be as lawful, and the transfer made by him shall be deemed to be as valid as if this Act had not been passed : and

Provided further that nothing in this Act shall affect any rule of succession prescribed for tenant's rights in agricultural land by any special law for the time being in force."

A joint reading of the aforesaid provisions therefore confirms the finding of both the Trial Court and First Appellate Court that Phool Kumari succeeded her husband's interest in the land in dispute after his death.

7. The next question that arises is the successor of Phool Kumari. Section 4 of the U.P.Z.A. and L.R. Act which vests the property was enforced from 1.7.1952. Thus, after the vesting, Mst. Phool Kumari became bhoomidhar of the property in dispute under the U.P.Z.A. and L.R. Act. Succession under the U.P.Z.A. and L.R. Act with regard to a woman holding a life interest as a widow since prior to the date

of vesting is provided under Section 172(2)(a)(i) of the Act. The said Section at the time of coming into force of U.P.Z.A. and L.R. Act reads as follows:

*"**172. Succession in the case of a woman holding an interest inherited as a widow, mother, daughter, etc. -***

.....

(2) Where a bhumidhar or sirdar who has before the date of vesting inherited an interest in any holding as a widow, mother, step-mother, father's mother, daughter, sister or step-sister-

(a) dies, and such bhumidhar or sirdar was on the date immediately before the said date an intermediary of the land comprised in the holding, or held the holding as a fixed-rate tenant, or an ex-proprietary or occupancy tenant in Avadh, or as a tenant on special terms in Avadh and

(i) she was in accordance with the personal law applicable to her entitled to a life estate only in the holding, the holding shall devolve upon the nearest surviving heir (such heir being ascertained in accordance with the provisions of section 171) of the last male intermediary or tenant aforesaid; and if....."

8. Successors of a woman holding a life interest as a widow prior to the date of vesting will therefore be determined as per provisions of Section 171 of the U.P.Z.A. and L.R. Act. The original Section 171 reads as follows:

*"**171. General order of successions-** Subject to the provisions of sections 169 and 173, when a bhumidhar, sirdar or asami being a male dies, his interest in his holding shall devolve in accordance with the order of succession given below:*

(a) male lineal descendants in the male line of descent :

Provided that the son or sons of a pre-deceased son how-low-so-ever shall inherit the share which would have devolved upon the deceased if he had been then alive;

(b) widow;

(c) father;

(d) mother, being a widow;

(e) father's father;

(f) father's mother, being a widow;

(g) widow of a male lineal descendant in the male line of descent;

(h) step-mother, being a widow;

(i)unmarried daughter;

(j) daughter's son ;

(k) brother, being the son of the same father as the deceased;

(l) unmarried sister;

(m) brother's son, the brother having been a son of the same father as

the deceased;

(n) father's father's son;

(o) brother's son's son;

(p) father's father's son's son."

The same was amended by Section 39 of U.P. Act No. XVI of 1953 and was given retrospective effect from July 1, 1952. By Section 39 of the U. P. Act XVI of 1953, clause (j) was made (k) and vice versa. Clause (mn) was added and introduced after clause (m) as "***(mn) sister's son".***

A bare perusal of Section 171 of the U.P.Z.A. and L.R. Act, after it was duly amended by Act No. XVI of 1953, shows that it added *sisters' son* among the list of seccessors.

The Act was further amended by U.P. Act No.20 of 1954 which came in force from 19.10.1954. The said amendment made sisters preferential successor over sister's sons. However, both the Courts have given a concurrent finding that Mst. Phool Kumari died on 12.08.1954 i.e.,

before coming into force of the U.P. Act No. 20 of 1954 and are not disputed during course of arguments before this Court. Thus, under Section 172(2)(a)(i) read with Section 171(1)(mn), as it stood on 12.8.1954, i.e., the day Mst. Phool Kumari died, it is Deep Narain's sisters' sons who would inherit the property. Thus, there is no illegality in the finding recorded by both the courts holding that only Deep Narain's sisters' sons would inherit the property on death of Mst. Phool Kumari on 12.8.1954 as per the law applicable on the said date, and not his sisters.

9. So far as the substantial question of law number two that jurisdiction of the Civil Court would be barred under Section 331 of the U.P. Z.A. and L.R. Act and only Revenue Court has jurisdiction is concerned, learned counsel for the appellants has relied upon the judgment of the Supreme Court in the cases of **Narendra Kumar Mittal and others v. M/s. Nupur Housing Development Pvt. Ltd. and another ; 2019 (144) RD 785 and Shri Ram and another v. Ist Addl. Distt. Judge and others; (2001) 3 SCC 24** and Full Bench judgments of this Court in the cases of **Ram Awalamb v. Jata Shankar; AIR 1969 Allahabad 526 and Ram Padarath and others v. Second Addl. District Judge, Sultanpur and others; 1989 (1) AWC 290 (All).**

10. Learned counsel for the appellants has strongly submitted that in view of the aforesaid judgments, it is only the Revenue Court, which can hear the matter with regard to declaration of ownership of the property.

11. Learned counsel for the respondents, on the other hand, has submitted that since the suit is filed for cancellation of sale deed dated 18.02.1963 executed by natural guardians of minors, it is only the Civil Court, which would decide the dispute as the sale deeds were required to be cancelled and could not be ignored till it is cancelled. He further submits that in any view of the matter, property is sold by the natural guardian of the minors and, since, on attaining majority, the minors intend to get the sale deed cancelled, therefore, only the Civil Court has jurisdiction in such a scenario.

12. Law with regard to a sale deed executed by a natural guardian of a minor under the Hindu law and its cancellation is settled since long. Natural guardian has a right to execute the sale deed of the property and even presuming that the same is having any defect, and minors have a right to rectify the same on becoming major. This option available with minors makes the sale deed at best a voidable document. Suffice would be to refer to the judgment of the Supreme Court in the case of **Nangali Amma Bhavani Amma v. Gopalkrishnan Nair; (2004) 8 SCC 785,** relevant paragraph 8 of the said judgment reads,

"8. In view of the express language used, it is clear that the transaction entered into by the natural guardian in contravention of sub-section (2) was not void but merely voidable at the instance of the minor. To hold that the transaction in violation of Section 8(2) is void would not only be contrary to the plain words of the statute but would also deprive the minor of the right to affirm or ratify the transaction upon attaining majority. This Court in Vishwambhar v. Laxminarayan [(2001) 6 SCC 163] has also held that such transactions are not void but merely voidable. It was also held that a suit must

be filed by a minor in order to avoid the transaction within the period prescribed under Article 60 of the Limitation Act. The High Court did not consider the issue of limitation at all in view of its finding on the effect of a violation of Section 8(2) of the Act. As the conclusion of the High Court on this aspect of the matter is unsustainable, the impugned decision must be set aside."

13. In view of the law settled as aforesaid, the sale deed dated 18.2.1963 at best is a voidable document at the option of the minors, as the minors may or may not challenge the same. As per the law settled by the Full Bench of this court in the case of **Ram Padarath (supra),** Civil Court's jurisdiction is ousted and Revenue Court will have exclusive jurisdiction to decide the title of a person over an agricultural property only when the Revenue Court can ignore a void ab initio document and proceed to grant reliefs. The same principle was later affirmed by the Supreme Court in the cases of Shri Ram (supra) and **Narendra Kumar Mittal (supra)**. Paragraph 7 of the judgment in Ram Padarath (supra) reads:

"7. So far as voidable documents like those obtained by practising coercion, fraud, misrepresentation, undue influence etc., are concerned, their legal effect cannot be put to an end without its cancellation. But a void document is not required to be cancelled necessarily. Its legal effect if any can be put to an end to by declaring it to be void and granting some other relief instead of cancelling it. Once it is held to be void it can be ignored by any court or authority being of no legal effect or consequence. A document executed without free consent or one which is without consideration or the object of which is unlawful or executed by a person not competent to contract like a minor or in excess of authority would be a void document. In case it is in excess of authority it would be void to that extent only. There is presumption of due registration of a document and correctness of the facts mentioned in the same, but the said presumption is not conclusive and be dislodged."

14. In the present case, since the document could not be ignored by the Revenue Court and it needs to be challenged before its effect could be nullified, therefore, the Civil Court alone had jurisdiction to decide the case. The sale deed dated 18.2.1963, till it is challenged by minors, stands valid and in the said circumstances, the Revenue Court cannot give any declaration against it. Thus, it is only the Civil Court which is having jurisdiction to cancel the sale deed and decide the suit. There is no illegality in the judgment and decree passed by both the courts.

15. The second appeal is accordingly ***dismissed.***

(2023) 4 ILRA 1225
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Writ-A No. 48893 of 2017

Ravi Shanker Maurya ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:

Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
A.S.G.I., Sri Ajai Singh, Sri Vivek Kumar Rai

Service Matter – Railways – Recruitment - Group-D (Class-IV Employees) - A hyper-technical approach in rejecting a candidate's candidature due to minor mistakes in filling out an OMR sheet during the examination for a Class-IV (Group-D) post is unwarranted. Petitioner, having qualified both the written and physical tests, was not called for medical examination and document verification because the petitioner reproduced the stipulation of Column No.10 of OMR sheet instead of reproducing the declaration made at first page of booklet. The Court held that there was no allegation of different handwriting or use of any unfair means. Rejection of the petitioner's candidature by the Railway authorities was arbitrary and hyper-technical. The petition was allowed.

Allowed. (E-5)

List of Cases cited:

1. Pitta Naveen Kumar & ors. Vs Raja Narasaiah Zangiti & ors., (2006) 10 SCC 261

2. Karnataka Public Service Commission & ors. Vs B.M. Vijaya Shankar & ors., 1992 (2) SCC 206

3. Ajay Kumar Mishra Vs U.O.I., W.P. (C) 11642 of 2016, dated 23.12.2016

4. State Bank of India & ors. Vs Palak Modi & anr., (2013) 3 SCC 607

5. Vivek Kumar Yadav Vs U.O.I. & ors., O.A. No. 330/00105/2017, dated 10.4.2017

6. Hanuman Dutt Shukla & ors. Vs St. of U.P. & ors., (2018) 16 SCC 447

7. U.O.I. & ors. Vs Sunil Kumar, 2021 SCC OnLine Del 4637

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

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, learned counsel for the petitioner, Sri Ajay Singh, learned counsel for the Railways and perused the record.

2. By way of the present writ petition, the petitioner has challenged the judgement dated 11.8.2017, passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad (hereinafter referred to as "C.A.T.') in Original Application No. 101 of 2016 by which the application of the petitioner against cancellation of his candidature was rejected.

3. Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, learned counsel for the petitioner, contended that the order impugned is absolutely erroneous and arbitrary. The factual matrix of this case is as below:-

(i) The Railway Recruitment Cell, North-Central Railway, Allahabad issued an employment notice No. 1 of 2013, whereby applications were invited for filling up several categories of Class-IV post in Railways.

(ii) The petitioner also submitted his application in pursuance of this employment notice and he was also allotted Roll Number as 1210118369. The petitioner, after appearing in written test, was declared successful and thereafter he also qualified physical efficiency test held on 10.3.2015. Thereafter, the petitioner was not called for medical test and no reason was given to the petitioner even in reply to his application under Right to Information Act, therefore, the petitioner filed Original Application No. 101 of 2016 before the C.A.T.

(iii) In reply to the above original application, the Railways had filed a short reply and in paragraph No.6 of the said short reply, it was stated by the Railways that the petitioner had filled up declaration column in OMR sheet wrongly which amounted to concealment of his identity in examination and constituting an infringement of prescribed instructions, therefore, for this reason the petitioner was not called for medical examination as well as for verification of his documents. The Railways along with its reply also brought on record a copy of the application form, submitted by the petitioner, as well as photocopy of OMR sheet of the petitioner.

(iv) After considering the aforesaid pleadings, the C.A.T. rejected the original application of the petitioner by order dated 11.8.2017 on the ground that in the OMR sheet there was specific direction which is being reproduced below:-

"Copy of the Declaration given in First page of your Question Booklet in the space given in the OMR answer sheet. Your candidature shall be cancelled if you do not copy the Declaration. You must put your signature on OMR sheet at item no.13."

And the petitioner failed to comply with the aforesaid direction, therefore, his candidature was rightly rejected as the above condition was not directory but mandatory.

4. Learned Senior Counsel on the behalf of the petitioner contended that though in Column No.10 of OMR sheet, it is mentioned *"In your own running handwriting reproduce the Declaration as given in first page of the question booklet in the space given below either in Hindi or in English."*, the aforesaid stipulation in itself is quite misleading, therefore, the petitioner mistakenly reproduced the same stipulation as mentioned in Column No. 10 of OMR sheet instead of reproducing the declaration mentioned on the first page of question booklet. It was further contended by learned Senior Counsel that the purpose of the stipulation in Column No.10 of OMR sheet is to preclude imposter from appearing in examination in place of the candidate and apart from the aforesaid, there exists no other purpose of the declaration because the petitioner has already mentioned the above declaration in his application form and there is no allegation against the petitioner that the handwriting used in the Column No.10 of OMR sheet is different from the handwriting made in the declaration made in Para-22 of the application form, therefore, approach of the Railways Authority, rejecting the candidature of the petitioner, is hyper-technical and arbitrary.

5. On the other hand, learned counsel for the Railways, Sri Ajay Singh, contended that there is specific provision in the employment notice No. 1 of 2013 that incorrect information will lead to cancellation of the candidature/appointment and direction in OMR sheet regarding reproduction of declaration mentioned on the first page of question booklet in his own handwriting is mandatory in nature and violation of the same will technically result cancellation of candidature of the petitioner. In support of his contention, learned counsel for the Railways relied upon the judgement titled as ***Pitta Naveen Kumar and others vs. Raja Narasaiah Zangiti & Ors.,*** reported in **(2006) 10 SCC 261** as well as one of the judgements of the Apex Court titled as ***Karnataka Public Service Commission and others vs. B.M. Vijaya Shankar and others*** reported in **1992 (2) SCC 206.**

6. We have considered the rival contention of the parties as well as judgement relied upon by the respondent-Railways.

7. From the Instruction-9 of employment notice No.1 of 2013 dated 27.7.2013, it is clear that if the candidate declared incorrect information in his declaration at Column No. 22 then his candidature/appointment is liable to be cancelled. In the aforesaid notification, there was no direction regarding filling of OMR sheet. On perusal of application form (annexed at page-58 of the writ petition), it shows that the petitioner made declaration in Column No.22 in the aforementioned form and there is no dispute that any concealment or incorrect information was made in the aforesaid declaration of application form. Perusal of the OMR sheet (annexed at Page-60 of the writ petition) shows that the petitioner, instead of reproducing the declaration made at the first page of the booklet in pursuance of stipulation in Column-10 of OMR sheet, reiterated the aforesaid stipulation in his own handwriting and there is no dispute that this reiteration in Column No. 10 of OMR sheet is made by any other person except the petitioner.

8. So far as the judgements relied upon by the Railways is concerned, the same are not applicable in the present case, having different issue therein. As in the judgement of **Pitta Naveen Kumar and others (supra),** there was an issue of age relaxation. Though there was no provision for the same, therefore, for the aforesaid issue the Hon'ble Apex Court made observation that strict adherence to the rules necessary when rules operate only to disadvantage of the candidate concerned not otherwise. In the present case the issue is totally different i.e. reproducing the declaration made at the first page of booklet in Column No.10 of OMR sheet. So far as the judgement of **Karnataka Public Service Commission and others (supra)** is concerned, the same is relating to violation of instructions issued by the Commission by mentioning roll number by the candidate not only in the space provided there on the cover page of the answer book but also on all the pages inside the answer book, contrary to clear instructions. This judgement is also quite distinguishable because the same is also not applicable in the present facts and circumstances.

9. We have also gone through Para-6 of the procedure regarding recruitment of Group-D (Class-IV employees) for the recruitment by the Railways (annexed by the petitioner at page-49 of writ petition). Para-6 of the aforesaid procedure provides that minimum educational qualification for Class-IV employee is only to read and write in any language, meaning thereby, he should be literate. Therefore, standard of care and precaution on the part of the candidate, applying for Class-IV post, cannot be equated with the candidate applying for other posts for which educated person is required.

10. In the judgements titled as **Ajay Kumar Mishra vs. Union of India in W.P. (C) 11642 of 2016 and C.M. No. 45868 of 2016** decided on 23.12.2016, ***State Bank of India and other vs. Palak Modi and another with State Bank of India and another vs. Minshu Saxena and another,*** reported in **(2013) 3 SCC 607** and ***Vivek Kumar Yadav vs. Union of India and others*** **(O.A. No. 330/00105/2017)** decided on 10.4.2017, the Hon'ble Apex Court as well as High Court clearly held

that for rejecting the candidature of a selected candidate hyper-technical view should not be taken. Similarly in paragraph-7 of the judgement in Hanuman Dutt Shukla and others vs. State of Uttar Pradesh and other reported in (2018) 16 SCC 447 Hon'ble Apex Court has held as under:-

" It is submitted by Mr. P.P. Rao, learned Senior Counsel and other learned Senior Counsel/counsel appearing for the parties that as per the Recruitment Rules framed by the State Government to appoint the eligible candidates to the posts, referred to supra, there is no prohibition to disentitle a candidate from evaluating the answer sheets, who used whitener or blade in the relevant blocks in the OMR sheet (answer sheet). The said advisory note given by the Selection Board cannot be treated as a rule to declare such candidates who have used whitener or blade in the relevant blocks in the OMR/answer sheet as ineligible for evaluating their answer sheets. This statement is in conformity with the Recruitment Rules and it would further support the sand taken by the learned Advocate General, representing the respondent State of U.P. in making submission on the basis of written suggestions."

11. Paragraphs 14 & 15 of the judgement titled as ***Union of India and others vs. Sunil Kumar*** reported in **2021 SCC OnLine Del 4637** are quoted hereinbelow:-

"14. We are in agreement with the learned CAT because if we see the Hindi signatures of the respondent, they are exactly the same on the application form as well as on the OMR Sheet. Pertinently, the petitioners have not disputed the thumb impression of the respondent on the application form and the OMR Sheet. It is not a case of impersonation. The only dispute raised by the petitioners, which is the ground for rejection of the candidature of the respondent, is that his signatures on the application form in English do not tally with his signatures on the OMR sheet in English.

*15. It is to be noted here that the OMR sheet in the box provided for signatures in English, specifically provides that "**NOT in Capital Letters".** It is also to be kept in mind that the respondent was appearing for a "Group D' post of Khallasi and his knowledge of English cannot be presumed to be as proficient as a man of letters. The first impression, which one gets after reading the instruction in box no. 7 on the OMR sheet at the place where the candidate has to sign, is that **the capital letters are not to be used while signing in English.** The respondent attempted to follow the said instruction by apparently refraining from using capital letters in his signatures as he had earlier used while signing on the application form."*

12. In above mentioned cases, Hon'ble Apex Court held that minor mistake in filling OMR sheet in the examination or Class-IV employee cannot be a ground to reject his candidature, but in the present case, though there was no allegation by the Railways that the petitioner was involved in using any unfair means or any type of interpolation, but merely on the ground that the petitioner reproduced the stipulation of Column No.10 of OMR sheet instead of reproducing the declaration made at first page of booklet in compliance of aforesaid stipulation, rejection of the candidature of the petitioner is absolutely arbitrary and

erroneous on the basis of hyper-technical view. It is also not the case of the petitioner that petitioner is ineligible in any manner for Class-IV post and also this fact is not in dispute that the petitioner has qualified written examination as well as physical test which is necessary requirement for the selection of a Class-IV employee

13. Therefore, we are of the view that the C.A.T. ignored the aforesaid aspect and rejected the original application of the petitioner by adopting the hyper-technical view, regarding non-reproduction of declaration made on the first page of booklet in Column No.10 of OMR sheet.

14. Therefore, the judgement dated 11.8.2017, passed by the C.A.T. in Original Application No. 101 of 2016 is quashed and respondents are directed to conduct the medical examination of the petitioner and verify his documents and issue appointment letter if the petitioner is otherwise eligible. It is also directed that if all posts have been filled up despite pendency of litigation, then the Railways will create supernumerary post for the petitioner.

15. Accordingly, the writ petition stands **allowed**.

16. The aforesaid exercise is to be done by the Railways within a period of 3 months from the date of receiving certified copy of this order.

(2023) 4 ILRA 1230
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2023

BEFORE

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

First Appeal From Order No. 16 of 1995

United India Insurance Co. Ltd.
...Appellant
Versus
Rajesh Kumar Tripathi & Anr.
...Respondents

Counsel for the Appellant:
Sri K.S. Amist

Counsel for the Respondents:
Sri T.P. Srivastava, Sri Ajay Misra, Sri Durga Shanker Shukla, Sri Mahesh Dwivedi, Sri S.K. Verma, Sri Ram Singh

Accident - Electrocution - Motor Vehicles Act, 1988, S. 165 - Claim for compensation concerning death arising from the use of a motor vehicle - The term *accident* is not defined under the Motor Vehicles Act - Incident occurred when a truck, overloaded and driven at excessive speed, came into contact with an electric wire, resulting in a high voltage surge through the village, leading to the electrocution of the claimant's wife - Despite the vehicle being overloaded, the driver failed to stop - Held: Court rejected the appellant's (Insurance Company) contention regarding remoteness of damage and concluded that the accident was caused by the negligent use of the vehicle - Insurance Company was held liable to compensate the claimant but was granted the right to recover the amount from the vehicle owner due to the owner's failure to produce evidence of the driver's valid license. (Para 9, 10)

Appeal partly allowed. (E-5)

List of Cases cited:

1. Pappu & ors. Vs Vinod Kumar Lamba & ors. AIR 2018 SC 592

2. Shivaji Dayanu Patil Vs Vasschala Uttam More, 1991 0 Supreme SC 322

3. Kalim Khan & ors. Vs Fimidabee & ors., 2018 LawSuit (SC) 571

4. Kaushnuma Begum Vs. New India Assurance Co. Ltd., 2001 LawSuit (SC) 6

5. U.P.S.R.T.C. Vs Rajendra Kumar Gupta & ors., First Appeal From Order No. 2520 of 2020, dt 25.5.2020

6. Renu Devi & ors. Vs. Gurfan Ahmad & ors., 2022 LawSuit (All) 2019

7. United India Insurance Co. Ltd. Vs Smt. Krishnaven & ors., C.M.A. No. 2217 of 2015, dt 5.10.2015

8. St. of J & K & ors. Vs Mir Fathima & ors., MAC App No. 52 of 2021, dt 22.9.2022

9. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors., First Appeal From Order No. 1818 of 2012, dt 19.7.2016

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

1. Heard Sri K.S. Amist, learned counsel for the appellant and Sri Durga Shanker Shukla, learned counsel for the respondent.

2. This appeal, at the behest of United India Insurance Co. Ltd. challenges the judgment and award dated 15.9.1994 passed by XVI Additional District Judge/ Motor Accident Claims Tribunal, Allahabad in Claim Petition No. 175 of 1991 whereby the learned Tribunal has awarded Rs.1,72,000/- as compensation with interest at the rate of 15% per annum with a direction upon the appellant herein to pay the above.

3. Brief facts as culled out from the record are that on the fateful day when the incident occurred the truck insured with the appellant was overloaded and was being driven by its driver on the excessive speed. The truck dashed with the electric wire which was there and due to the overloading the wire broke and sparks were there which touched the high voltage and spread to the village whereby the wife of the respondent-claimant breathed his last due to electrocution. The driver did not stopped his vehicle though it was overloaded. The deceased was skilled labourer earning Rs. 2200/- per month and was 20 years of age. The claimant filed claim petition. The Insurance Company filed its reply but the driver and owner did not file any reply. The reply of Insurance Company was one of denial. The Tribunal framed issues and while dealing with issue No.1 the Tribunal came to the conclusion that on 4.3.1991 when the truck which was overloaded and was plying on the road in rash and negligent manner by its driver, it came in contact with low voltage electric wire. The low voltage wire broke and came in contact with high voltage wire which resulted into circulation of high voltage in low voltage wire. The high voltage circulated to the house of the deceased through low voltage wire and the deceased came in contact with the same. P.W.1, Rajesh Kumar Tripahti had seen the truck being overloaded and it being came in contact of low voltage electric wires. He was present at the place of incident. Lot of people gathered in the village and the driver of the truck ran away. P.W. 2 also deposed in similar way. D.W.1, Uttam Sahab Yadav, mentioned that there was no accident of his vehicle on the said date and village people stopped him and feigned ignorance about the wire. He does not even remember whether the police has made challan of his vehicle or not and why he was arrested by the police. All these facts cumulatively considered by the Court to come to the conclusion that accident occurred due to the use of vehicle as defined under Section 166 of Motor Vehicles Act.

4. Learned counsel for the appellant has relied on the decision in **Pappu and others Versus Vinod Kumar Lamba and**

others, reported in AIR 2018 SC 592 so as to contend that the Insurance Company is liable to indemnify the owner as the driver who was driving the vehicle in question does not have valid driving license and the vehicle was being plied against the policy conditions.

5. Learned counsel for respondent-claimants has placed reliance on the decisions in **Shivaji Dayanu Patil vs. Vasschala Uttam More, 1991 0 Supreme SC 322, Kalim Khan & Others vs. Fimidabee & Others, 2018 LawSuit (SC) 571, Kaushnuma Begum vs. New India Assurance Company Ltd., 2001 LasWuit (SC) 6,** First Appeal From Order No. 2520 of 2020 (**U.P. State Road Transport Corporation vs. Rajendra Kumar Gupta & Others)** decided on 25.5.2012, **Renu Devi and 5 others vs. Gurfan Ahmad and 2 others, 2022 LawSuit (All) 2019**, decision of Madrash High Court in C.M.A. No. 2217 of 2015 **(United India Insurance Company Limited vs. Smt. Krishnaven & others)** decided on 5.10.2015, and decision of **High Court of Jammu and Kashmir and Ladakh at Srinagar in MAC App No. 52 of 2021 (State of J & K & Others vs. Mir Fathima & Others**) decided on 22.9.2022 so as to rebut the grounds raised by the Insurance Company.

6. The decision cited by learned counsel for the respondent-claimants would have to be perused in the light of the principle enunciated for negligence and for remoteness of damages.

7. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental though it is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

8. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the

part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.*** *From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was

being driven with reasonable care or that there is equal negligence on the part the other side."

emphasis added

9. The accident took place because of the use of vehicle which is similar to the cases of **Shivaji Dayanua Patil (Supra) & Renu Devi (Supra)**. The provision of Section 165 of Motor Vehicles Act,1955 does not define the term accident and, therefore, judgment in **Renu Devi (Supra)** pressed into service would be helpful to the Court. The principle of res-ipsa loquitor is also required to be invoked and the submission of learned counsel for the appellant that there is remoteness of damage, cannot be accepted.

10. This takes this Court to this issue of driving license of the driver being not valid and electricity company being not made party. Here the decision in **Pappu and others (Supra)** will come to aid of the appellant as it was for the owner and driver to prove that the vehicle was being plied by the driver having valid driving license and only after the driving license is filed, the Insurance Company would be under an obligation to prove otherwise.

11. As far as compensation is concerned, it cannot be said that compensation awarded is on higher side. Rather the Tribunal has not considered to grant any amount under the head of future loss of income.

12. In view of the above, the appeal is partly allowed qua owner. The Insurance Company would be at liberty to recover the amount deposited from the owner of the vehicle as owner has failed to produce any documentary evidence so as to show that the driver was having license to drive the said vehicle.

13. Record and proceedings be sent back to the Tribunal forthwith. The amount kept in fixed deposit be disbursed to the claimants with interest accrued, if the same has not yet been disbursed.

(2023) 4 ILRA 1234
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.03.2023

BEFORE

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

Application U/S 482. No. 2941 of 2023

Pravin Kumar Singh @ Pravin Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ajeet Kumar Yadav, Sri Ashish Kumar Gupta

Counsel for the Opposite Parties:
G.A.

Criminal Law– Application under Section 482-quashing of proceedings under Sections 376, 363, 366, 504, 506 IPC and Sections 3/4 POCSO Act- applicant and victim married each other living happily-offence concerned is not a private dispute-collective wrong against the society-power of quashing of criminal proceedings should be exercised sparingly- quashing of a case under Section 376 I.P.C. read with Sections 3/4 POCSO Act on the basis of compromise entered between parties-legally, not permissible-Application dismissed.

HELD:

It is no doubt true that the power of quashing of criminal proceedings should be exercised very sparingly and with circumspection and that too in rarest of the rare cases and it was not justified for the Court in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the inherent powers do not confer any arbitrary jurisdiction on the Court to act according to its whims and fancies.

Recently, a coordinate Bench of this Court in Application U/s 482 No.8514 of 2023 titled as Om Prakash vs. State of U.P. and another, has also held that the criminal proceedings under Section 376 I.P.C. and POCSO Act cannot be quashed on the basis of compromise entered into between the accused and the victim.

Thus, having regard to the aforesaid settled legal position, quashing of a case under Section 376 I.P.C. read with Sections 3/4 POCSO Act on the basis of compromise entered between the present accused/ applicant no.1 and opposite party no.2, the victim, is not legally permissible. Therefore, the instant application lacks merit and is liable to be dismissed.

Application dismissed. (E-14)

List of Cases cited:

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

2. Rathish Babu Unnikrishnan Vs St. (NCT of Delhi), 2022 SCC OnLine SC 513

3.Satish Kumar Jatav Vs St. of U.P., 2022 LiveLaw (SC) 488

4. Ramveer Upadhyay Vs St. of U.P., AIR 2022 SC 2044

5. Narinder Singh & ors. Vs St. of Pun. & anr. reported in (2014) 6 SCC 466

6. St. of M.P. Vs Madanlal reported in (2015) 7 SCC 681

7. Shimbhu Vs St. of Har. reported in (2014) 13 SCC 318

8.Daxaben Vs St. of Guj. & ors. reported in 2022 SCC OnLine SC 936

9.Application U/s 482 No.8514 of 2023 titled as Om Prakash vs. State of U.P. and another

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

1. Sri Subhash Chandra Yadav, Advocate has put in appearance on behalf of opposite party No.2 by filing his *vakalatnama* in Court today, which is taken on record.

2. Heard Sri Ajeet Kumar Yadav, learned counsel for the applicants, Sri Anurag Verma, learned A.G.A. for the State, Sri Subhash Chandra Yadav, learned counsel for opposite party No.2 and perused the entire record.

3. The instant application under Section 482 Cr.P.C. has been filed by the accused/ applicants for quashing the entire proceedings of S. T. No.20 of 2014 "State vs. Pravin Kumar Singh and others" arising out of Case Crime No.345 of 2013, under Sections 376, 363, 366, 504, 506 I.P.C. and 3/4 POCSO Act, relating to Police Station Ashiyana, District Lucknow, pending in the Court of learned Special Judge, POCSO Act, Lucknow as well as impugned charge sheet no.35 of 2014, dated 15.02.2014 submitted against the applicant no.1 under Sections 376, 363, 366, 504, 506 I.P.C. and 3/4 POCSO Act and the applicant nos.2 and 3 under Sections 504, 506 I.P.C. by the Investigating Officer in the aforesaid case crime in the light of compromise took place between the parties.

4. Learned counsel for the applicants has submitted that a false first information report came to be lodged against the accused/ applicants, who are innocent and

have been falsely implicated in this case. His further submission is that in fact, the first information report came to be lodged at the behest of opposite party no.2 only because of the fact that the present applicant no.1 was acquainted with the opposite party no.2, victim. His next submission is that the victim, in her statement recorded under Sections 161 and 164 Cr.P.C., has supported the prosecution case. However, during the pendency of aforesaid criminal case, the applicants and opposite party no.2 have settled their dispute amicably.

5. His next submission is that, in fact, the accused/ applicant no.1 and the opposite party no.2, victim have married and are living happily together as husband and wife. Therefore, the impugned criminal proceeding deserves to be quashed.

6. His further submission is that having regard to the fact that the accused/ applicant no.1 and opposite party no.2, the victim are living together as husband and wife, no useful purpose would be served by keeping the impugned criminal proceeding pending against the accused/ applicants. The chance of clinching conviction, in the light of aforesaid fact, is remote and bleak.

7. Sri Subhash Chandra Verma, the learned counsel for opposite party No.2 has admitted the fact that the opposite party no.2, victim has married with the applicant no.1 and they are living happily together as husband and wife.

8. Per contra, Sri Anurag Verma, learned A.G.A. for the State has vehemently opposed the prayer by submitting that Protection of Children from Sexual Offences Act, 2012 has been enacted by the Legislature for prevention and protection of children as defined in the said Act. His further submission is that admittedly charge sheet has been submitted against the present applicant no.1 under Sections 376, 363, 366, 504, 506 I.P.C. and 3/4 POCSO Act and agaisnt the applicant nos.2 and 3 under Sections 504 and 506 I.P.C.

9. Learned A.G.A. for the State has also submitted that the victim was a child on the date of occurrence. Therefore, no compromise between such victim and the accused/ applicants is permissible in law. Therefore, the present application is misconceived, which is liable to be dismissed.

10. In **State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335** the Hon'ble Supreme Court in paragraph no.102 has held as under:-

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

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their

face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

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

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

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

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

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

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

11. The Hon'ble Supreme Court in the case of **Rathish Babu Unnikrishnan v. State (NCT of Delhi), 2022 SCC OnLine SC 513** in para nos.16, 17 and 18 has held as under:-

"16. The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

17. The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce

defence evidence during the trial, to rebut the presumption.

18. Situated thus, to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the trial court will not in our opinion be judicious. Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited."

12. It is no doubt true that the power of quashing of criminal proceedings should be exercised very sparingly and with circumspection and that too in rarest of the rare cases and it was not justified for the Court in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the inherent powers do not confer any arbitrary jurisdiction on the Court to act according to its whims and fancies.

13. Hon'ble Supreme Court in the case of **Satish Kumar Jatav vs. State of U.P., 2022 LiveLaw (SC) 488** has held that the ground that "no useful purpose will be served by prolonging the proceedings of the case" cannot be a good ground and/or a ground at all to quash the criminal proceedings when a clear case was made out for the offence alleged. Likewise in **Ramveer Upadhyay vs. State of U.P., AIR 2022 SC 2044** the Hon'ble Supreme Court held that the jurisdiction under Section 482 Cr.P.C. is not to be exercised for asking. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint/F.I.R. except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. Entertaining a petition under Section 482 Cr.P.C. at an interlocutory stage itself might ultimately result in miscarriage of justice.

14. \So far as the question of quashing of criminal proceeding of S.T. No.20 of 2014 "State vs. Pravin Kumar Singh and others" arising out of Case Crime No.345 of 2013, under Sections 376, 363, 366, 504, 506 I.P.C. and 3/4 POCSO Act, is concerned, Hon'ble Supreme Court in **Narinder Singh and others vs. State of Punjab and another** reported in **(2014) 6 SCC 466,** has specifically held that the matter under Section 376 I.P.C. is also such an offence, which, though committed in respect of a particular victim, cannot be termed to be a private dispute between the parties. It has serious adverse societal effect. Therefore, any proceeding on the basis of alleged compromise of the accused vis-a-vis the victim cannot be quashed. Hon'ble Apex Court in **State of Madhya Pradesh vs. Madanlal** reported in **(2015) 7 SCC 681** while repelling the acquittal on the basis of compromise in the matter pertaining to Sections 376 read with 511 I.P.C., has placed reliance upon principles laid down by three-Judge Bench in **Shimbhu vs. State of Haryana** reported in **(2014) 13 SCC 318.**

15. This principal of law also came to be reiterated recently by Hon'ble Supreme Court in **Daxaben vs. State of Gujarat and others** reported in **2022 SCC OnLine SC 936** wherein the Hon'ble Supreme Court in Paragraphs No.34, 38, 47 and 49 has held as under:-

"34. In Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1, this Court observed:--

"46. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 CrPC though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained."

38. However, before exercising its power under Section 482 of the Cr.P.C. to quash an FIR, criminal complaint and/or criminal proceedings, the High Court, as observed above, has to be circumspect and have due regard to the nature and gravity of the offence. Heinous or serious crimes, which are not private in nature and have a serious impact on society cannot be quashed on the basis of a compromise between the offender and the complainant and/or the victim. Crimes like murder, rape, burglary, dacoity and even abetment to commit suicide are neither private nor civil in nature. Such crimes are against the society. In no circumstances can prosecution be quashed on compromise, when the offence is serious and grave and falls within the ambit of crime against society.

47. In State of Madhya Pradesh v. Laxmi Narayan, (2019) 5 SCC 688, a three-Judge Bench discussed the earlier judgments of this Court and laid down the following principles:--

"15. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

15.1. That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3. Similarly, such power is not to be exercised for the offences under the special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4. Offences under Section 307 IPC and the Arms Act, etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act, etc. which have a serious impact on the society cannot be quashed in exercise of powers

under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge-sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paras 29.6 and 29.7 of the decision of this Court in Narinder Singh [(2014) 6 SCC 466 : (2014) 3 SCC (Cri) 54] should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5. While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of noncompoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise, etc."

(emphasis supplied)

49. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegation in the complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence."

16. Recently, a coordinate Bench of this Court in **Application U/s 482 No.8514 of 2023 titled as Om Prakash vs. State of U.P. and another**, has also held that the criminal proceedings under Section 376 I.P.C. and POCSO Act cannot be quashed on the basis of compromise entered into between the accused and the victim.

17. This Court is also able to notice that the fact, that the case under Protection of Children from Sexual Offences Act, 2012 can be compromised between the applicants and the opposite party no.2, victim is also engaging the attention of Hon'ble the Apex Court in **Writ Petition (s) (Criminal) No(s).253 of 2022 "Ramji Lal Bairwa and another vs. State of Rajasthan and another".**

18. Thus, having regard to the aforesaid settled legal position, quashing of a case under Section 376 I.P.C. read with Sections 3/4 POCSO Act on the basis of compromise entered between the present accused/ applicant no.1 and opposite party no.2, the victim, is not legally permissible. Therefore, the instant application lacks merit and is liable to be dismissed.

19. With the aforesaid observations/ directions, the instant application under Section 482 Cr.P.C. **is dismissed.**

(2023) 4 ILRA 1241
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.04.2023

BEFORE

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

Application U/S 482. No. 3119 of 2023

Ankit Saxena & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Manish Bajpai. Sri Pradeep Kumar Maurya

Counsel for the Opposite Parties:
G.A.

Criminal Law – Section 482 CrPC- Quashing of criminal proceedings between the parties- dispute arising out of matrimonial discord- private in nature- guidelines laid down for quashing of criminal proceedings – overwhelming element of private dispute-no heinous offence involved-such criminal proceedings may be quashed-application allowed.

HELD:
Adverting to the facts of this case, it is not disputed that the present first information report was an outcome of matrimonial dispute between the parties i.e. opposite party No.2 and the applicants, which is an overwhelming element of a private dispute. Therefore, having regard to the law laid down by the Hon'ble Supreme Court in Rangappa Javoor vs. The State of Karnataka and another reported in 2023 LiveLaw (SC) 74 and Jasmair Singh and another vs. State of Haryana and another reported in (2022) 9 SCC 73 in respect of quashing of criminal proceedings on the basis of compromise entered into between the parties and considering the aforesaid overall facts and circumstances of the present case, submissions made by counsel for parties and upon the perusal of material on record, it appears that during pendency of the present application, parties have already settled their dispute voluntarily and amicably. Compromise so entered into by parties have been verified by learned court below. This fact has not been denied by learned counsel for opposite parties. As of now, no difference exists between parties. Consequently, this Court is of the considered opinion that no useful purpose shall be served by prolonging the proceedings of above mentioned case. In view of compromise entered into by the parties, chances of conviction of accused applicants are also remote and bleak. Resultantly, continuation of proceedings would thus, itself cause injustice to parties. The instant trial would only entail loss of precious judicial time in a futile pursuit.

In view of above, the instant application succeeds and is liable to be allowed.

Application allowed. (E-14)

List of Cases cited:

1. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. reported in (2017) 9 SCC 641

2. Criminal Appeal No. 1489 of 2012 (Ramgopal & anr. Vs The St. of M.P.), 2021 SCC OnLine SC 834

3. Ramawatar Vs St. of M.P. reported in 2021 SCC OnLine SC 966

4. Rangappa Javoor Vs The St. of Karnataka & anr. reported in 2023 LiveLaw (SC) 74

5. Jasmair Singh & anr. Vs St. of Har. & anr. reported in (2022) 9 SCC 73

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

1. Sri Anurag Singh, Advocate has put in appearance on behalf of opposite party No.2 by filing his *vakalatnama* in Court today, which is taken on record.

2. Heard Sri Santosh Srivastava, Advocate holding brief of Sri Manish Bajpai, learned counsel for the applicants, Sri Rajesh Verma, learned A.G.A. for the State, Sri Anurag Singh, learned counsel for opposite party No.2 and perused the material available on record.

3. The instant application under Section 482 Cr.P.C. has been filed by the applicants for quashing the impugned charge sheet dated 15.01.2019 as well as impugned order dated 31.10.2019 passed by the learned Additional Chief Judicial Magistrate, Court No.28, Lucknow in Case No.95003 of 2019.

4. Learned counsel for the applicants has submitted that a first information report came to be lodged against the accused/ applicant on the basis of false facts in order to implicate the accused/ applicants.

5. His further submission is that there are vague and general allegations against all the accused/ applicants in the first information report, which do not constitute any offence as alleged in the first information report.

6. His next submission is that during investigation, no credible offence against the present accused/ applicants could be collected. Despite this fact, a charge sheet came to be laid against the present accused/ applicants.

7. His further submission is that the learned trial court vide impugned order dated 31.10.2019 mechanically took cognizance of the matter and issued process to the applicants to appear and stand trial.

8. His next submission is that the continuation of such proceeding is nothing but an abuse of process of this Court and malicious prosecution too. He has also submitted that as the dispute related to the matrimonial discord between the parties, the parties settled their dispute and filed a compromise, which has been sent for verification by a coordinate Bench of this Court vide order dated 01.03.2023 passed in Application U/s 482 No.2108 of 2023 titled as Ankit Saxena and others vs. State of U.P. and another.

9. His further submission is that pursuant to aforesaid order dated 01.03.2023, the learned trial court has verified the compromise vide order dated 18.03.2023. A copy of the same is annexed as annexure No.6 to the instant application.

10. Learned counsel for the applicants, therefore, submits that having regard to the fact that the dispute between the parties was essentially matrimonial in nature, the parties settled their dispute. Therefore, the impugned criminal proceeding deserves to be quashed as the dispute-in-question is private in nature which does not have any adverse societal effect.

11. Per contra, learned A.G.A. for the State has vehemently opposed the prayer. However, learned counsel for opposite party No.2 has very fairly admitted the fact that the parties have settled their dispute amicably and filed a compromise, which came to be verified by the learned trial court vide order dated 18.03.2023.

12. The Hon'ble Supreme Court in **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and Others vs. State of Gujarat and another** reported in **(2017) 9 SCC 641** has laid down the following guidelines with regard to quashing of criminal proceedings as well

regarding compromise in criminal proceedings in paragraphs 16 to 16.10 of the judgment, which is quoted below:

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions.

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

16.5. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the

disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

13. The Hon'ble Supreme Court in **Criminal Appeal No. 1489 of 2012 (Ramgopal and Another Vs. The State of M.P.), 2021 SCC OnLine SC 834,** has reiterated the guidelines regarding quashing of criminal proceedings in view of compromise. Following has been observed in paragraph 18-19:-

"18. It is now a well crystalized axiom that plenary jurisdiction of this Court to impart complete justice under Article 142 cannot ipso facto be limited or restricted by ordinary statutory provisions. It is also noteworthy that even in the absence of an express provision akin to Section 482 Cr.P.C. conferring powers on the Supreme Court to abrogate and set aside criminal proceedings, the jurisdiction exercisable under Article 142 of the Constitution embraces this Court with scopious powers to quash criminal proceedings also, so as to secure complete justice. In doing so, due regard must be given to the overarching objective of sentencing in the criminal justice system, which is grounded on the sub-lime philosophy of maintenance of peace of the collective and that the rationale of placing an individual behind bars is aimed at his reformation.

19. We thus sum-up and hold that as opposed to Section 320 Cr.P.C. where the Court is squarely guided by the compromise between the parties in respect of offences 'compoundable' within the statutory framework, the extra-ordinary power enjoined upon a High Court under Section 482 Cr.P.C. or vested in this Court under Article 142 of the Constitution, can be invoked beyond the metes and bounds of Section 320 Cr.P.C. Nonetheless, we reiterate that such powers of wide amplitude ought to be exercise carefully in the context of quashing criminal proceedings, bearing in mind: (i) Nature and effect of the offence on the conscious of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations."

(Emphasis supplied)

14. Hon'ble Supreme Court i**n Ramawatar v. State of M.P.** reported in **2021 SCC OnLine SC 96**6, while adverting its judgment rendered in **Ramgopal's case (supra)**, in para no.11 has held as under:-

"11. The Court in Ramgopal (Supra) further postulated that criminal proceedings involving non-heinous offences or offences which are predominantly of a private nature, could be set aside at any

stage of the proceedings, including at the appellate level. The Court, however, being conscious of the fact that unscrupulous offenders may attempt to escape their criminal liabilities by securing a compromise through brute force, threats, bribes, or other such unethical and illegal means, cautioned that in cases where a settlement is struck post-conviction, the Courts should, inter-alia, carefully examine the fashion in which the compromise has been arrived at, as well as, the conduct of the accused before and after the incident in question. While concluding, the Court also formulated certain guidelines and held:

"19? Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind : (i) Nature and effect of the offence on the conscious of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations.""

15. Adverting to the facts of this case, it is not disputed that the present first information report was an outcome of matrimonial dispute between the parties i.e. opposite party No.2 and the applicants, which is an overwhelming element of a private dispute. Therefore, having regard to the law laid down by the Hon'ble Supreme Court in **Rangappa Javoor vs. The State of Karnataka and another** reported in **2023 LiveLaw (SC) 74 and Jasmair Singh and another vs. State of Haryana and another** reported in **(2022) 9 SCC 73** in respect of quashing of criminal proceedings on the basis of compromise entered into between the parties and considering the aforesaid overall facts and circumstances of the present case, submissions made by counsel for parties and upon the perusal of material on record, it appears that during pendency of the present application, parties have already settled their dispute voluntarily and amicably. Compromise so entered into by parties have been verified by learned court below. This fact has not been denied by learned counsel for opposite parties. As of now, no difference exists between parties. Consequently, this Court is of the considered opinion that no useful purpose shall be served by prolonging the proceedings of above mentioned case. In view of compromise entered into by the parties, chances of conviction of accused applicants are also remote and bleak. Resultantly, continuation of proceedings would thus, itself cause injustice to parties. The instant trial would only entail loss of precious judicial time in a futile pursuit.

16. In view of above, the instant application succeeds and is liable to be allowed.

17. Accordingly, the instant application under Section 482 Cr.P.C. is **allowed.** Consequently, the entire proceeding of Case No.95003 of 2019 arising out of F.I.R./ Case Crime No.104 of 2018, under Sections 498-A, 504, 506 I.P.C. and Sections 3/4 D.P. Act, Police Station Mahanagar, District Lucknow, is, hereby, quashed.

18. Interim order, if any, stands discharged.

19. Office is directed to send a copy of this order to the Court concerned through email/fax immediately for necessary compliance.

(2023) 4 ILRA 1246
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.03.2023

BEFORE

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

Application U/S 482. No. 3934 of 2023

Kusum Devi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sachin Mishra, Sri Akash Deep Srivastava, Sri Ayush Mishra, Sri Bala Nath Mishra, Sri Prabha Shanker Mishra, Sri Ram Vishak Mishra

Counsel for the Opposite Parties:
G.A., Sri Ved Prakash Shukla

A. Criminal Law–Application under Section 482 CrPC- summoning order and entire proceedings- arising out of -section 306 IPC- challenged.

B. Section 306 IPC- Abetment of suicide- Section 107 IPC- Abetment of a thing- person charged of abetment- must gave committed the act of abetment directly to the deceased- suicide note in the instant case- establishes- applicants by their acts- continuous course of conduct- created a situation- deceased perceiving no other option except to commit suicide. (Paras 15 to 18)
HELD:
Perusal of the aforesaid suicide note as well as the evidence available on record, this Court finds substance in the contention raised by the learned counsel for the opposite party no.2 as well as learned A.G.A. that prima facie case for the alleged offence is made out against the applicants. It is a clear case wherein the applicants by their acts and by their continuous course of conduct had created a situation which led to the deceased perceiving no other option except to commit suicide. Thus, the offence falls within the four corners of Section 306 IPC. The applicants had played an active role in forcing the deceased to leave his job and he worked on behalf of the license of his father, but only minimal expenses for maintaining his wife and child were given to him and eventually, the property was also grabbed from him, therefore, placed under these circumstances by the applicant, the deceased had no other option but to commit suicide. (Para15)

The question of mens rea on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused and if the acts and deeds are only of such nature where the accused intended nothing more than harassment or snap show of anger, a particular case may fall short of the offence of abetment of suicide. However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. From the details of suicide note, which was sent on the mobile phone of the informant by her husband through mobile phone of her father-in-law, prove the compelling circumstances and continued act of annoying the deceased, which can be inferred as instigation/abetment to commit suicide. (Para 17)

In the judgment of Apex Court in the case of ***Ude Singh vs. State of Haryana reported in (2019) 17 SCC 301***, it has been held that if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the fourcorners of Section 306 IPC. (Para 18)

C. Non-bailable warrants not issued in cursory manner- Court should properly balance- personal liberty and social interest before issuing warrants- proper procedure followed. (Para 20)
Held:
It is on 20.12.2022, non-bailable warrants have been issued after service of summons upon the accused applicants, therefore, the 11 bailable warrants as well as non-bailable warrants have

been issued following the guidelines in the case of Inder Mohan Goswami (supra) wherein the Apex Court has been held that the court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided. (Para 20)

D. Whether appropriate to quash the chargesheet under Section 482 CrPC-stage- Magistrate has only issued process against the applicants- evidence produced by the accused in his defence cannot be looked at this stage, except in very exceptional circumstances- at initial stages of the criminal proceedings- *prima facie* case is made out disclosing the ingredients of offence alleged against the accused- the Court cannot quash a criminal proceeding-Application dismissed. (Para 23)

Held:

This Court comes on the issue whether it is appropriate for this Court being the Highest Court to exercise its jurisdiction under Section 482 Cr.P.C. to quash the charge-sheet and the proceedings at the stage when the Magistrate has merely issued process against the applicants and trial is to yet to come only on the submission made by the learned counsel for the applicants that present criminal case initiated by opposite party no.2 are not only malicious but also abuse of process of law. It is no more res integra that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence(s) alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any law or Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is clear from the law laid down by the Apex Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding. (Para 23)

Application dismissed. (E-14)

List of Cases cited:

1.Purushottam Chaudhary Vs C.B.I. decided on 27.02.2023

2.Inder Mohan Goswami & anr. Vs St. of Uttranch. & ors. reported in (2007) 12 SCC 1

3.R.P. Kapoor Vs St. of Pun., AIR 1960 SC 866

4.St. of Har. Vs Bhajan Lal 1992 SCC (Criminal) 426

5.Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq & anr., (para 10) 205 SCC (Criminal) 283

6. Mohd. Allauddin Vs St. of Bih., AIR 2019 SC 1910

7. Sakeer & ors. Vs. St. of U.P passed in Criminal Misc. Application U/s 482 No. 13727 of 2006 decided on 06.03.2020

8. Ude Singh Vs St. of Hary. reported in (2019) 17 SCC 301

9.Neeharika Infrastructure (P) Ltd. Vs St. of Mah. reported in (2021) SCC OnLine 315

10. Shafiya Khan @ Shakuntala Prajapati Vs St. of U.P., reported in (2022) 4 SCC 549

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

1. Instructions passed on by the learned AGA today in the Court, is taken on record.

2. Heard Mr. Prabha Shanker Mishra and Mr. Akash Deep Srivastava , learned counsel for the applicants, Mr. Ved Prakash Shukla, learned counsel for the opposite

party no.2, Mr. Pankaj Srivastava, learned A.G.A. for the State as well as perused the entire material available on record.

3. The present 482 Cr.P.C. application has been filed to quash the impugned orders dated 02.09.2022 (summoning) and 18.01.2023 (NBW/82/83 Cr.P.C.) as well as the entire proceedings of Criminal Case No.75 of 2022 (State vs. Kusum Devi and others), arising out of Case Crime No.75 of 2022, under Section 306 I.P.C., Charge sheet No.216 of 2022, Police Station-Naini, District-Prayagraj (Allahabad), pending in the court of Chief Judicial Magistrate, Allahabad.

4. The brief facts as enumerated in the application are as follows:-

i) An FIR has been lodged by wife of the deceased, namely, Sunita Mishra against as many as 5 named accused on 19.02.2022 at about 13:48 hrs, which was registered as Case Crime No.75 of 2022, under Section 306 IPC, P.S. Naini, District-Prayagraj stating therein that the opposite party no.2-Sunita Mishra w/o Sundar Mishra is resident of House No.115, Jawahar Nagar, Naini, Prayagraj. The husband of opposite party no.2 was working in Merchant Navy, however, when he came to know about the illness of his father, he came back to reside with his father in the year 2019 and started doing contract work in Nagar Nigam on license, which was in favour of his father. The informant/opposite party no.2 has five year old daughter, therefore, father of the deceased only provided expenses for their livelihood. The informant's Jeth, namely, Dinesh Mishra and Jethani, namely, Rani Devi as well as the other Jeth, namely, Manohar Mishra and mother-in-law of the informant, namely, Kusum Devi used to harass the informant for not having son and passed remarks as to what she will do with the money when she does not have any son. When the informant requested for money for education of her child, the aforesaid persons stated as to what was the purpose of educating her daughter. As the deceased really loved his daughter as well as his wife (the informant), therefore, he had sent his wife and daughter to Ahmedabad for purpose of educating his child. The informant and her daughter had gone to Ahmedabad for the aforesaid purpose on 26.12.2021, after which she was informed through telephone by her husband that his family members were exerting pressure upon him to perform second marriage and in case, he does not agree to do the same, they would disown him from the entire property. She was also informed by her husband that her Jeth and Jethani were persuading her father-in-law to disown her husband and execute a will in their favour. Taking advantage of illness of father-in-law of the informant, who was suffering from cancer since last one year and was confined to bed, the brothers of the deceased persuaded the informant's father-in-law and influenced him to give the entire property to them. She has also alleged that she was informed by her husband (now deceased) that on 05.01.2022 taking advantage of illness of her father-in-law, the entire property was taken by the brothers of the deceased. Coming to know about the same, her husband expressed that he does not want to live any more. On the same day, 05.01.2022 at about 10:30 p.m., the informant received the Whats-app messages from 9415613440 on her mobile no.9723224428, which was a suicide note of her husband. Being shocked by the same, she tried to contact the family members but they did not pickup the phone. Being tensed, the informant left

Ahmedabad in the morning at 06:00 a.m. and reached Prayagraj at the resident of the applicants on 07.01.2022 and found that on 06.01.2022, the postmortem of the body of the deceased (husband) had already been conducted and the funeral took place on 07.01.2022, but no information was given to the informant, nor anyone was ready to disclose anything about the incident. After the last rites (Terahvi) of her husband, the behaviour of the family members including the applicants was not proper, therefore, apprehending some untoward incident and due to fear, the informant went to Ahmedabad. She has further alleged that the applicants have instigated/abetted her husband to commit suicide under such circumstances where they were bothering him by passing taunts and remarks of disowning him from the property, under such circumstances he was forced to commit suicide. She was also suspecting that her husband has been murdered and the same has been given the shape of suicide, therefore, whether it is the suicide by abettement by the family members or after murdering him, colour of suicide has been given to the incident, can be well assessed after proper inquiry, therefore, she requested that the inquiry may be conducted. She further alleged that when she came back from Ahmedabad, she was not permitted to enter her house, hence, the present case has been lodged.

ii) After investigation, the charge sheet has been submitted on 27.07.2022 and the applicants have been summoned vide order dated 02.09.2022 after which bailable warrants have been issued on 07.12.2022 and finding service of summons to be sufficient, non-bailable warrants have been issued on 20.12.2022 after which on non-appearance of the applicants, Non-bailable warrants alongwith proceedings U/s 82 & 83 Cr.P.C. have been initiated against the applicants. Hence the present case has been filed.

5. Learned counsel for the applicants submits as under:-

i) the applicants are innocent and have been falsely implicated in the present frivolous case, which cannot be supported by any evidence.

ii) the present FIR has been lodged after a delay of about one month and 14 days without giving any plausible explanation for the same.

iii) the present FIR has been lodged with false and frivolous allegation with intention to get the property for which a registered will has been executed by father of the deceased in favour of mother-in-law of the informant on 09.03.2023 mentioning therein that after the death of Balram Mishra, name of Kusum Mishra be mutated in the revenue records. Subsequently, the Tehsildar passed the order dated 15.10.2022 and mutated the name of Kusum Mishra (mother-in-law of the informant) in the revenue record.

iv) disputing the suicide note, learned counsel for the applicants submits that no suicide note was recovered from the room of the deceased.

v) no offence under section 306 IPC is made out against the applicants as there is noting on record to show that there was abettment or instigation on the part of the applicants due to which the deceased committed suicide.

vi) relying upon the judgment of this Court in the case of ***Purushottam***

Chaudhary vs. Central Bureau of Investigation thru. The Superintendent decided on 27.02.2023 in Application U/s 482 No.1974 of 2023, learned counsel for the applicants submits that non bailable warrants should not be issued in a cursory manner and the order regarding proclamation U/s 82 & 83 CrPC should be issued only on the application of proclamation supported by affidavit.

vii) he further submits that issuance of non-bailable warrants should be avoided unless accused is charged with heinous offence or likely to destroy evidence. In support of his contention, he has relied upon the judgment of Apex Court in the case of ***Inder Mohan Goswami and another vs. State of Uttaranchal and others reported in (2007) 12 SCC 1***, in which the Apex Court has held that the court should be extremely careful before issuing non-bailable warrants as issuance of the warrants involves interference with the personal liberty.

6. Learned counsel for the applicants, therefore, submitted that the present criminal proceedings initiated against the applicant is not only malicious but also amount to an abuse of the process of the court of law. On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicant that the proceedings of the above mentioned criminal case are liable to be quashed by this Court.

7. On the other hand, Mr. Pankaj Srivastava, learned AGA for the State as well as Mr. Ved Prakash Shukla, learned counsel for the opposite party no.2 has opposed the submission made by the learned counsel for the applicants and submitted that delay has been well explained as the informant (wife of the deceased) came to know about the intention of the applicants after attending the last rites ceremonies of her husband and compelling circumstances, which were created by the applicants, she was left with no other option but to lodge the FIR. In the FIR itself, the explanation for delay is given. Even otherwise, it is quite natural that lady, who has lost her husband, will take time to understand the situation and act accordingly. It is admitted case of the applicants that the FIR has been lodged due to property dispute, hence it can be said that the circumstances under which the deceased committed suicide were nothing but the dispute regarding property, which was grabbed by the brothers of the deceased and the applicants had forced the deceased to leave his job. Thus left with nothing, he was placed in such circumstances under which he committed suicide.

8. Learned AGA for the State as well as learned counsel for the opposite party no.2 has further submitted that at the stage of taking cognizance by the Magistrate as per the provisions contained in Section 190(1)(b), the concerned Magistrate has to see as to whether prima facie case is being made out against the applicants. In the instant case, the concerned Magistrate has rightly taken cognizance on 02.09.2022 on the basis of the further investigation and other documents collected by the Investigating Officer including the statements of the witnesses. In support of his contention, learned counsel has relied upon the following judgments-

i. R.P. Kapoor vs. State of Punjab, AIR 1960 SC 866;

ii. State of Haryana vs. Bhajan Lal 1992 SCC (Criminal) 426;

iii. Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and

another, (para 10) 205 SCC (Criminal) 283;

iv. Mohd. Allauddin vs. State of Bihar, AIR 2019 SC 1910;

v. Sakeer and others vs. State of U.P. passed in Criminal Misc. Application U/s 482 No. 13727 of 2006 decided on 06.03.2020.

9. Learned A.G.A. as well as learned counsel for the opposite party no.2 further submits that perusal of F.I.R. as well as statements of the witnesses, goes to show that, prima facie case for the alleged offence is made out against the applicant. Lastly, the learned A.G.A. states that this High Court may not quash the entire criminal proceedings under Section 482 Cr.P.C. at the pre-trial stage, for which he has relied upon the judgment of the Apex Court in the case of **Mohd. Allauddin Khan Vs. The State of Bihar & Others** reported in 2019 0 Supreme (SC) 454, wherein the Apex Court has held that the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 Cr.P.C. because whether there are contradictions or/and inconsistencies in the statements of the witnesses is an essential issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. However, in the present case the said stage is yet to come.

10. On the cumulative strength of the aforesaid submissions, learned AGA for the State as well as learned counsel for the opposite party no.2 states that this Court may not exercise its inherent power under Section 482 Cr.P.C. in the present case, and hence the present application is liable to be rejected.

11. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

12. It would be appropriate to refer Section 306 IPC, which reads as under:-

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

13. In this context, it is also relevant to refer to Section 107 IPC, which reads as under:-

*"**107. Abetment of a thing**.--A person abets the doing of a thing, who—*

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

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

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

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

14. Section 107 IPC, when read carefully, requires that a person who is charged for abetment of a thing must have committed act of abetment directly to the deceased. It is useful to refer the suicide note of the deceased, which has been sent in the mobile of informant from the mobile number of the father of the deceased, which is enumerated herein-below:-

"मै सुन्दर मिश्रा s/o बलराम प्रसाद मिश्रा अपनी जिन्दगी से तन्ग अपने परिवार वालो से मेरे आत्महत्या मे जिमेदार मेरे घर वाले है मैने अपनी जिन्दगी इनके नाम कर दी और मुझे इन्ह लोगो ने धोखा दिया इसके जिमेदार घर के सभी लोग है मेरी पत्नी और बेटी इन लोगो की वजह से अलग है अतः मेरी कानून से प्रार्थना है कि मेरा ईसाफ किया जाय और इन लोगो को इनकी कर्मो की सजा दी जाये क्योकि इन लोगो ने मेरी जिन्दगी को तबाह कर दिया और जाब कर रहा था वो इन लोगो ने झुड़वा दिया और अपने फायदे के लिये यूज कर लिया अतः आप लोगो से निवेदन है कि मेरे साथ इन्साफ हो

मेरे पत्नी और बेटी का न्याय हो वाकि सारी साक्ष्य और रिकाडिगं मेरी पत्नी देगी

आपका

सुन्दर मिश्रा"

15. Perusal of the aforesaid suicide note as well as the evidence availble on record, this Court finds substance in the contention raised by the learned counsel for the opposite party no.2 as well as learned A.G.A. that *prima facie* case for the alleged offence is made out against the applicants. It is a clear case wherein the applicants by their acts and by their continuous course of conduct had created a situation which led to the deceased perceiving no other option except to commit suicide. Thus, the offence falls within the four corners of Section 306 IPC. The applicants had played an active role in forcing the deceased to leave his job and he worked on behalf of the license of his father, but only minimal expenses for maintaining his wife and child were given to him and eventually, the property was also grabbed from him, therefore, placed under these circumstances by the applicant, the deceased had no other option but to commit suicide.

16. In the present case, the applicants had by their acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which an instigation in the case can be inferred.

17. The question of mens rea on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused and if the acts and deeds are only of such nature where the accused intended nothing more than harassment or snap show of anger, a particular case may fall short of the offence of abetment of suicide. However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. From the details of suicide note, which was sent on the mobile phone of the informant by her husband through mobile phone of her father-in-law, prove the compelling circumstances and continued act of annoying the deceased, which can be inferred as instigation/abettment to commit suicide.

18. In the judgment of Apex Court in the case of ***Ude Singh vs. State of Haryana***

reported in (2019) 17 SCC 301, it has been held that if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the four-corners of Section 306 IPC.

19. As regards the submission of learned counsel for the applicants that non-bailable warrants have been issued in a cursory manner, learned AGA as well as counsel for the opposite party no.2 has submitted that initially, an FIR was lodged on 19.02.2022 and the applicants were released on anticipatory bail by the court below itself vide order 23.06.2022, which was till submission of charge sheet. On 27.07.2022, the charge sheet was submitted and cognizance was taken on 02.09.2022 and, thereafter, two dates, i.e. 04.10.2022 and 04.11.2022 were fixed for appearance of the accused persons. Thereafter, on 07.12.2022, bailable warrants have been issued against the applicants fixing date on 20.12.2022 for appearance. On 20.12.2022 also, when the applicants did not appear before the court concerned, non-bailable warrants have been issued against them noting that service of summons were sufficient upon the accused persons. Subsequently, on 18.01.2023, non-bailable warrants as well as the proceedings under Section 82&83 Cr.P.C. have also been initiated. After coming to know about the charge sheet, the applicants have filed an anticipatory bail application on 22.11.2022 before the concerned court, therefore, they were well aware of the cognizance order as well as the orders vide which date was fixed for 07.12.2022 for appearance of the accused. The aforesaid anticipatory bail application was dismissed on 06.02.2023 and, thereafter, on 13.02.2023, the anticipatory bail application was filed before this Court, which is still pending.

20. It is on 20.12.2022, non-bailable warrants have been issued after service of summons upon the accused applicants, therefore, the bailable warrants as well as non-bailable warrants have been issued following the guidelines in the case of Inder Mohan Goswami (supra) wherein the Apex Court has been held that the court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

21. In the present case, inspite of having knowledge of the cognizance order on 22.11.2022, the anticipatory bail application was moved before the court below and when the applicants did not appear, bailable warrants were issued on 07.12.2022 and noting that service upon the applicants were sufficient, non-bailable warrants were issued and subsequently, seeing that the applicants are avoiding appearance before the court, the proceedings U/s 82&83 CrPC were initiated by the court concerned. Therefore, it appears that the accused applicants were watching the court proceedings from outside and were avoiding their appearance so that the trial may not proceed further. There is no report of moving any application for initiation of proceedings U/s 82&83 Cr.P.C.

22. From perusal of the instructions passed on to the Court by learned AGA, it is clear that in collusion with the police officials, evidence regarding suicide note was tempered and misplaced, therefore, on the application moved by the informant/complainant before the senior officials, proper action has been taken against the erring officials, who in collusion with the applicants have tried to tempered the evidence by misplacing the suicide note, which was found in the pocket of the deceased, when the concerned police officials has reached at the place of occurrence.

23. This Court comes on the issue whether it is appropriate for this Court being the Highest Court to exercise its jurisdiction under Section 482 Cr.P.C. to quash the charge-sheet and the proceedings at the stage when the Magistrate has merely issued process against the applicants and trial is to yet to come only on the submission made by the learned counsel for the applicants that present criminal case initiated by opposite party no.2 are not only malicious but also abuse of process of law. It is no more res integra that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence(s) alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any law or Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is clear from the law laid down by the Apex Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.

24. In the case of ***State of Haryana Vs. Bhajan Lal reported in 1992 AIR 604***, the Apex Court in paragraph 102 has enumerated 7 categories of the cases where power under Section 482 Cr.P.C. can be exercised by this Court, which are quoted below:-

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

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

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

under an order of a Magistrate within the purview of Section 155 (2) of the Code.

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

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

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

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

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

25. The principles laid down by the Apex Court in the aforesaid case, have consistently been followed in the recent judgement of three-Judge Bench of the Apex Court in the case of ***Neeharika Infrastructure (P) Ltd. vs. State of Maharashtra reported in (2021) SCC OnLine 315*** wherein it has been held that there is no denial of the fact that power under Section 482 Cr.P.C. is very wide, but as observed by this Court in catena of decisions, referred to hereinabove, conferment of wide power requires the court to be more cautious and it casts an onerous and more diligent duty on the court. Therefore, in exceptional cases, when the High Court deems it fit, regard being had to the parameters of quashing and the self-restraint imposed by law, may pass appropriate interim orders, as thought apposite in law, however, the High Court has to give brief reasons which will reflect the application of mind by the court to the relevant facts.

26. In recent relevant judgement of the Apex Court in the case of ***Shafiya Khan @ Shakuntala Prajapati vs. State of U.P.,*** reported in ***(2022) 4 SCC 549,*** it was observed as under;-

"16. It is no doubt true that the power of quashing of criminal proceedings should be exercised very sparingly and with circumspection and that too in rarest of the rare cases and it was not justified for the Court in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the inherent powers do not confer any arbitrary jurisdiction on the Court to act according to its whims and fancies."

27. In view of the aforesaid, this Court finds that the submissions made by the applicants' learned counsel call for adjudication on pure questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. The prayer for quashing the entire proceedings is refused as I do not see any abuse of the Court's process either.

28. In such a situation where the applicants have instigated and created such circumstances that the deceased was left with no other option but to commit suicide and perusal of the averments made in the FIR as well as the statement of the witnesses recorded by the I.O. and the conduct of the applicants in a heinous offence where a person had lost his life and a special case where evidence is being tempered for which action has already been taken against the erring official, this Court is of the opinion that the relief as prayed by the applicants cannot be granted.

29. This Court, however, may clarify that whatever is said in this judgment is purely tentative and limited to the purpose of judging the worth of the prayer to quash proceedings as well as impugned orders. It is and ought not be regarded by the Trial Court as any kind of a comment or evaluation about evidence, which is yet to surface during trial. The truth of the prosecution case has to be established beyond doubt at the trial in accordance with law. However, this Court is of opinion that this is not a case, where the prosecution ought to be scuttled at the threshold in the exercise of powers under Section 482 of the Code.

30. With the aforesaid observations, the present application under Section 482 Cr.P.C. is, accordingly, **dismissed.**

(2023) 4 ILRA 1256
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.03.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Application U/S 482. No. 5947 of 2023

Shailendra Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ramanand Gupta, Sri Harshit Gupta

Counsel for the Opposite Parties:
G.A.

A. Criminal Law – Application under Section 482 CrPC- order of revisional court upholding the summoning order passed by the trial court- under challenge- proceedings arise out of complaint case under Sections 420, 504 and 506 IPC- issue of delay in filing the complaint- transaction done in the capacity of an employee of the company- no personal liability.

B. Delay duly explained in the complaint itself- entire prosecution story cannot be disbelieved on the ground of delay- case is not of civil nature-incident involves criminality- applicant received Rs. 4 lakhs in the name of his company for providing land to the complainant-neither the land was allotted nor the money was returned. (Paras 13 and 14)

HELD:

Even otherwise, the Hon'ble Supreme Court of India in the case of State of H.P. Vs. Gian Chand reported in (2001) 6 SCC 71 has opined that the entire prosecution story could not be disbelieved on the ground of delay. (Para 13)

To the submission made by the learned counsel for the applicant that entire case is civil in nature, this Court may record that this case is not civil but criminal, in which the applicant received four lacs rupees in the name of is company for the purposes of providing land to the complainant. However, the complainant was neither allotted the land in his favour nor his money was returned due to which Rs. 4 lacs of the complainant is alleged to have been looted. When the complainant demanded his money from the applicant twice, he abused and threatened him. Apart from the above, there is no civil litigation pending between the applicant and the complainant as the stage of civil litigation has not been reached. This is a case of breach of trust. (Para 14)

C. Section 420 IPC- necessary ingredients explained-neither the land was allotted nor the money was returned- fine distinction between breach of contract and offence of cheating-intention to defraud since inception of the transaction is necessary-if necessary, the corporate veil can be pierced-to ascertain liability. (Paras 19 to 39)

Held:

Then in order to attract Section 420 I.P.C., essential ingredients are: (I) cheating; (ii) dishonest inducement to deliver property or to make or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security; and, (iii) mens rea of accused at the time of making inducement and which act of omission. (Para 19)

It is now well settled that the corporate veil can in certain situations be pierced or lifted. The principle behind the doctrine is a changing concept and it is expanding its horizon as was held in State of U.P. v. Renusagar Power Co. The ratio of the said decision clearly suggests that whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable therefore. (Para 39)

D. Section 482 CrPC- appropriate to quash proceedings at this stage- Magistrate has merely issued the process against the applicants-trial yet to begin-adjudication on pure questions of fact-best done by trial court-no pre-trial before the trial-prima facie case made out against the applicant- sufficient material to proceed against him-impugned orders upheld-application dismissed. (Para 51)

Application dismissed. (E-14)

List of Cases cited:

1. Sayeed Yaseer Ibrahim Vs St. of U.P. & anr. reported in 2020 0 Supreme (SC) 1280

2. R. Nagendra Yadav Vs The St. of Telangana & anr. reported in 2022 0 Supreme (SC) 1250

3. Randheer Singh Vs The St. of U.P. & ors. reported in 2021 0 Supreme (SC) 664

4. Raghvendra Singh & ors. Vs St. of U.P. & anr., in Application U/S 482 No. 2300 of 2016 decided on 11th August, 2022

5. St. of H.P. Vs Gian Chand reported in (2001) 6 SCC 71

6. Mahadeo Prasad Vs St. of West Bengal, reported in AIR 1954 SC 724

7. Jaswantrai Manilal Akhaney Vs St. of Bom., reported in AIR 1956 SC 575

8. G.V. Rao Vs L.H.V. Prasad & ors., reported in 2000(3) SCC 693

9. Hridaya Ranjan Prasad Verma & ors. Vs St. of Bih. & anr., reported in 2000(4) SCC 168

10. S.W. Palanitkar & ors. Vs St. of Bih. & anr., reported in 2002(1) SCC 241

11. Hira Lal Hari lal Bhagwati Vs CBI, New Delhi, reported in 2003(5) SCC 257

12. Devender Kumar Singla Vs Baldev Krishan Singh reported in 2004 (2) JT 539 (SC)

13. Indian Oil Corporation Vs NEPC India Ltd., reported in 2006(6) SCC 736

14. Rajesh Bajaj Vs State NCT of Delhi, reported in 1999(3) SCC 259

15. Vir Prakash Sharma Vs. Anil Kumar Agarwal & anr., reported in 2007(7) SCC 373

16. Sh. Suneel Galgotia & anr.Vs St. of U.P. & ors. reported in 2016 (92) ACC 40

17. United India Insurance Company Ltd. Vs B.Rajendra Singh & ors., reported in JT 2000(3)SC.151

18. Vice Chairman, Kendriya Vidyalaya Sangathan & anr. Vs Girdhari Lal Yadav, reported in 2004 (6) SCC 325

19. Ram Chandra Singh Vs Savitri Devi & ors., reported in 2003(8) SCC 319

20. S.P. ChengalVaraya Naidu (dead) by L.Rs Vs Jagannath (dead) by L.Rs & ors., reported in AIR 1994 SC 853

21. St. of Mah. Vs Mayer Hans George reported in AIR 1965 SC 722 (V 52 C 123)

22. Kartar Singh Vs St. of Pun. reported in (1994) 3 SCC 569

23. R.P. Kapur Vs St. of Pun.; AIR 1960 SC 866

24. St. of Har. & ors. Vs Ch. Bhajan Lal & ors.;1992 Supp (1) SCC 335

25. St. of Bih. & anr. Vs P.P. Sharma & anr.; 1992 Supp (1) SCC 222

26. Zandu Pharmaceuticals Works Ltd. & ors. Vs Mohammad Shariful Haque & anr.; 2005 (1) SCC 122

27. M. N. Ojha Vs Alok Kumar Srivastava; 2009 (9) SCC 682

28. Mohd. Allauddin Khan Vs The State of Bih & ors. reported in 2019 0 Supreme (SC) 454

29. Nallapareddy Sridhar Reddy Vs The St. of Andhra Pradesh & ors. reported in 2020 0 Supreme (SC) 45

30. Rajeev Kaurav Vs Balasahab & ors. reported in 2020 0 Supreme (SC) 143

31. St. of U.P. Vs Akhil Sharda & ors. reported in 2022 SCC OnLine SC 820

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

1. From the perusal of the certified copy of the impugned order passed by the revisional court enclosed as Annexure-7 to the affidavit accompanying the present application, it is apparent that the said order has been passed on **16th January, 2023** but inadvertently, in the prayer clause of this application it has wrongly been transcribed as "16th January, 2022" in place of **16th January, 2023**.

2. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the material on record.

3. This application under Section 482 Cr.P.C. has been filed for quashing the Judgement and order dated 16.01.2023 passed by learned Additional Sessions Judge-I, Lalitpur, whereby Criminal Revision No. 90 of 2022 (Shailendra Singh Vs. State of U.P. and another) filed by the revisionist has been rejected upholding the summoning order dated 14.02.2020 passed by learned Additional Chief Judicial Magistrate, Lalitpur passed in Complaint Case No. 3983 of 2018 (Sandeep Awasthi Vs. Shailendra Singh Bundela) under Sections 420, 504, 506 I.P.C. Police Station Taalbehat, District Lalitpur. The applicant has further prayed for stay of the entire proceedings of the aforesaid complaint case.

4. The crux of the allegations made in the complaint is that opposite party no.2 had moved an application under Section 156(3) Cr.P.C. before the Chief Judicial Magistrate, Lalitpur stating therein that the complainant had very good relations with the applicant and he disclosed him that he works in the company in the name and style of "Shubhalaya Greens 303 R.K. Towar, M.P. in Bhopal", which provides plot on a very low prices. Further he offered him a plot measuring 20 x 70 yards in Bhaurikal, Madhya Pradesh at 5,25,000/-. Trusting on the proposal/offer given by the applicant, the complainant made his first payment of Rs. 50,000/- through Cheque no. 001669 Central Bank, Taalbehat, Lalitpur on 01.05.2015 in favour of Shubhalay Mines and Developers Pvt. Ltd., Central Bank Jail Road, Bhopal (M.P.) (hereinafter referred as the 'company of opposite party no.2") towards his purchase of the land and applicant gave a receipt bearing serial no. 901 dated 01.05.2015 to the complainant on behalf of the company. It is further alleged that after some time applicant again demanded Rs. 3,50,000/- out of remaining amount and complainant issued another cheque bearing cheque no. 891084 dated 12.05.2015 of amount 3,50,000/- in favour of company. Similarly, complainant invested Rs. 4,00,000/- in the said project. For one year several times the complainant contacted the applicant on the phone for execution of the sale-deed and he was assured by the applicant that work is in progress and the registry of the land will be done as soon as possible. Your plot has been booked. Later on the complainant came to know that the applicant/opposite party had taken money from several persons by cheating and promising them to give a plot, after which several calls were made by the complainant but the applicant/opposite party did not respond. Attaching the receipt and other documents, the applicant made an application before the Chairman, RERA Bhavan at Bhopal and the Chairman said that no transaction has been done by the applicant Shailendra Singh. Under the criminal conspiracy, the opposite party has taken money by luring many persons and did not return the money to anyone and a new firm Shrimant Vinayak Infrastructure has been formed by the applicant/opposite party under the guise of that company, the applicant/opposite party is doing similar work. On 01.06.2018, the complainant went to residence of opposite party and talked about his plot after being very upset and when he asked for his money back, the applicant behaved indecently, abused him, talked about usurping the money and threatened to kill him. After that, the complainant also sent a legal notice to the applicant/opposite party through an Advocate. Neither the applicant replied to the notice nor returned the money and there was no contact with the applicant nor was it known.

5. It is further alleged that on 13.08.2018 at around 10.00 am, the complainant received information that the applicant was at his home, then the complainant along with Satish Litauria Sanjay Srivastava went to the residence of the applicant and demanded his money and talked about the plot, then he abused him along with his associates and refused to give the money and said that your money have usurped. He also threatened them that if they demand their money or lodge any report to the Police Station, he will kill them. Just after, the complainant sent the information about the aforesaid incident to the concerned police station and he has also sent his report through registry to the Superintendent of Police, Lalitpur but no

action was taken, due to which the complainant has filed the present complaint against the applicant under Section 156 (3) Cr.P.C.

6. After considering the facts and circumstances of the present case the Learned Additional Chief Judicial, Magistrate, Lalitpur summoned the applicant under section 420, 504, 506 IPC vide order dated 14.02.2020. Being aggrieved by the aforesaid summoning order dated 14.02.2020 applicant filed criminal revision along with delay condonation application before District-Judge, Lalitpur wherein he briefly explained his contention regarding misappropriation of money with complainant and said offence is made out against applicant. The said revision was admitted and the delay condonation application was allowed by the court below on 30.09.2022 and the court concerned also issued notice to complainant to resolve the controversy. However, vide judgement and order dated 16.01.2023 applicant's revision has been rejected by the District Judge, Lalitpur. During the pendency of the said revision Civil Judge Junior Division (F.T.C.), Lalitpur issued non- bailable warrant against applicant on 18.07.2022 and meantime the said court further proceeded with the proceedings of Section 82 Cr.P.C. on 02.09.2022.

7. It is the case of the applicant that he applicant was the employee of the company and the cheques in question was issued by the complainant in favour of company and being an agent the applicant only communicated the complainant about the company's offers and nothing more than that. The applicant had never forced to complainant to invest his money in aforesaid company/project. It is further stated that there is no forgery as alleged, is made out against the applicant, inasmuch as the applicant was completely unaware from the alleged forgery which was committed by the company. It was only on account of being employee false and frivolous complaint case has been registered against him at a belated stage by means of an application under Section 156 (3) Cr.P.C. It is further submitted that entire disputed amount has been duly received by the company and the company is not impleaded as party in present complaint case. Just on account of harassment complainant falsely implicated the applicant in present case without any cogent and clinching evidence. The entire proceedings of the present case are nothing but an abuse of process of law which is liable to be quashed by this Court.

8. Submission of the learned counsel for the applicant:

(i) The application of the complainant (opposite party no.2 herein) under section 156(3) Cr.P.C. came to be filed in the Court of Chief Judicial Magistrate, Lalitpur on 29.08.2018 after delay of 3 years of making his first payment towards company for which no plausible explanation has been given.

(ii) The court below has treated the aforesaid application as complaint case and recorded the statements of the complainant and his witnesses under Sections 200 & 202 Cr.P.C. In the statement recorded under Section 200 Cr.P.C., the complainant/opposite party no.2 has reiterated the same version as unfolded in his application under Section 156 (3) Cr.P.C.

(iii) Thereafter another person namely Anil came into picture apart from

the witnesses mentioned in the complaint case and his statement has been recorded as P.W.-1 before the court concerned under section 202 Cr.P.C. in which he has supported prosecution story. As per his statement, he works at complainant's shop for many years.

(iv) Statement of Ajit Kumar, who was unknown person has been recorded under section 202 Cr.P.C. as P.W.-2 wherein he has reiterated the version as unfolded in the complaint case. The testimony of the P.W.2 is completely unreliable and unsustainable because he specifically alleged against the applicant and his statement before the court appears to be influenced by the complainant. Moreover, complainant has not adduced Satish Litoria and Sanjay Srivastava, who are alleged to be the witnesses of complaint and in place of them, the complainant has produced another two new witnesses i.e. Anil and Ajit Kumar only in order to strengthen his case.

(v) entire case is civil in nature wherein company in question misappropriates the money of the complainant and for the recovery of disputed amount complainant should institute a civil suit for recovery of 4 lacs from the company but the complainant opted criminal way to harass the applicant even when applicant has no role to play in the matter. In support of this submission, learned counsel for the applicant has placed on record the account statement of company and copy of registration certificate of the company which is incorporated under the companies act, 1956 having its registered office in Madhya Pradesh.

(vi) The aforesaid complaint has been moved by the opposite party no. 2 with ulterior motive only for harassment of the applicant meaning thereby entire prosecution story seems false and fabricated and is initiated only for harassing the applicant. The applicant has not received any single penny from the complainant and he resigned for the said company in 2015 after serving four months only therein.

(vii). The complainant/opposite party no.2 has neither impleaded the company in the complaint case as one of the opposite parties nor filed any civil suit for recovery of his earnest money and therefore, no offence under Sections 420, 504, 506 I.P.C can be said to be made out against the applicant.

In support of his case, learned counsel for the applicant has placed reliance upon the following judgments of the Hon'ble Supreme Court as well as this Court:

(a) Sayeed Yaseer Ibrahim Vs. State of U.P. & Another reported in 2020 0 Supreme (SC) 1280;

(b) R. Nagendra Yadav Vs. The State of Telangana & Another reported in 2022 0 Supreme (SC) 1250;

(c) Randheer Singh VS. The State of U.P. & Others reported in 2021 0 Supreme (SC) 664; and

(d) Raghvendra Singh & 3 Others Vs. State of U.P. & Another, in Application U/S 482 No. 2300 of 2016 decided on 11th August, 2022.

On the cumulative strength of the aforesaid,, the learned counsel for the applicant submits that the applicant is an innocent person, who has been falsely implicated in the aforesaid case and he has no criminal antecedents to his credit except the present one. The Additional Chief Judicial Magistrate, Lalitpur in a routine manner has summoned the applicant vide order dated 14.02.2020 to face trial under Sections 420, 504, 506 I.P.C. against which, the applicant preferred Criminal Revision No. 90 of 2022 (Shailendra Singh Vs. State of U.P. and another) which too has been illegally rejected by the learned revisional Court vide order dated 16.01.2022 without considering the factual and legal aspects of the matter and therefore. the impugned orders are liable to be quashed by this Court. Apart from the above, he also prays that since no case under Sections 420, 504, 506 I.P.C. is made out against the applicant as essential ingredients of cheating are missing, entire proceedings of the complaint case be quashed.

9. Per contra, learned A.G.A. has submitted that the impugned summoning order has been passed after appraising the evidence available on the face of record, which order has been rightly upheld by the learned revisional Court, therefore the impugned orders are perfectly, legal just and proper which calls for no interference by this Court in exercise of powers conferred under Section 482 Cr.P.C. jurisdiction. It is further submitted that from the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants at this stage. All the submissions made relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. He also submits that it is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings. It is clear from the law laid down by this Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding. On the cumulative strength of the aforesaid, learned A.G.A. urges that offence under Sections 420,504 and 506 I.P.C. is made out against the applicants. The present application under Section 482 Cr.P.C. is devoid of merit and the same is liable to be dismissed by this Court.

10. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present application under Section 482 Cr.P.C.

11. Seeing the fact that order dated 18th July, 2022 issuing non-bailable warrants has been issued to the applicant as also proceedings under Sections 82 Cr.P.C. have been initiated against him by the court below on 2nd September, 2022 and some documents as to whether the applicant was only an employee of the company or its owner or one of its partner have not been brought on record. Before proceeding on merit of the orders impugned, this Court was issuing notice to the complainant/opposite party no.2 calling upon him to file his counter affidavit along with the counter affidavit of the State, but the learned counsel for the applicant

insisted the Court to decide this application finally on that day itself. Therefore, this Court has no other option but to decide the same on the basis of materials whichever are available on record.

12. So far as the submission made by the learned counsel for the applicant that there is a delay of three years in making application under Section 156 (3) Cr.P.C. by the complainant for which no plausible explanation has been given, is concerned, this Court may record that perusal of the present complaint case itself explains such delay. In the complaint it has been submitted by the applicant that after giving second cheque of Rs. 3,50,000/- to the applicant for purchasing the plot as offered by the applicant, the complainant contacted the applicant time and again, and on every occasion, the applicant avoided him. When the complainant met the applicant, he has taken time from the complainant ensuring every time that soon the sale-deed of the plot will be executed in his favour. The complainant has came to know that like the complainant, the applicant has also taken money from various persons for giving plot and he also avoided them and has not got the sale-deed executed qua the plot in their favour and he insisted him either to return his money or get the sale-deed executed in his favour, however, he was abused and threatened. After that the complainant made an application before the RERA where he has not obtained any fruitful order. Thereafter, he made various applications before the concerned Police Station and the Officer of the Police Department, this time again his request for lodging of the FIR in that regard has gone unheard. Hence he has approached the court below by filing an application under Section 156 (3) Cr.P.C. Because of the aforesaid reason, three years have elapsed and delay has occurred in the present case which is not on the part of the complainant.

13. Even otherwise, the Hon'ble Supreme Court of India in the case of **State of H.P. Vs. Gian Chand** reported in *(2001) 6 SCC 71* has opined that the entire prosecution story could not be disbelieved on the ground of delay. Relevant paragraph 12 of the aforesaid judgment is as follows:

"Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case. I*n the present case, PW1, the mother of the prosecutrix is a widow. The accused is a close relation of brother of late husband of PW1. PW1 obviously needed her family members consisting of her in-laws to accompany her or at least help her in lodging the first information report at the police station. The incident having occurred in a village, the approach of the in-laws of PW1 displayed rusticity in first calling upon the father of the accused and complaining to him of what his son had done. It remained an unpleasant family affair on the next day of the incident which was tried to be settled, if it could be, within the walls of*

family. That failed. It is thereafter only that the complainant, the widow woman, left all by herself and having no male family member willing to accompany her, proceeded alone to police station. She was lent moral support by Ruldu Ram, the village Panch, whereupon the report of the incident was lodged. The sequence of events soon following the crime and as described by the prosecution witnesses sounds quite natural and provides a satisfactory explanation for the delay. It was found to be so by the learned Sessions Judge. The High Court has not looked into the explanation offered and very superficially recorded a finding of the delay having remained unexplained and hence fatal to the prosecution case. It is common knowledge and also judicially noted fact that incidents like rape, more so when the perpetrator of the crime happens to be a member of the family or related therewith, involve the honour of the family and therefore there is a reluctance on the part of the family of the victim to report the matter to the police and carry the same to the court. A cool thought may precede lodging of the FIR. Such are the observations found to have been made by this Court in State of Punjab Vs. Gurmit Singh & Ors., (1996) 2 SCC 384 and also in the case of Harpal Singh (1981) SCC Crl. 208. We are satisfied that the delay in making the FIR has been satisfactorily explained and therefore does not cause any dent in the prosecution case."

14. To the submission made by the learned counsel for the applicant that entire case is civil in nature, this Court may record that this case is not civil but criminal, in which the applicant received four lacs rupees in the name of is company for the purposes of providing land to the complainant. However, the complainant was neither allotted the land in his favour nor his money was returned due to which Rs. 4 lacs of the complainant is alleged to have been looted. When the complainant demanded his money from the applicant twice, he abused and threatened him. Apart from the above, there is no civil litigation pending between the applicant and the complainant as the stage of civil litigation has not been reached. This is a case of breach of trust.

The judgments relied upon by the learned counsel for the applicant in support of his aforesaid submission are not applicable in the facts of the present case

In the case of Sayeed Yaseer Ibrahim (Supra), the Apex Court has not found any ingredient of Section 420 I.P.C. The Apex Court in R. Nagendra Yadav (Supra) has quashed the proceedings on the ground that for the same dispute civil suit was pending between the parties. In the case of Randheer Singh (Supra), the Hon'ble Supreme Court from the version of the FIR and the charge-sheet submitted has not found any case under Sections 420, 467, 468 and 471 I.P.C. being made out against the accused. In Raghvendra Singh (Supra), the Hon'ble Single Judge of this Court has observed that the dispute between the parties arose due to a forged will and such case does not relate to criminality.

15. Apart from the aforesaid two submissions advanced by the learned counsel for the applicant, the other submissions raise disputed question of fact and the correctness or otherwise of the same cannot be examined or decided at this pre-trial stage. This Court finds substance in the submissions made by the learned A.G.A. for the State in toto.

16. Now this Court comes on the issue of any cheating, fraud, deception, dishonesty being committed by the applicant in committing cheating upon the complainant by taking Rs. 4 lacs in the garb of purchase of a land.

17. Before coming to the merits of the submissions and replies on the issue of applicant on committing cheating, deception, fraud, it would be worthwhile to reproduce Section 420 I.P.C., which is cheating and defined in Section 415 I.P.C. and the same are being quoted herein-below:

"415. Cheating.- Whoever, by ***deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property,*** *or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".*

*Explanation.--****A dishonest concealment of facts is a deception*** *within the meaning of this section."*

"420. ***Cheating and dishonestly inducing delivery of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person,*** *or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

18. In order to attract allegations of "cheating", following things must exist:

(i) deception of a person;

(ii) (A) **fraudulent or dishonest inducement of that person,**

(a) to deliver any property to any person; or,

(b) to consent that any person shall retain any property,

(B) intentional inducing that person to do or omit to do any thing,

(a) which he would not do or omit if he was not so deceived, and,

(b) such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

(Emphasis added)

19. Then in order to attract Section 420 I.P.C., essential ingredients are:

(I) cheating;

(ii) dishonest inducement to deliver property or to make or destroy any valuable security or any thing which is sealed or signed or is capable of being converted into a valuable security; and,

(iii) mens rea of accused at the time of making inducement and which act of omission.

20. In **Mahadeo Prasad Vs. State of West Bengal**, reported in AIR 1954 SC 724 it was observed that to constitute offence of cheating, intention to deceive should be in existence at the time when inducement was offered.

21. In **Jaswantrai Manilal Akhaney Vs. State of Bombay**, reported in AIR 1956 SC 575, Court said that a guilty intention is an essential ingredient of the offence of cheating. For the offence of cheating, "mens rea" on the part of that person, must be established.

22. In **G.V. Rao Vs. L.H.V. Prasad and others,** reported in *2000(3) SCC 693*, Court said that Section 415 has two parts. While in the first part, the person must *"dishonestly"* or "*fraudulently"* induce the complainant to deliver any property and in the second part the person should intentionally induce the complainant to do or omit to do a thing. In other words in the first part, inducement must be dishonest or fraudulent while in the second part, inducement should be intentional.

23. In **Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another,** reported in *2000(4) SCC 168*, Court said that in the definition of 'cheating', there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, inducement must be fraudulent or dishonest. In the second class of acts, the inducement must be intentional but not fraudulent or dishonest. It was pointed out that there is a fine distinction between mere breach of contract and the offence of cheating. It depends upon the intention of accused at the time to inducement which may be judged by his subsequent conduct but for this, subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. In order to hold a person guilty of cheating it would be obligatory to show that he had fraudulent or dishonest intention at the time of making the promise. Mere failure to keep up promise subsequently such a culpable intention right at the beginning, i.e, when he made the promise cannot be presumed.

24. In ***S.W. Palanitkar and others Vs. State of Bihar and another,*** reported in 2002(1) SCC 241, while examining the ingredients of Section 415 IPC, the aforesaid authorities were followed.

25. In **Hira Lal Hari lal Bhagwati Vs. CBI, New Delhi**, reported in *2003(5) SCC 257*, Court said that to hold a person guilty of cheating under Section 415 IPC it is necessary to show that he has fraudulent or dishonest intention at the time of making promise with an intention to retain property. The Court further said:

"Section 415 of the Indian Penal Code which defines cheating, requires deception of any person (a) inducing that person to: (i) to deliver any property to any person, or (ii) to consent that any person shall retain any property OR (b) intentionally inducing that person to do or omit to do anything which he would not do

or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person, anybody's mind, reputation or property. In view of the aforesaid provisions, the appellants state that person may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the Section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest."

(Emphasis added)

26. I**n Devender Kumar Singla Vs. Baldev Krishan Singh** reported in 2004 (2) JT 539 (SC), it was held that making of a false representation is one of the ingredients of offence of cheating.

27 . In **Indian Oil Corporation Vs. NEPC India Ltd**., reported in *2006(6) SCC 736* in similar circumstances of advancement of loan against hypothecation, the complainant relied on Illustrations (f) and (g) to Section 415, which read as under:

"(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

"(g). A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contact and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

28. The Court said that crux of the postulate is intention of the person who induces victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. Court also referred to its earlier decisions in **Rajesh Bajaj Vs. State NCT of Delhi**, reported in *1999(3) SCC 259 a*nd held that it is not necessary that in the body of his complaint, a complainant should verbatim reproduce all the ingredients of the offence which he is alleging, nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent.

29. In **Vir Prakash Sharma Vs. Anil Kumar Agarwal and another**, reported in *2007(7) SCC 373* it was held that if no act of inducement on the part of accused is alleged and no allegation is made in the complaint that there was any intention to cheat from the very inception, the requirement of Section 415 read with Section 420 IPC would not be satisfied. The Court relied on the earlier decisions in **Hridaya Ranjan Prasad Verma (supra) and Indian Oil Corporation Vs. NEPC India Ltd.(supra).**

30. The aforesaid authorities have been referred to and relied on in reference to offence under Section 420 I.P.C. by a Division Bench of this Court in **Sh. Suneel Galgotia and another Vs. State of U.P. and others** reported in *2016 (92) ACC 40.*

31. Apart from the above, this Court has also noticed the other judgments of the Apex Court, reiterating the aforesaid laws.

32. In the case of **United India Insurance Company Ltd. V. B.Rajendra Singh and others,** reported in *JT 2000(3)SC.151*, considering the fact of fraud, the Apex Court held in paragraph 3 as under :

"Fraud and justice never dwell together". (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper overall these centuries. Lord Denning observed in a language without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything"(Lazarus Estate Ltd. V. Beasley 1956(1)QB 702)."

33. In the case of **Vice Chairman, Kendriya Vidyalaya Sangathan and Another Vs. Girdhari Lal Yadav,** reported in *2004 (6) SCC 325*, the Apex Court considered the applicability of principles of natural justice in cases involving fraud and held in paragraph 12 and 13 as under :

"12. Furthermore, the respondent herein has been found guilty of an act of fraud. In opinion, no further opportunity of hearing is necessary to be afforded to him. It is not necessary to dwell into the matter any further as recently in the case of Ram chandra Singh v. Savitri devi this Court has noticed:

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16.Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."

34. In the case of **Ram Chandra Singh Vs. Savitri Devi and others**, reported in *2003(8) SCC 319*, the Apex Court held in paragraphs 15, 16, 17, 18, 25 and 37 as under :

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.

37. It will bear repetition to state that any order obtained by practising fraud on court is also non-est in the eyes of law."

35. In the case of **S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs and others,** reported in *AIR 1994 SC 853,* the Apex Court held in para 7 as under:

"7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

36. In **State of Maharastra Vs. Mayer Hans George** reported in *AIR 1965 SC 722 (V 52 C 123),* the Apex Court specially in paragraph-10, has observed as follows:

"10. In Russell on Crime, 11th edn. Vol. 1, it is stated at p. 64:..... ***there is a presumption that in any statutory crime the common law mental element, mens rea, is an essential ingredient."***

On the question how to rebut this presumption*, the learned author points out that the policy of the courts is unpredictable. I shall notice some of the decisions which appear to substantiate the author's view. In Halsbury's Laws of England, 3rd edn. Vol. 10, in para, 508, at p. 273, the following passage appears:*

"A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may

require a specific intention, malice, knowledge, wilfulness. or recklessness. On the other hand, it may be silent as to any requirement of mens rea, and in such a case in order to determine whether or not mens rea is an essential element of the offence, it is necessary to look at the objects and terms of the statute." This passage also indicates that the absence of any specific mention of a state of mind as an ingredient of an offence in a statute is not decisive of the question ***whether mens rea is an ingredient of the offence or not****: it depends upon the object and the terms of the statute. So too, Archbold in his book on "Criminal Pleading, Evidence and Practice", 35th edn., says much to the same effect at p. 48 thus:*

"It has always been a principle of the common law that mens rea is an essential element in the commission of any criminal offence against the common law In the case of statutory offences it depends on the effect of the statute.*..... There is a presumption that mens era is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the works of the statute creating the offence or by the subject matter with which it deals."*

*The leading case on the subject is Sherras v. De Rutzen(1). Section 16(2) of the Licensing Act, 1872, prohibited a licensed victualler from supplying liquor to a police constable while on duty. It was held that section did not apply where a licensed victualler bona fide believed that the police officer was off duty Wright J., observed "****There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."*****.....***

37. In **Kartar Singh Versus State of Punjab r**eported in *(1994) 3 SCC 569*, the Apex Court specifically in paragraph nos. 115 to 119 has observed as follows:

"115. In a criminal action, the general conditions of penal liabilities are indicated in old maxim "actus non facit reum, nisi mens sit rea" i.e. the act alone does not amount to guilt, it must be accompanied by a guilty mind. But there are exceptions to this rule and the reasons for this is that the legislature, under certain situations and circumstances, in its wisdom may think it so important, in order to prevent a particular act from being committed, to forbid or rule out the element of mens rea as a constituent part of a crime or of adequate proof of intention or actual knowledge. However, unless a statute either expressly or by necessary implication rules out 'mens rea' in cases of this kind, the element of 'mens rea' must be read into the provisions of the statute. The question is not what the word means but whether there are sufficient grounds for infer-ring that the Parliament intended to exclude the general rule that mens rea is an essential element for bringing any person under the definition of 'abet'.

116. There are judicial decisions to the effect that it is generally necessary to go behind the words of the enactment and take other factors into consideration as to whether the element of 'mens rea' or actual knowledge should be imported into the definition. See (1) Brand v. Wood (2) Sherras v. De Rutzen, (3) Nicholls v. Hall, and (4) Inder Sain v. State of Punjab.

117. This Court in State of Maharashtra v. M.H. George while examining a question as to whether mens rea or actual knowledge is an essential ingredient of the offence under Section 8(1) read with Section 23(1)(a) of the Foreign Exchange Regulation Act, 1947, when it was shown that the respondent (accused) in that case voluntarily brought gold in India without the permission of Reserve Bank, held by majority that the Foreign Exchange Regulation Act is designed to safeguarding and conserving foreign exchange which is essential to the economic life of a developing country and the provisions have therefore to be stringent aiming at eliminating smuggling. Hence, in the background of the object and purpose of the legislation, if the element of mens rea is not by necessary implication invoked, its effectiveness as an instrument for preventing smuggling would be entirely frustrated.

118. But Subba Rao, J. dissented and held thus : (SCR p.

139) "... the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability helps him to assist the State in the enforcement of the law : can he do anything to promote the observance of the law? Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof."

119. Thereafter, a similar question arose in Nathulal v. State of M.P. as regards the exclusion of the element of mens rea in the absence of any specific provision of exclusion. Subba Rao, J. reiterated his earlier stand taken M.H. George and observed thus : (AIR p. 45) ***"Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea.*** *The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated."*

38. From the records of the present application, it is crystal clear that though the applicant is stated to be ex-employee of the company in question, but it is not disputed that it was the applicant on whose insistence or persuasion, the complainant has given Rs. 4,00,000/- (Rupees four lacs only) in favour of the said company for purchasing of a plot and as per the case of the complainant neither any sale-deed has been executed in his favour nor the said

amount has been returned to him and also when he used to demand his money, he has been abused and threatened by the applicant twice. Neither the complainant knew the said company nor he has given Rs. 4 lacs by way of two cheques to the applicant directly in favour of the said company. Such acts of the applicant, in the opinion of this Court prima facie amounts to cheating, deception and mens rea.

39. It is now well settled that the corporate veil can in certain situations be pierced or lifted. The principle behind the doctrine is a changing concept and it is expanding its horizon as was held in State of U.P. v. Renusagar Power Co. The ratio of the said decision clearly suggests that whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable therefore.

40. In view of the aforesaid facts, this Court finds substance in the submission made by the learned Additional Government Advocates that case for the offences under Sections 420, 504, 506 I.P.C. prima facie is made out against the applicant and the ingredients of Sections 420, 504, 506 I.P.C. are prima facie attracted to the applicant.

41. Now, this Court comes on the issue whether it is appropriate for this Court being the Highest Court to exercise its power under Section 482 Cr.P.C. to quash the proceedings at the stage when the Magistrate has merely issued process against the applicants and trial is to yet to begin, only on the submission made by the learned counsel for the applicants that present criminal case initiated by opposite party no.2 are not only malicious but also abuse of process of law. The aforesaid issue has elaborately been discussed by the Apex Court in the following judgments:

(i) **R.P. Kapur Versus State of Punjab;** *AIR 1960 SC 866,*

(ii) **State of Haryana & Ors. Versus Ch. Bhajan Lal & Ors**.;*1992 Supp.(1) SCC 335,*

(iii) **State of Bihar & Anr. Versus P.P. Sharma & Anr.;** *1992 Supp (1) SCC 222,*

(iv) **Zandu Pharmaceuticals Works Ltd. & Ors. Versus Mohammad Shariful Haque & Anr.**; *2005 (1) SCC 122,* and

(v) **M. N. Ojha Vs. Alok Kumar Srivastava;** *2009 (9) SCC 682.*

42 In the case o**f R.P. Kapur (Supra),** the following has been observed by the Apex Court in paragraph 6:

"Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under s. 561 -A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code. In the present case the magistrate before whom the police report has been filed under s. 173 of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of

the appellant that his request for the quashing of the .proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no ques- tion of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under s. 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magis- trate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and' contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under s. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide: In Re: Shripad G. Chandavarkar AIR 1928 Bom 184, Jagat Ohandra Mozumdar v. Queen Empress ILR 26 Cal 786), Dr. Shanker Singh v. The State of Punjab 56 Pun LR 54 : (AIR 1954 Punj 193),

Nripendra Bhusan Ray v. Govind Bandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. K. Sivarama Subrahmanya Ayyar ILR 47 Mad 722: (AIR 1925 Mad 39)."

43. In the case of **State of Haryana (Supra)**, the following has been observed by the Apex Court in paragraph 105:

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

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

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

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

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

44. In the case of **State of Bihar (Supra)**, the following has been observed by the Apex Court in paragraph 22. :-

"The question of mala fide exercise of power assumes significance only when the criminal prosecution is initiated on extraneous considerations and for an unauthorised purpose. There is no material whatsoever is this case to show that on the date when the FIR was lodged by R.K. Singh he was activated by bias or had any reason to act maliciously. The dominant purpose of registering the case against the respondents was to have an investigation done into the allegations contained in the FIR and in the event of there being sufficient material in support of the allegations to present the charge sheet before the court. There is no material to show that the dominant object of registering the case was the character assassination of the respondents or to harass and humiliate them. This Court in State of Bihar v J.A.C. Saldhana and Ors., [1980] 2 SCR 16 has held that when the information is lodged at the police station and an offence is registered, the mala fides of the informant would be of secondary importance. It is the material collected during the investigation which decides the fate of the accused person. This Court in State of Haryana and Ors. v. Ch. Bhajan Lal and Ors., J.T. 1990 (4) S.C. 650 permitted the State Government to hold investigation afresh against Ch. Bhajan Lal inspite of the fact the prosecution was lodged at the instance of Dharam Pal who was enimical towards Bhajan Lal."

45. In the case of **Zandu Pharmaceuticals Works Ltd. (Supra),** the following has been observed by the Apex Court in paragraphs nos. 8 to 12:

"8. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae

to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

9. In R. P. Kapur v. State of Punjab (AIR 1960 SC 866) this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings.

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

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

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

10. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.

11. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) 335). A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare

cases. The illustrative categories indicated by this Court are as follows:

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

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

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. (4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code. (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

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

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

*As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. T***he High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage.** *(See: Janata Dal v. H. S. Chowdhary (1992 (4) SCC 305), and Raghubir Saran (Dr.) v. State of Bihar (AIR 1964 SC 1). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the*

complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi v. R. Prasanna Kumar (1990 Supp SCC 686), State of Bihar v. P. P. Sharma (AIR 1996 SC 309), Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995 (6) SCC 194), State of Kerala v. O. C. Kuttan (AIR 1999 SC 1044), State of U.P. v. O. P. Sharma (1996 (7) SCC 705), Rashmi Kumar v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) (AIR 1996 SC 2983) and Rajesh Bajaj v. State NCT of Delhi (1999 (3) SCC 259.

12. The above position was recently highlighted in State of Karnataka v. M. Devendrappa and Another (2002 (3) SCC 89)."

(emphasis added)

46. Thereafter, in the case of M.N. Ojha Vs. Alok Kumar Srivastava, reported *in 2009 (9) SCC 682* has made observations in paragraphs 25, 27, 28, 29 and 30 regarding the exercise of power under section 482 Cr.P.C. as well as the principles governing the exercise of such jurisdiction:-

"25. Had the learned SDJM applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself along with the complaint, surely he would have dismissed the complaint. He would have realized that the complaint was only a counter blast to the FIR lodged by the Bank against the complainant and others with regard to same transaction.

26. This Court in Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. [(1998)5 SCC 749 held:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he

has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

27. The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinize even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

28. The High Court committed a manifest error in disposing of the petition filed by the appellants under Section 482 of the Code without even adverting to the basic facts which were placed before it for its consideration.

29. It is true that the court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot go into the truth or otherwise of the allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending.

30. ***Interference by the High Court in exercise of its jurisdiction under Section 482 of Code of Criminal Procedure can only be where a clear case for such interference is made out. Frequent and uncalled for interference even at the preliminary stage by the High Court may result in causing obstruction in progress of the inquiry in a criminal case which may not be in the public interest****. But at the same time the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to exercise the jurisdiction may equally result in injustice more particularly in cases where the Complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint."*

(emphasis added)

47. In the case of **Mohd. Allauddin Khan Vs. The State of Bihar & Others** reported in *2019 0 Supreme (SC) 454*, the Apex Court has held that the High Court had no jurisdiction to appreciate the evidence in proceedings under Section 482 Cr.P.C. The relevant paragraph nos. 15 to 17 are being quoted herein below:

"*15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed*

the offences punishable under Sections 323, 379read with Section 34 IPC, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.") because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case."

(Emphasis added)

48. The Apex Court in its another judgment in the case of **Nallapareddy Sridhar Reddy Vs. The State of Andhra Pradesh & Ors.** reported in 2020 0 Supreme (SC) 45, dealing with a case under Sections 406 and 420 I.P.C. has observed that the Court does not have to delve deep into probative value of evidence regarding the charge. It has only to see if a prima facie case has been made out. Veracity of deposition/material is a matter of trial and not required to be examined while framing charge. The Apex Court further observed that the veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The Apex Court in paragraph nos. 21, 22 and 24 has observed as follows:

"21 The appellant has relied upon a two-judge Bench decision of this Court in Onkar Nath Mishra v The State, (2008) 2 SCC 561 to substantiate the point that the ingredients of Sections 406 and 420 of the IPC have not been established. This Court while dealing with the nature of evaluation by a court at the stage of framing of charge, held thus:

"11. ***It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence****. At that stage, the court is not expected to go deep into the probative value of the material on record.* ***What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out****. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients*

constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence."

(Emphasis supplied)

22 In the present case, the High Court while directing the framing the additional charges has evaluated the material and evidence brought on record after investigation and held:

"LW1 is the father of the de facto complainant, who states that his son in law i.e., the first accused promised that he would look after his daughter at United Kingdom (UK) and promised to provide Doctor job at UK and claimed Rs.5 lakhs for the said purpose and received the same and he took his daughter to the UK. He states that his son-in-law made him believe and received Rs.5 lakhs in the presence of elders. He states that he could not mention about the cheating done by his son-in- law, when he was examined earlier. LW13, who is an independent witness, also supports the version of LW1 and states that Rs.5 lakhs were received by A1 with a promise that he would secure doctor job to the complainant's daughter. He states that A1 cheated LW1, stating that he would provide job and received Rs.5 lakhs. LW14, also is an independent witness and he supported the version of LW13. He further states that A1 left his wife and child in India and went away after receiving Rs.5 lakhs.

Hence, from the above facts, stated by LWs. 13 and 14, prima facie, the version of LW1 that he gave Rs.5 lakhs to A1 on a promise that he would provide a job to his daughter and that A1 did not provide any job and cheated him, receives support from LWs. 13 and 14. When the amount is entrusted to A1, with a promise to provide a job and when he fails to provide the job and does not return the amount, it can be made out that A1 did not have any intention to provide job to his wife and that he utilised the amount for a purpose other than the purpose for which he collected the amount from LW1, which would suffice to attract the offences under Sections 406 and 420 IPC. ***Whether there is truth in the improved version of LW.1 and what have been the reasons for his lapse in not stating the same in his earlier statement, can be adjudicated at the time of trial.***

It is also evidence from the record that the additional charge sheet filed by the investigating officer, missed the attention of the lower court due to which the additional charges could not be framed."

Emphasis supplied)

24 ***The veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The High Court has relied upon the materials on record and concluded that the ingredients of the offences under Sections 406 and 420 of the IPC are attracted. The High Court has spelt out the reasons that have necessitated the addition of the charge and hence, the impugned order does not warrant any interference."***

(Emphasis added)

49. The Apex Court in the case of **Rajeev Kaurav Vs. Balasahab & Others** reported in *2020 0 Supreme (SC) 143* has clearly held that the conclusion of the High Court to quash the criminal proceedings on the basis of its assessment of the statements recorded under Section 161 Cr.P.C. is not permissible as the evidence of the accused cannot be looked into before the stage of trial. The relevant portions whereof read as follows:

"6. It is no more res integra that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence/offences alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings. It is clear from the law laid down by this Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.

7. Mr.Shoeb Alam, learned counsel appearing for Respondent Nos.1 to 3 relied upon several judgments of this Court to submit that allegations only disclose a case of harassment meted out to the deceased. The ingredients of Section 306 and 107 IPC have not been made out. It is submitted that there is nothing on record to show that the Respondents have abetted the commission of suicide by the deceased. He further argued that abetment as defined under Section 107 IPC is instigation which is missing in the complaint made by the Appellant. He further argued that if the allegations against Respondent Nos.1 to 3 are not prima facie made out, there is no reason why they should face a criminal trial.

8. We do not agree with the submissions made on behalf of Respondent Nos.1 to 3. The conclusion of the High Court to quash the criminal proceedings is on the basis of its assessment of the statements recorded under Section 161 CrPC. Statements of witnesses recorded under Section 161CrPC being wholly inadmissible in evidence cannot be taken into consideration by the Court, while adjudicating a petition filed under Section 482 CrPC1.

9. Moreover, the High Court was aware that one of the witnesses mentioned that the deceased informed him about the harassment meted out by Respondent Nos.1 to 3 which she was not able to bear and hence wanted to commit suicide. The High Court committed an error in quashing criminal proceedings by assessing the statements under Section 161 Cr. P.C.

10. ***We have not expressed any opinion on the merits of the matter. The High Court ought not to have quashed the proceedings at this stage, scuttling a full-fledged trial in which Respondent Nos.1 to 3 would have a fair opportunity to prove their innocence."***

(Emphasis supplied)

50. In the latest judgment of the Hon'ble Supreme Court in the case of **State of U.P. Vs. Akhil Sharda & Others** reported in 2022 SCC OnLine SC 820 has held that while deciding the application under Section 482 Cr.P.C., the High Court has conducted mini trial which is not permissible at that stage. The relevant portion whereof reads as follows:

"28. Having gone through the impugned judgment and order passed by the High Court by which the High Court has set aside the criminal proceedings in exercise of powers under Section 482 Cr.P.C., ***it appears that the High Court has virtually conducted a mini trial, which as such is not permissible at this stage and while deciding the application under Section 482 Cr.P.C. As observed and held by this Court in a catena of decisions no mini trial can be conducted by the High Court in exercise of powers under Section 482 Cr.P.C. jurisdiction and at the stage of deciding the application under Section 482 Cr.P.C., the High Court cannot get into appreciation of evidence of the particular case being considered****. (See Pratima (supra); Thom (supra); Rajiv (supra) and Niharika (supra).*

29. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and the manner in which the High Court has allowed the petition under Section 482 Cr.P.C., ***we are of the opinion that the impugned judgment and order passed by the High Court quashing the criminal proceedings is unsustainable. The High Court has exceeded in its jurisdiction in quashing the criminal proceedings in exercise of powers under Section 482 Cr.P.C.***

30. It is also required to be noted that even the High Court itself has opined that the allegations are very serious and it requires further investigation and that is why the High Court has directed to conduct the investigation by CBCID with respect to the FIR No.227 of 2019. However, while directing the CBCID to conduct further investigation, the High Court has restricted the scope of investigation. The High Court has not appreciated and considered the fact that both the FIRs namely FIR Nos.260 of 2018 and 227 of 2019 can be said to be interconnected and the allegations of a larger conspiracy are required to be investigated. It is alleged that the overall allegations are disappearance of the trucks transporting the beer/contraband goods which are subject to the rules and regulations of the Excise Department and Excise Law.

31 The High Court has quashed the criminal proceedings by observing that there was no loss to the Excise Department. ***However, the High Court has not at all appreciated the allegations of the larger conspiracy.*** *The FIR need not be an encyclopedia (See Satpal Vs. Haryana, (2018) 6 SCC 110 Para 7).*

*32 Even otherwise, it is required to be noted that the allegation of missing of two trucks was the beginning of the investigation and when during the investigation it was alleged that earlier also a number of trucks were missing transporting contraband goods, the FIR should not have been restricted to missing of the two trucks only and return of on the goods thereafter. T****he High Court has not at all appreciated and/or considered the allegation of the larger conspiracy and that both the FIRs/criminal cases are interconnected and part of the main***

conspiracy which is very serious if found to be true. We however refrain from making any further observations as at this stage of proceedings as we are at the stage of deciding the application under Section 482 Cr.P.C. only and as the trial of both the cases have yet to take place. Therefore, we refrain from making any further observations which may affect the case of the either of the parties. Suffice it to say and mention that in the facts and circumstances of the case the High Court has committed a grave/serious error in quashing and setting aside the criminal proceedings *arising out of Criminal Case No.5694 of 2019 and Case Crime No.260 of 2018 PS lodged under Section 406, registered at PS - Husainganj, District - Lucknow.*

(Emphasis supplied)

51 . In view of the aforesaid, this Court finds that the submissions made by the applicant's learned counsel call for adjudication on pure questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the complaint case and the material led before the court below makes out a prima facie case against the accused/applicant at this stage and there appears to be sufficient ground for proceeding against the accused/applicant. I do not find any justification to quash the orders impugned passed against the applicant as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing. All the judgments relied upon by the learned counsel for the applicants referred to above are clearly distinguishable in the facts of the present case. On examination of both the impugned orders, this Court finds that both the courts below while passing the impugned orders have recorded categorical finding of fact that prima facie case for the alleged Sections is made out against the applicant.

52. E ven otherwise, the applicant has made a mockery of the orders of the lower court by avoiding process of summon, bailable warrant, non-bailable warrant and the proceedings under Section 82 Cr.P.C. is not entitled to get leniency, mercy and justice in any way and that too from the Court which exercises inherent power under Section 482 Cr.P.C.

53. In view of the deliberations and discussions made above, this Court finds that the allegations made in the complaint disclose commission of a cognizable offence and those allegations have found support in the statements recorded under Sections 200 and 202 Cr.P.C. on the basis whereof the summoning order has been passed against the applicant, which has been rightly upheld by the learned revisional Court and thus the impugned orders do not call for any interference by this Court in exercise of powers conferred under 482 Cr.P.C. jurisdiction.

54. The present application under Section 482 Cr.P.C. is, accordingly, **rejected.** There shall be no order as to costs.

55. Written submission filed by the learned counsel for the applicants is taken on record.

(2023) 4 ILRA 1285
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE J.J. MUNIR, J.

Application U/S 482. No. 36921 of 2019

Vinod Bihari Lal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajiv Lochan Shuka, Sri Kumar Vikrant, Sri Manish Tiwari (Sr. Adv.)

Counsel for the Opposite Parties:
G.A.

A. Criminal Law – Application under Section 482 CrPC- entire proceedings of Sessions Trial under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986- challenged-Base cases against gang comprising two men- commission of economic crimes through fraud and deceit- Chapters XVI, XVII, and XXII of IPC.

B. Definition of gang- Section 2(b) of the Act of 1986- violence or disturbance of public order alone- not the *sine qua non* of a gang as defined under the Act- the term *otherwise* in the definition interpreted- twin objects-disturbing public order- gaining any undue temporal, pecuniary, material or other advantage- may be achieved through practice of violence or otherwise- term otherwise not be read *ejusdem generis.* (Paragraphs 17, 19 to 23)

HELD:

A perusal of the aforesaid provision shows that violence or disturbance of public order alone are not the sine qua non of a gang as defined under the Act of 1986. It postulates a group of persons, who either acting singly or collectively, employ violence, or threat or show of violence, or intimidation, or coercion, 'or otherwise' with the object of (i) disturbing public order; (ii) or of gaining any undue temporal, pecuniary, material; or other advantage for himself or any other person, indulge in anti-social activities, enumerated in clauses (i) to (xxii) of subsection (b) of Section 2 of the Act of 1986. (Para 17)

C. Interim order in the proceedings in the base case- effect- stay order directing stay of proceedings- coercive steps or bail order in a crime- it does not efface the crime- prosecution under the Act of 1986 can continue. (Paragraph 29)

HELD:

It is well settled that the effect of a stay order directing stay of proceedings or of coercive steps or a bail order in a crime does not to efface the crime. It only puts in limbo some proceedings that are to be taken in the case based on the crime or some consequences like arrest, that would otherwise follow. A bail order ensures a temporary liberty for the accused pending trial or subject to other orders of the Court, but the accused, who is on bail, is not a man free from blemish or the overhanging shadow of the case awaiting trial. At times, an accused on bail is regarded as a man in constructive custody of the Court through the sureties. (Para 29)

D. Mandatory compliance of the provisions of Rules 5(2), 5(3), 16 and 17 of the Rules of 21 of Act of 1986- Rule 16 mandates- authorities approving the gang chart should also come to the conclusion on an independent application of mind- case ought to be registered against the accused- no fallacy in the mode of approval of gang chart found in this case- Application dismissed. (Para 32 and 33)

HELD:
A perusal of Rules 5(2) and 5(3) shows that these relate to the gang-chart, its preparation and approval. There is nothing shown in the gang-chart here, which may show a violation of Rule 5(2) or 5(3). All that is required by Rule 16 is that the Authorities recommending registration of a case under the Act of 1986 should come to the conclusion with an independent application of mind that a case under the Act of 1986 ought to be registered. Likewise, the Authorities approving the gangchart also should come to the conclusion on an independent application of mind that a case under the Act of 1986 ought to be registered against the accused on the basis of the activities of the gang. There is no prescription for the employment of particular words to serve as index of due application of mind. (Para 32)

It must be observed that at the stage of approving the gang-chart on the basis of materials placed, the competent Authority should satisfy himself that a case for prosecution under the Act of 1986 is made out. Collection of further materials to prosecute follows at a later stage when after registration of the case, investigation commences. At the stage of approval of the gang-chart, the approving Authority has to be convinced that a case for investigation under the Act of 1986 is made out. (Para 33)

Application dismissed. (E-14)

List of Cases cited:

1. Animal Welfare Board of India Vs A. Nagaraja & ors., (2014) 7 SCC 47

2. United Bank of India Vs. Pijush Kanti Nandy & ors., (2009) 8 SCC 605

3. Ambuj Parag Dubey & ors. Vs St. of U.P. & ors., 2022 (4) ACR 3878

4. Sunil Fulchand Shah Vs U.O.I. & ors., (2000) 3 SCC 409

(Delivered by Hon'ble J. J. Munir, J.)

This Application under Section 482 of the Code of Criminal Procedure, 19731 has been preferred by Vinod Bihari Lal, Director (Administration), Sam Higginbottom University of Agriculture, Technology and Sciences, P.S. Naini, District Prayagraj, seeking to quash the proceedings of Special Sessions Trial No.54 of 2019, State vs. Vinod B. Lal and others (arising out of Crime No.0850 of 2018), under Section 2/3 of The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 19862, Police Station Naini, District Allahabad, pending in the Court of the Special Judge (Gangsters Act), Allahabad.

2. The First Information Report3 giving rise to the crime, which after investigation, has culminated in the charge-sheet impugned, was lodged on 28.07.2018 at P.S. Naini, then District Allahabad, now Prayagraj by Pradeep Kumar Mishra, Station House Officer, P.S. Naini, District Prayagraj. On the basis of the impugned charge-sheet, Special Sessions Trial No.54 of 2019 was registered on the file of the Special Judge (Gangsters Act), Allahabad. The FIR says that the S.H.O. along with his companion constables and the driver returned to Station after taking care of the law and order in the area and doing investigation. During the course of time that he was looking after the area, he came to know that Vinod B. Lal son of Bihari Lal, resident of Agriculture Campus, Naini, Prayagraj and David Dutta son of A.B. Dutta, a resident of 86, Myorabad, P.S. Cantt., Prayagraj, are an organized gang, whereof Vinod B. Lal is the leader. This gang, comprising two men, is proficient in the commission of economic crimes through fraud and deceit, being offences of the kind, described in Chapters XVI, XVII and XXII of the Indian Penal Code, 18604

and by perpetration of such offences, the members of the gang gain personal, material and pecuniary benefit for themselves. This they do by tampering and forging documents. By commission of such offences, they accumulate wealth and because of their fear and terror amongst members of the public, no one comes forward to lodge a report against them or muster courage to testify in Court.

3. It is further on said in the FIR that for the act of the two accused in running a Christian Public School at Katju Road, Shahganj, without the permission of the Development Area, an FIR was lodged on 21.07.2017 by Diwakar Nath Tripathi, Vice Chairman, Bharatiya Janata Party, Kashi Kshetra, Allahabad. On the basis of the said FIR, Crime No.170 of 2017 was registered, under Sections 406, 419, 420, 467, 468, 471, 120-B IPC, P.S. Shahganj. It was investigated and after collection of material, that came to fore a charge-sheet was filed in Court on 21.01.2018.

4. On 09.08.2017, Diwakar Nath Tripathi aforesaid lodged an FIR, giving rise to Crime No.476 of 2017, under Sections 406, 419, 420, 467, 468, 471, 120-B IPC, wherein after investigation and collection of material, substantiating the allegations, a charge-sheet was filed in Court on 04.10.2017.

5. On the 25th of August, 2017, B. Shahim Siddiqui son of late Nasimuddin Siddiqui, resident of 7D, Mahewa, Naini lodged an FIR at P.S. Naini, giving rise Crime No.726 of 2017, under Sections 147, 148, 323, 504, 506, 307 IPC against Ram Kishan and others, wherein after investigation on the basis of material collected, a charge-sheet was filed against Vinod B. Lal on 01.03.2018.

6. Again on 17.12.2017, an FIR lodged by Diwakar Nath Tripathi at P.S. Civil Lines, Crime No.761 of 2017, under Sections 419, 420, 406, 467, 468, 471, 120-B IPC was registered against P.C. Singh and others. In the aforesaid case, after investigation, on the basis of material collected, a charge-sheet was filed against Vinod B. Lal and others on 09.04.2018.

7. On the 17th of December, 2017, Rudra Narain Pathak son of Chandra Shekhar Pathak, a resident of Rampur, P.S. Ramnagar, District Varanasi submitted a written information to P.S. Mutthiganj, on the basis of which Crime No. 244 of 2017, under Sections 147, 419, 420, 467, 468, 471, 504, 506 IPC was registered against Arun Paul and others. Investigation ensued and on the basis of materials collected, a charge-sheet was filed on 01.04.2018 against R.K. Gaban and Vinod B. Lal for offences punishable under Sections 419, 420, 467, 468, 471 IPC.

8. It is on the basis of all these material, the informant reported that Vinod B. Lal and David Dutta have committed an offence punishable under Section 2/3 of the Act of 1986. The gang-chart relating to the aforesaid accused has been approved by the District Magistrate. With so much of information, the present crime was reported and registered under the Act of 1986.

9. The gang-chart relating to the gang, headed by the applicant and of which Davit Dutta was shown as the sole member, was approved by the District Magistrate, Allahabad on 28.07.2018. The gang-chart carries the approval of the Senior Superintendent of Police, Allahabad dated 27.07.2018 and the recommendation of the Superintendent of Police, Trans Yamuna and the Circle Officer, Karchhana.

10. The Police after investigation have filed a charge-sheet, on the basis of which the Special Judge (Gangsters Act), Allahabad has taken cognizance on 09.08.2019. During investigation, the Police have recorded the statements of the three first informants of the five base cases, on the foot of which the present crime under Section 2/3 of the Act of 1986 was registered, leading to the impugned proceedings.

11. Heard Mr. Manish Tiwari, learned Senior Advocate assisted by Mr. Kumar Vikrant, learned Counsel for the applicant and Mr. Shashi Shekhar Tiwari, learned A.G.A. appearing on behalf of the State.

12. It is submitted by Mr. Manish Tiwari, learned Senior Advocate appearing for the applicant, that even if all allegations in the impugned charge-sheet are regarded as true, no case under Sections 2/3 of the Act of 1986 is made out against the applicant. In order to support the aforesaid submission, Mr. Manish Tiwari has referred to the definition of a gang in Section 2(b) of the Act of 1986. He submits that there are two essential ingredients to constitute a gang. The two essential ingredients, according to Mr. Manish Tiwari, are 'violence' or 'disturbance of public order' indulged in by a group of persons, acting either singly or collectively, for the purpose of pecuniary gain etc.

13. It is the learned Senior Advocate's submission that none of the offences charged against the applicant, either involve violence or the disturbance of public order. Therefore, even if there be allegations about pecuniary gain, the consequences under the Act of 1986 would not attach. He next submits that there are five base cases registered against the applicant, on the foot of which the present prosecution has been launched under Section 2/3 of the Act of 1986. But, in each of those crimes, the applicant has been given judicial reprieve of some kind or the other either by this Court or the Supreme Court. Therefore, in the submission of the learned Senior Advocate, the base cases are not available to provide foundation to the prosecution to pursue the present case under the Act of 1986. It is in the last submitted by the learned Senior Advocate that there is violation of Rules 5(2), 5(3), 16 and 17 of The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 20215, vitiating the gang-chart. He has emphasized that non-adherence to these rules has vitiated the basis of registration of the crime and a fortiori the police report and the prosecution. He has drawn the Court's attention to the aforesaid Rules.

14. Mr. Shashi Shekhar Tiwari, learned A.G.A. has opposed the motion to admit this application to hearing. Mr. Tiwari has submitted that violence and disturbance of public public order alone are not essential to constitute a group of persons into a gang under Section 2(b) of the Act of 1986. The definition is much wider and other kinds of actions directed to gain any temporal, pecuniary, material or other advantage for himself or another member of the group, acting singly or together, can constitute the group into a gang, within the meaning of the Act of 1986.

15. It is next submitted that the crimes that have been registered against the applicant, wherein charge-sheets have been filed, form the basis, amongst other things, to proceed against the applicant for commission of an offence punishable under Section 2/3 of the Act of 1986. The mere

fact that interim orders or interim reliefs in the said base cases have been granted to the applicant, does not mean that the basis for taking action under the Act of 1986 is removed. Mr. Tiwari next submits that so far as compliance with the Rules of 2021 is concerned regarding drawing up of the gang-chart, there is substantial compliance with the requirements.

16. Upon hearing learned Counsel for the parties, this Court is of opinion that in order to consider the first submission of Mr. Manish Tiwari, it is imperative to refer to the provisions of Section 2(b) of the Act of 1986, which reads:

"**2. Definitions.**--In this Act,--

(a) x x x

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities (Act no. 2 of 1974), namely--

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act no. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act no. 4 of 1910) or the Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force, or

(iii) occupying or talking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or (Act no. 61 of 1985)

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Art, 1956, or

(vi) offences punishable under section 3 of the Public Gambling Act, 1867 (Act no. 104 of 1956), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking for any lease or right or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under section 171-E of the Indian Penal Code, or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities;

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966;

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xxv) indulging in crimes that impact security of State, public order and even tempo of life.

(c) x x x x

(d) x x x x

(e) x x x x

(f) x x x x"

17. A perusal of the aforesaid provision shows that violence or disturbance of public order alone are not the sine qua non of a gang as defined under the Act of 1986. It postulates a group of persons, who either acting singly or collectively, employ violence, or threat or show of violence, or intimidation, or coercion, "or otherwise' with the object of (i) disturbing public order; (ii) or of gaining any undue temporal, pecuniary, material; or other advantage for himself or any other person, indulge in anti-social activities,

enumerated in clauses (i) to (xxii) of sub-Section (b) of Section 2 of the Act of 1986.

18. It is a well settled cannon of statutory interpretation that a statute should be read and understood according to its plain grammatical meaning, unless that construction leads to an absurd result, or defeats the object and the very purpose of it.

19. A reading of sub-Section (b) of Section 2 of the Act of 1986 would indicate that with object of disturbing public order or gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, a group of persons acting singly or collectively may act by violence or threat or show of violence, or intimidation, or coercion or otherwise. Thus, the employment of the words 'otherwise' after the word 'coercion' indicates that the twin object of disturbing public order or gaining any undue temporal, pecuniary advantage etc. is the hallmark of a group acting through a member, singly or collectively, to qualify as a gang. The twin object of disturbing public order or gaining any undue temporal, pecuniary advantage etc. may be achieved through practice of violence, threat or show of violence, or intimidation etc. or otherwise. The employment of the word 'otherwise' after 'coercion' is not to be read ejusdem generis with the preceding word like coercion, intimidation, violence etc. Rather, the employment of the word 'otherwise' shows that the group may act in any manner to achieve the object of disturbing public order or gaining any undue temporal, pecuniary advantage etc., where violence or coercion or intimidation may not at all be involved. Of course, all that is done by the group, acting in unison or a member singly, must be indulgence in one or the other anti-social activities enumerated in the various clauses of sub-Section (b) of Section 2 of the Act of 1986. The construction placed on the words 'or otherwise', which are words of general import after specific words to exclude the rule of ejusdem generis, finds authoritative interpretation about it in **Animal Welfare Board of India v. A. Nagaraja and others6.** There have been interpretations when the words 'or otherwise' have been construed ejusdem generis as in **United Bank of India v. Pijush Kanti Nandy and others7.** But, those cases depend on the context in which the words occur in the statute. In **Animal Welfare Board of India** *(supra),* it was held while interpreting the provisions of Section 11 of The Prevention of Cruelty to Animals Act, 1960 thus:

"39. Section 11(1)(a) uses the expressions "or otherwise", "unnecessary pain or suffering", etc. Beating, kicking, etc. go with the event so also torture, if the report submitted by AWBI is accepted. Even otherwise, according to AWBI, the expression "or otherwise" takes in Jallikattu, bullock cart race, etc. but, according to the State of Tamil Nadu, that expression has to be understood applying the doctrine of ejusdem generis. In our view, the expression "or otherwise" is not used as words of limitation and the legislature has intended to cover all situations, where the animals are subjected to unnecessary pain or suffering. Jallikattu, bullock cart races and the events like that, fall in that expression under Section 11(1)(a). The meaning of the expression "or otherwise" came up for consideration in Lila Vati Bai v. State of Bombay [AIR 1957 SC 521 : 1957 SCR 721] and the Court held that the words "or otherwise" when used, apparently intended to cover other cases which may not come within the

meaning of the preceding clause. In our view, the said principles also can be safely applied while interpreting Section 11(1)(a)."

20. I t would also be apposite to quote the provisions of Section 11(1)(a) of The Prevention of Cruelty to Animals Act, 1960, in the context of which the words 'or otherwise' were held not limited by preceding words invoking the ejusdem generis rule. Section 11 aforesaid reads:

"11. Treating animals cruelly.--(1) If any person--

(a) beats, kicks, over-rides, over-drives, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes or, being the owner permits, any animal to be so treated; or

(b)x x x

(c) x x x"

21. It is ultimately to be inferred from the context where the words 'or otherwise' have been employed and the object of the particular provision, whether the said words are to be construed ejusdem generis or free. Here, the words are not a meaningless or vague end to the preceding meaningful words of the same genre. Rather, the words 'or otherwise' are words of wide import to describe anything, which has the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for a member of the group or any other person comprising it, by indulging in the enumerated anti-social activities. Temporal and pecuniary advantages may be gained through anti-social activities of a non-violent kind as well, so long there is a group of persons determined to do it individually or in unison. Therefore, in the opinion of this Court, there is no reason to read the words 'or otherwise', occurring in sub-Section (b) of Section 2 of the Act of 1982 ejusdem generis.

22. The question fell for consideration before a Division Bench of this Court recently in **Ambuj Parag Dubey and others v. State of U.P. and others8,** where it has been held:

"22. The expression 'or otherwise' as used in the definition of gang can be read conjunctively or disjunctively. If read conjunctively, the words 'or otherwise', in law, when used in a general phrase, following an enumeration of particulars, are commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the classes before mentioned. The word "or" in "or otherwise" is a disjunctive that marks an alternative which generally corresponds to the words "either". An interoperation of the general words "or otherwise" limiting them to the matters and things of the same kind as the previous words (violence, intimidation, coercion) would make the general words "or otherwise" following the preceding specific words, redundant. These words "or otherwise" are not words of limitation, but of extension so as to cover all possible offences. The word "otherwise" is, therefore, not to be read "ejusdem generis" with the other instances of violence mentioned in the earlier part of sub-section.

23. Further, on perusal of the offences which have been included in the definition of Gang includes offences under Chapter-XVII of Indian Penal Code which include the offence of theft under Section

378, offences under Section 403 and the related sections dealing with criminal misappropriation of property, Section 405 and allied sections deals with the crime of criminal breach of trust, dishonest misappropriation of property. Section 410 and related sections concern stolen property, Section 420 and related sections deal with offences of cheating which only involve deception, fraudulent or dishonest inducement to a person or his property. It is evident from the provisions included within the definition of gang do not require existence of force or violence. Similarly, offences under Section 3 of U.P. Public Gambling Act may not necessarily involve the use of force. Thus, the word 'otherwise' has been employed disjunctively in the definition of gang and cannot be read as "ejusdem generis", with other incidents of violence mentioned in the earlier part of this sub-section (Vide: Verneet Kumar (supra))"

23. In view of what has been said above, this Court does not find any merit in the submission of Mr. Manish Tiwari that violence in one form or the other is a *sine qua non* for a group of persons to qualify as a gang under Section 2(b) of the Act of 1986.

24. Even if it be accepted for awhile that violence or threat of violence is essential to bring a group of persons acting individually or together within the mischief of a gang as defined under Section 2(b), this Court must take judicial notice of the contents of the FIRs relating to the base cases, on the foot of which the impugned prosecution has been launched. The FIRs of the base cases in all fairness ought to have been annexed by the applicant. That has not been done. Nevertheless, since those FIRs are available on the website of the U.P. Police (UPCOP), this Court has looked into the contents of some of them. In Case Crime No.244 of 2017, under Sections 147, 419, 420, 467, 468, 471, 504, 506 IPC, P.S. Mutthiganj, District Prayagraj, the first informant has alleged as follows:

"प्रार्थी की उक्त आरजियात हड़पने की नियत से लखनऊ डायसेशन ट्रस्ट एसोसिएशन के कथित सचिव अरुण पल व उनके सहयोगी काल्विन थायडोर, विनोद बी लाल, यस बी लाल, डेनियल सुभान, आर के गबन, उषा हेमिल्टन, कमल मसीह, प्रफुल्ल मेसी, रिंकी स्वरूप, शशि प्रकाश जो एक अपराधी एवम भूमाफिया किस्म के व्यक्ति है जिनका एक संगठित गिरोह है जो शहर की खाली पड़ी जमीनों को अवैध कब्जा करने की नीयत से कूट रचित दस्तावेज तैयार कर जमीन हड़प लेते है इसी तरह प्रार्थी की आरजियात स्थित मौज मैकू उस्मान पुर उर्फ कटघर थाना मुट्ठीगंज को अवैध तरीके से हड़पने की नीयत से एक फर्जी कूट रचित दस्तावेज वाद सं0 170/ सन 1974 लखनऊ डायसेशन ट्रस्ट एसोशिएशन बनाम कमीशन इक्यूमिनिकल मिशन दाखिला दिनांक 04/04/1974 व आदेश दिनांक 10/04/1974 मुंसिफ बेस्ट इलाहाबाद पीठासीन अधिकारी के नाम के स्थान पर यस 0 पी0 पाल अंकित है और दिनांक 24.04.1974 को हस्ताक्षर सी० पी० लाल का है एवं न्यायालय की कूटरचित फर्जी मुद्रा से तैयार कर हड़पने की साजिश किये है उक्त कूट रचित दस्तावेज की सत्यता के संबंध में प्रार्थी के अधिवक्ता के द्वारा मा0 उच्च न्यायालय इलाहाबाद में जन सूचना अधिकार के तहत एक प्रार्थना पत्र इस आशय का दिया गया कि 01/04/1974 से 30/04/1974 के बीच मुंसिफ बेस्ट इलाहाबाद के पद पर पीठासीन कौन थे। मा0 उच्च न्यायालय द्वारा अवगत कराया गया कि 01/04/1974 से 30/04/1974 बीच मुंसिफ बेस्ट इलाहाबाद के पद पर पीठासीन अधिकारी श्री चक्रवर्ती प्रभाकर मिश्र नियुक्त थे। कूट रचित जजमेंट / डिक्री की छाया प्रति एवम मा0 उच्च न्यायालय द्वारा प्राप्त सूचना की छाया प्रति प्रार्थना पत्र के साथ संलग्न की जा रही है। मुंसिफ बेस्ट इलाहाबाद के कार्यालय एवं रिकर्ड रूम में इस मुकदमें के संबंध में रिकर्ड का मुयायना किया गया लेकिन न दाखिले के और न ही निर्णय के संबंध में कोई रिकर्ड नही है। दिनांक 20/08/2017 को समय लगभग 12.30 बजे दिन प्रार्थी अपने सहयोगी उदय प्रताप सिंह व शिव बहादुर सिंह के साथ आराजी संख्या 143 जिसमे बरसात का पानी भर गया था, को कुछ मजदूरो को ले कर साफ करवा रहे थे कि मौके पर अरुण पाल, आर के गबन उषा हेमिल्टन कमल मशीह, प्रफुल्ल मेसी, रिंकी स्वरूप आ गए और प्रार्थी को

गाली देते हुए सफाई करने से मना करने लगे। प्रार्थी के मना करने पर उपरोक्त लोग उपरोक्त कूटरचित फर्जी जजमेंट / डिक्री का हवाला देते हुये धमकी दिए कि दोबारा इस जमीन पर आओगे तो बोटी बोटी काट कर इस जमीन में गाड़ दूँगा उपरोक्त लोग अपराधी एवं भूमाफिया किश्म के व्यक्ति है । कूटरचित फर्जी दस्तावेज तैयार कर शहर की खाली जमीन पर कब्जा करने का संगठित गिरोह है प्रार्थी को भय व्याप्त है कि उपरोक्त लोग प्रार्थी की जमीन के लालच में प्रार्थी को जान से न मार दे प्रार्थी ने उपरोक्त घटना की सूचना मुट्ठीगंज थानाध्यक्ष को दिया परंतु आज तक कोई कार्यवाही नही हुई।"

(emphasis by Court)

25. Again during investigation, Shahim Siddiqui, who is the first informant of Case Crime No.726 of 2017, under Sections 147, 148, 323, 504, 506, 307 IPC, one of the base cases, has said in his statement under Section 161 of the Code, a copy whereof is annexed as Annexure No.7 to the affidavit in support of the present application as follows:

"श्री सहीम सिददीकी पुत्र स्व0 श्री नमीमुददीन सिददीकी निवासी 7डी महेवा थाना नैनी इलाहाबाद ने पूछने पर बयान किये कि दिनांक 25.8.17 को समय करीब 5.30 बजे करीब अपने कालेज सुआर में अपने शैक्षिक कार्य के लिए गया था काम पूरा होने के बाद कैन्टीन के बाहर खड़ा होकर अपने दास्ते का इंतजार कर रहा था तभी अचानक कालेज के स्टाफ रामकिसन राकेश दूबे चार पांच अन्य लोग असलहे से लैश होकर मुझे मारते पीटते हुए कमरे में उठाले गये तथा मुझे जान से मारने की नियत से विनोद की बात के ललकारने पर मेरे ऊपर रिवाल्वर से फायर किया परन्तु गोली मिस हो गयी जिससे मेरी जान बच गयी। तथा मुझे गाली गुप्ता दिये व जान से..... अपना जान बचाकर भागा।"

(emphasis by Court)

26. In the circumstances, it cannot be said to be a case where the applicant may urge that there is no allegation about violence or threat of violence by him or at his instance by one or the other member of the group. To the contrary, there is abundant material about the group of persons, of which the applicant is the leader, threatening violence and indulging in coercion.

27. So far as the disturbance of public order is concerned, as already noticed hereinabove, a group of persons can have two alternate objects to qualify as a gang under Section 2(b) of the Act of 1986: They may have for their object the disturbance of public order or the gaining any undue temporal, pecuniary, material or other advantage for a member of the group or any other person. All that is necessary is that in order to attain either of the two objects, the group of persons, acting singly or in unison, should indulge in one of the enumerated anti-social activities envisaged under various clauses of sub-Section (b) of Section 2 of the Act of 1986. The submission of Mr. Manish Tiwari, therefore, that unless there is disturbance of public order by a group of persons, they cannot qualify as a gang within the meaning of Section 2(b) of the Act of 1986 is without substance.

28. The next submission of the learned Counsel for the applicant is that the five cases, on the foot of which the case under the Act of 1986 has been registered, culminating in the impugned prosecution, cannot at all form basis for taking action under the Act of 1986, inasmuch as different interim orders or reliefs in relation to the base cases have been granted by this Court or the Supreme Court. The five cases that are subject of the gang-chart, on the basis of which the impugned prosecution has been launched, and where, according to the applicant, interim orders have been passed by this Court or the Supreme Court are enumerated below in tabular form:

Sl.	Crime	Police	Sections	Status

No.	No.	Station/ District		
1	476 of 2017	Civil Lines/ Allahabad	406, 419, 420, 467, 468, 471, 120-B IPC	No coercive action, vide order dated 20.03.2023 passed by the Supreme Court in S.L.P. (Crl.) No.3337 of 2023
2	170 of 2017	Shahganj/ Allahabad	406, 419, 420, 467, 468, 471, 120-B IPC	Further proceedings stayed by this Court vide order dated 04.10.2018 passed in Application u/s 482 No.34944 of 2018
3	726 of 2017	Naini/ Allahabad	147, 148, 323, 504, 506, 307 IPC	No coercive action, vide order dated 13.11.2018 passed by this Court in Application u/s 482 No.40320 of 2018
4	244 of 2017	Mutthiganj/ Allahabad	147, 419, 420, 467, 468, 471, 504, 506 IPC	Issue notice vide order dated 09.05.2019 passed by this Court in Application u/s 482 No.13820 of 2019
5	761 of 2017	Civil Lines/ Allahabad	419, 420, 406, 467, 468, 471,	Further proceedings stayed vide

			120-B IPC	order dated 07.12.2018 passed by this Court in Application u/s 482 No.44250 of 2018

29. It is well settled that the effect of a stay order directing stay of proceedings or of coercive steps or a bail order in a crime does not to efface the crime. It only puts in limbo some proceedings that are to be taken in the case based on the crime or some consequences like arrest, that would otherwise follow. A bail order ensures a temporary liberty for the accused pending trial or subject to other orders of the Court, but the accused, who is on bail, is not a man free from blemish or the overhanging shadow of the case awaiting trial. At times, an accused on bail is regarded as a man in constructive custody of the Court through the sureties. In this regard, reference may be made to the following observations of the Constitution Bench in **Sunil Fulchand Shah v. Union of India and others9:**

"24. ..... The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word "bail" is surety. In Halsbury's Laws of England [Halsbury's Laws of England, 4th Edn., Vol. 11, para 166.], the following observation succinctly brings out the effect of bail:

The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned."

30. In view of this position to say that because of the indulgence of interim orders granted by this Court or the Supreme Court in one or the other five cases that are part of the gang-chart in the present prosecution, those cases are no longer available to the prosecution to proceed under the provisions of the Act of 1986, is a submission stated to be rejected.

31. The last submission advanced by Mr. Manish Tiwari is about the mandatory compliance with the provisions of Rule 5(2), 5(3), 16 and 17 of the Rules of 2021 framed under the Act of 1986. These Rules have been made by the State Government in exercise of powers under Section 23 of the Act of 1986 to carry out its purposes. Rules 5(2), 5(3), 16 and 17 are extracted below:

"5. General Rules.--

(2) The gang-chart will be presented to the district head of police after clear recommendation of the Additional Superintendent of Police mentioning the

detailed activities in relation to all the persons of the said gang.

(3) The following provisions shall be complied with in respect of gang-charts--

a. The gang-chart will not be approved summarily but after due discussion in a joint meeting of the Commissioner of Police/District Magistrate/Senior Superintendent of Police/Superintendent of Police.

b. There may be no gang of one person but there may be a gang of known and other unknown persons and in that form the gang-chart may be approved as per these rules.

c. The gang-chart shall not mention those cases in which acquittal has been granted by the Special Court or in which the final report has been filed after the investigation. However, the gang-chart shall not be approved without the completion of investigation of the base case.

d. Those cases shall not be mentioned in the gang-chart, on the basis of which action has already been taken once under this Act.

e. A separate list of criminal history, as given in Form No.--4, shall be attached with the gang-chart detailing all the criminal activities of that gang and mentioning all the criminal cases, even if acquittal has been granted in those cases or even where final report has been submitted in the absence of evidence.

Along with the above, a certified copy of the gang register kept at the police station shall also be attached with the gang-chart. In addition to the above, the information of crime and gang members mentioned in the gang-chart will also be updated on Interoperable Criminal Justice System (ICJS) portal and Crime and Criminal Tracking Network System (CCTNS).

16. Forwarding of Gang-Chart.--

The following manner shall be followed in the forwarding of Gang-Chart:

(1) Forwarding of the gang-chart by the Additional Superintendent of Police: The Additional Superintendent of Police will not only take a quick forwarding action in the case but he will duly peruse the gang-chart and all the attached forms; and when it is satisfied that there is a just and satisfactory basis to pursue the case, only then will he forward the letter along with the recommendation given below on the gang-chart to the Superintendent of Police/Senior Superintendent of Police.

'Throughly studied the gang-chart and attached evidence. The basis of action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 exists. Accordingly, forwarded with recommendation."

(2) Forwarding of the gang-chart by the district police in-charge: When the gang-chart along with all the Forms is received by the Senior Superintendent of Police/Superintendent of Police with the clear recommendation of the Additional Superintendent of Police, he will also thoroughly analyze all the facts and when it is confirmed that all the formalities of the Act have been fulfilled and there is a legal

basis for taking action in the case, then he should forward the gang-chart to the Commissioner of Police/District Magistrate stating that: "I have duly perused the gang-chart and attached forms and I am fully satisfied that all the particulars mentioned in the case are correct and there is a satisfactory basis for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. Accordingly, approved."

(3) Resolution of the Commissioner of Police/District Magistrate: When the gang-chart is sent to the Commissioner of Police/District Magistrate along with all the Forms, all the facts will also be thoroughly perused by the Commissioner of Police/District Magistrate and when he is satisfied that the basis of action exists in the case, then he will approve the gang-chart stating therein that: "duly perused the gang-chart and attached Forms in the light of the evidence attached with the gang-chart satisfactory grounds exist for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. The gang-chart is approved accordingly."

It is noteworthy that the words written above are only illustrative. There is no compulsion to write the same verbatim but it is necessary that the meaning of approval should be the same as the recommendations written above, and it should also be clear from the note of approval marked.

17. Use of independent mind.--

(1) The Competent Authority shall be bound to exercise its own independent mind while forwarding the gang-chart.

(2) A pre-printed rubber seal gang-chart should not be signed by the Competent Authority; otherwise the same shall tantamount to the fact that the Competent Authority has not exercised its free mind."

32. A perusal of Rules 5(2) and 5(3) shows that these relate to the gang-chart, its preparation and approval. There is nothing shown in the gang-chart here, which may show a violation of Rule 5(2) or 5(3). All that is required by Rule 16 is that the Authorities recommending registration of a case under the Act of 1986 should come to the conclusion with an independent application of mind that a case under the Act of 1986 ought to be registered. Likewise, the Authorities approving the gang-chart also should come to the conclusion on an independent application of mind that a case under the Act of 1986 ought to be registered against the accused on the basis of the activities of the gang. There is no prescription for the employment of particular words to serve as index of due application of mind.

33. It must be observed that at the stage of approving the gang-chart on the basis of materials placed, the competent Authority should satisfy himself that a case for prosecution under the Act of 1986 is made out. Collection of further materials to prosecute follows at a later stage when after registration of the case, investigation commences. At the stage of approval of the gang-chart, the approving Authority has to be convinced that a case for investigation under the Act of 1986 is made out.

34. In the opinion of this Court, therefore, any fallacy in the mode of approval of the gang-chart would not be of much relevance, where the case is already

up for trial after conclusion of investigation. This is not to say that the gang-chart betrays any violation of the Rules. A perusal of the material on record and the gang-chart shows due and independent application of mind by both the recommending and the approving Authorities. In connection with the contention advanced by the learned Senior Counsel for the applicant on this score, the holding of the Division Bench in **Ambuj Parag Dubey** *(supra)* is again of relevance, where it is observed:

"36. Rule 17 and 18 would have to be read together. Gang chart has to be sent in the prescribed Form No. 1. The endorsement to be made by each of the authorities have also been specified in Rule 16. The rule itself prescribes and mandates a printed Form. Rule 17 merely mandates that the competent authority while approving the gang chart should not be swayed by the recommendation of the police authorities mechanically but should satisfy himself independently that the grounds for prosecution is made out. The satisfaction at that stage is subjective and does not rest upon any evidence. The competent authority has to satisfy that the materials placed with the gang chart calls for prosecution. The stage of collecting evidence follows thereafter. The scope of judicial review is miniscule, the accused cannot challenge the FIR without challenging the gang chart. The question as to whether the antisocial activities of the proposed accused is that of a gang or gangster is a matter of investigation."

35. In view of what has been said above, this Court does not find any good ground to quash the impugned proceedings.

36. This application **fails** and is **dismissed**.

(2023) 4 ILRA 1299
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 37035 of 2022

Mehboob Pandey ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Mumtaz Ali, Sri Shad Khan

Counsel for the Opposite Parties:
G.A.

A. Criminal Law – Application under Section 482 CrPC – order rejection application under Section 311 CrPC to recall witnesses- direct trial court to recall witnesses for cross examination for proper and fair adjudication- trial under sections 147, 148, 149, 302 and 120-B IPC- earlier order of the trial judge allowing the application for recall of witnesses ignored.

B. Scheme of examination of witnesses- Chapter X Section 137 of the Indian Evidence Act, 1872- opportunity of cross examination not provided to the accused- violation of natural justice- Section 311 CrPC- incorporated to avoid such situation- power vested in the provision to be exercised- achieving a just decision of the case- trial court committed manifest error in not considering the earlier order. Impugned order quashed-Application allowed. (Paras 6 to 8, 20)

HELD:

From the perusal of the impugned order it is very much clear that the learned trial court did not peruse the Order Sheet that so far as the

cross examination of the PW-1 to PW-3 is concerned, applicants application has already been considered by the then learned trial judge on 9.10.2012 in view of Section 231 (2) Cr.P.C. It has also not been considered that for an accused who is in jail for such a long period, it is very much difficult to defend himself if his family members and the counsel are not cooperative with him. The scheme of the examination of the witnesses has been enumerated in chapter - X of The Indian Evidence Act and according to Section 137 of the Act, the witness would be called for his examination in chief, cross examination and re-examination if the party calling him wants his re-examination. There is no provision in Indian Evidence Act that if on any particular date, the witness could not be cross examined by the opposite party, he would not be again recalled for cross examination. However, if the witness could not be cross-examined in spite of sufficient opportunity provided by the Court, cross examination may be closed or if the accused refuses to cross examine the witness, the cross examination might be closed. Certainly, the closer of the cross-examination might be opened if due to some unavoidable circumstance, the witness could not be cross examined on behalf of the accused. This fact should be in the mind of the learned trial judge that if an opportunity for cross examination is not provided to the accused, it would be violation of natural justice. It is the basic principle of natural justice that an opportunity must be provided to the accused for cross examination and hearing. In case the witness has not been examined, the evidence of the examination in chief would be considered in toto against the accused and it would remain un-rebutted and this situation would be a mockery of justice due to mere technicalities. (Para 6)

From the above, it is very much clear that there are two parts of this Section. According to first part of the Section, the Court can exercise the power: - (1) to summon any person as a witness, or. (2) to examine any persons in attendance, though not summoned as a witness, or, (3) to recall and re-examine any person already examined. The second part, which is mandatory and imposes an obligation on the Court: - (1) to summon and examine, or (2) to recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case. (Para 8)

Application allowed. (E-14)

List of Cases cited:

1. Raja Ram Prasad Yadav Vs St. of Bih. & anr. A.I.R 2013 SC 3081

2. R.B. Mithani Vs St. of Mah., A.I.R. 1971, Supreme Court 1630

3.Shailendra Kumar Vs St. of Bih., A.I.R 2002 (Supreme Court) 270

4.Ramasami Vs Sriniwasan 1987 (3) Crimes 89 Madras

5.Rama Paswan Vs St. of Jhharkhand, 2007 Crl. L.J. 2750

6. Popat Lal & ors. Vs St. of Mah., 2002, Crl.L.J. 794

7. V.N Patil Vs Niranjan Kumar & ors., (2021) 3 SCC 661

8.Bhagwan Singh Vs St. of M.P, 2002 (44) ACC 1112 (SC)

9.Raj Kishor Jha Vs St. of Bih. 2003 (47) ACC 1068 (SC)

10. Chittarlal Vs St. of Raj., (2003) 6 SCC 397

11. Shri Bhagwan Vs St. of Raj., (2001) 6 SCC 296

12. Satnam Singh Vs St. of Raj., (2000) 1 SCC 662 others

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

1. Heard Sri Shad Khan holding brief of Sri Mumtaz Ali, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned A.G.A. For the State and perused the record.

2. This application has been moved for quashing the order dated 20.10.2022 passed by A.S.J Court No. 2 Bulandshahr whereby he rejected the application under section 311 Cr.P.C for recalling the witnesses PW-2, PW-3, PW-6, PW-8 and also to direct the learned trial court to recall the aforesaid witnesses for cross examination for proper and fair adjudication of S.T. No. 1401 of 2010 arising out of crime no. 203 of 2009, u/s 147, 148, 149, 302 and 120-B I.P.C Police Station Sikandrabad District - Bulandshahr.

3. In brief, facts of the case are that during the course of the trial the applicant has been in jail since 20.12.2010. Seven Session trial cases are consolidated together and leading case is S.T. No. 853 of 2009, the applicant is a very poor person. Due to non payment of fees, local counsel did not cross examine PW-2 Rizwan Ansari, PW-3 S.I Hari Singh, PW-6 Mohsin and PW-8 I.O Virendra Singh. The applicant somehow recently engaged Mr. Krishn Kumar Saxena advocate as his counsel who moved an application u/s 311 Cr.P.C on 19.10.2022 and requested the trial court to recall the aforesaid witnesses for cross-examination on behalf of the applicant.

4. Prior to that an application no. 98A1 had been moved on behalf of the applicant for recall of the witnesses PW-1 to PW-3 for cross examination and the then learned trial judge vide order dated 9.10.2012 had allowed the application with the direction that the application shall remain deferred U/s 231 (2) Cr.P.C. Despite such direction, the said witnesses were never recalled for their cross examination by the trial court. The cross examination of the aforesaid witnesses is very significant for proper and fair adjudication. The learned trial court without applying judicial mind and without perusing the previous order rejected the recall application in a routine manner. Hence, it is expedient for the ends of justice for invocation of inherent powers U/s 482 Cr.P.C by this court.

5. All the papers referred in the petition are annexed with the affidavit.

6. From the perusal of the impugned order it is very much clear that the learned trial court did not peruse the Order Sheet that so far as the cross examination of the PW-1 to PW-3 is concerned, applicants application has already been considered by the then learned trial judge on 9.10.2012 in view of Section 231 (2) Cr.P.C. It has also not been considered that for an accused who is in jail for such a long period, it is very much difficult to defend himself if his family members and the counsel are not cooperative with him. The scheme of the examination of the witnesses has been enumerated in chapter - X of The Indian Evidence Act and according to Section 137 of the Act, the witness would be called for his examination in chief, cross examination and re-examination if the party calling him wants his re-examination. There is no provision in Indian Evidence Act that if on any particular date, the witness could not be cross examined by the opposite party, he would not be again recalled for cross examination. However, if the witness could not be cross-examined in spite of sufficient opportunity provided by the Court, cross examination may be closed or if the accused refuses to cross examine the witness, the cross examination might be closed. Certainly, the closer of the cross-examination might be opened if due to some unavoidable circumstance, the witness could not be cross examined on behalf of the accused. This fact should be

in the mind of the learned trial judge that if an opportunity for cross examination is not provided to the accused, it would be violation of natural justice. It is the basic principle of natural justice that an opportunity must be provided to the accused for cross examination and hearing. In case the witness has not been examined, the evidence of the examination in chief would be considered in toto against the accused and it would remain un-rebutted and this situation would be a mockery of justice due to mere technicalities.

7. To avoid such circumstances Section 311 Cr.P.C has been incorporated in the code of criminal procedure which is as under :

"Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

8. From the above, it is very much clear that there are two part of this Section. According to first part of the Section, the Court can exercise the power :- (1) to summon any person as a witness, or. (2) to examine any persons in attendance, though not summoned as a witness, or, (3) to recall and re-examine any person already examined. The second part, which is mandatory and imposes an obligation on the Court:- (1) to summon and examine, or (2) to recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case.

9. In ***Raja Ram Prasad Yadav Vs. State of Bihar and Anr. A.I.R 2013 (SC) 3081,*** it has been held that it is, therefore imperative that invocation of Section 311 Cr.P.C and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provisions, namely, for achieving a just decision of the case. The power vested under the said provisions is made available to any court at any stage in any inquiry or trial or other proceedings initiated under the code for the purpose of summoning any person as a witness or for examining any persons in attendance, even though not summoned as witnesses or to re-call or re-examine any person in attendance. In so far as recalling and re-examining of any person already examined, the court must necessarily consider and ensure that such re-call and re-examination of any person, appears in the 3 of 8 view of the court to be essential for the just decision of the case.

10. In ***Raja Ram Prasad Yadav Vs. State of Bihar and Anr. A.I.R 2013 (SC) 3081***, it has been held that it is, therefore imperative that invocation of Section 311 Cr.P.C and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provisions, namely, for achieving a just decision of the case. The power vested under the said provisions is made available to any court at any stage in any inquiry or trial or other proceedings initiated under the code for the purpose of summoning any person as a witness or for examining any persons in attendance, even though not summoned as witnesses or to re-call or re-examine any person in attendance. In so far as recalling and re-examining of any person already examined, the court must necessarily consider and ensure that such re-call and re-examination of any person,

appears in the view of the court to be essential for the just decision of the case.

11. In ***R.B. Mithani Vs. State of Maharashtra, A.I.R. 1971,*** Supreme Court 1630, the Hon'ble Supreme Court has held that additional evidence summoned must be necessary not because, it would be impossible to pronounce judgement but also because there would be failure of justice without it. Though the power must be exercised sparingly and only in suitable case but once such action is justified, there is no restriction on the kinds of evidence, which may be received. It may be formal or substantial in nature.

12. In ***State of Haryana Vs. Ram Prasad 2006 Cr.L.J. 1001,*** the Punjab & Haryana High Court held that where the examination and re-examination of the witness is essential for the just decision of the case, it is obligatory of the Court to summon such a witness.

13. In ***Shailendra Kumar Vs. State of Bihar, A.I.R 2002 (Supreme Court) 270***, it is held that if there is any negligence, latches or mistake by not examining material witness, the Courts function to render just decision by examining such witness at any stage is not, in any way impaired.

14. In ***Ramasami Vs. Sriniwasan 1987 (3) Crimes 89 Madras***, it is held that the criminal court is not just umpire to deal only the material brought by the parties before it. The court has to play an active role in the administration of criminal jurisprudence. Though, it is not normal duty of the court to collect evidence, in cases where justice requires, the Court has power to further inquire into the matter in order to ascertain the truth.

15. In ***Rama Paswan Vs. State of Jhharkhand, 2007 Crl. L.J. 2750***, the Hon'ble Supreme Court has held that it would not be improper, the exercise of the power of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The Section is a general Section, which applies to all proceedings, inquiries and trials under the Court and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or inquiry.

16. The applicant-accused is of the view that by allowing the application under Section 311 Cr.P.C and by summoning the witnesses and keeping the documentary evidence on record, the accused-applicant have been prejudiced. In this respect in ***Popat Lal & Ors. Vs. State of Maharashtra, 2002, Crl.L.J. 794,*** the Bombay High Court has held that Section 311 Cr.P.C. is not granted only for the benefit of the accused and it will not be improper exercise of power of the Court, if the Court summons a witness only because the evidence will support the prosecution case and not the defense case.

17. The averment of para 14 to 17 in ***V.N Patil Vs. Niranjan Kumar and others, (2021) 3 SCC 661***, are relevant hence they are reproduced as under :-

"14. The object underlying Section 311 CrPC is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that

occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".

15. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar v. State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240 : (SCC p. 141, para 17)

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learrned Special Judge to examine Smt Ruchi Saxena as a court witness the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. This principle has been further reiterated in Mannan Shaikh v. State of W.B., (2014) 13 SCC 59 : (2014) 5 SCC (Cri) 547 and thereafter in Ratanlal v. Prahlad Jat, (2017) 9 SCC 340 : (2017) 3 SCC (Cri) 729 and Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839 . The relevant paragraphs of Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839 are as under: Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839, SCC p. 331, paras 10-11).

"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re- examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine, or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re- examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth

the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice."

18. In the aforesaid case, the appeal was allowed by the apex court and the order of High Court was set aside and order of the trial court regarding summoning of the witnesses and production of document was restored.

19. Mentioning the name of all witnesses in FIR or in statements u/s 161 CrPC is not a requirement of law. Such witnesses can also be examined by prosecution with the permission of the court. Non-mentioning of the name of any witness in the FIR would not justify rejection of evidence of the eye-witness. In para 13 of ***Bhagwan Singh Vs. State of M.P, 2002 (44) ACC 1112 (SC)*** it was held that that there is no requirement of law for mentioning the names of all the witnesses in the FIR, the object of which is only to set the criminal law in motion. In the cited case Kiran (PW 7) herself was injured and being the niece of Hari Ram (deceased), had no reason to involve innocent persons in the commission of the crime. In addition to the above citation in **Raj Kishor Jha Vs. State of Bihar, 2003 (47) ACC 1068 (SC), Chittarlal Vs. State of Rajasthan, (2003) 6 SCC 397, Shri Bhagwan Vs. State of Rajasthan, (2001) 6 SCC 296, Satnam Singh Vs. State of Rajasthan, (2000) 1 SCC 662,** the Apex Court has held similar principles of law.

20. On the basis of above discussion this Court comes to the conclusion that the trial Court has committed manifest error in not considering the previous order dated 9.10.2012 and it has also been failed in considering the recall application in right prospective hence, this application is liable to be allowed.

ORDER

This application is **allowed** and the impugned order dated 19.10.2022 is quashed and the application under section 311 Cr.P.C is allowed. The learned trial court is directed to summon the witness PW-2, PW-3, PW-6 and PW-8 for their cross examination by and on behalf of the applicant Mahboob Pandey. It is also directed that the learned trial court shall provide sufficient opportunity to the applicant for cross examination for the aforesaid witnesses.

(2023) 4 ILRA 1305
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ-A No. 4821 of 2023

Manisha Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Shalini Mishra, Sri Sanjay Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Ravi Prakash Pandey

A. Service Law –claim for the payment of gratuity and pension of deceased husband of petitioner rejected-husband not working against a sanctioned post-service never regularised despite working for his entire life with the department-petitioner entitled for pension under U. P.

development Authorities Centralised Services Retirement Benefit Rules, 2011.

B. State Government cannot be involved in exploitative labour practice-persona cannot be engaged on temporary basis for long periods-refusing the benefits of regular employees-services of petitioner's husband are liable to be treated as regular service-Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021-applicable only on the State Government employees-even otherwise, the Act of 2021 has been read down- petitioner entitled to regular pension and other retiral benefits-Petition allowed.

HELD:
The Supreme Court has repeatedly held that the State Government cannot be involved in exploitative labour practice. It cannot engage persons on temporary basis for long periods refusing to grant them benefits of regular employees. Suffice would be to refer to the judgment in case of Prem Singh vs. State of U.P. and others, (2019) 10 SCC 516.

Therefore, in view of the law settled by the Supreme Court settled by the Supreme Court in the case of Prem Singh (Supra) and the period spent by the petitioner's husband and the fact that he was also getting all the service benefits at par with regular employees, the services of petitioner's husband are liable to be treated as regular service.

The present Rules of 2011 are parallel to the Rules of State Government which have been read down by the Supreme Court, being held in violation of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. In the present case also, an artificial classification is created as admittedly, as the employees on adhoc appointments perform the same duties as the regular employees and are throughout treated as the regular employee. Thus, the matter is squarely covered by the law settled in case of Prem Singh (Supra).

Petition allowed. (E-14)

List of Cases cited:

1.Prem Singh Vs St. of U.P. & ors., (2019) 10 SCC 516

2.Writ-A No.8968 of 2022 (Dr. Shyam Kumar Vs St. of U.P. & ors.)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State.

2. Present writ petition is filed by the petitioner challenging the orders dated 22.11.2022 and 17.1.2023 whereby the respondents have rejected the claim of the petitioner for payment of gratuity and pension of late husband of the petitioner on the ground that husband of the petitioner was not working against the sanctioned post.

3. The husband of the petitioner was appointed on the post of Assistant Cost Accountant on probation basis on 18.06.1988 and he continued to work regularly. The husband of the petitioner expired on 11.06.2019. The husband of the petitioner was working regularly and regular service benefits including the revised pay scale and allowances and benefit of ACP were given by the respondents from time to time.

4. It is sad to note that petitioner's husband services were never regularized despite his having spent the entire working life with the department. During his service period, petitioner was also provided all the service benefits as provided to the regular employees. Thus, for all practical purposes, petitioner was treated as regular employee.

5. The Supreme Court has repeatedly held that the State Government cannot be involved in exploitative labour practice. It

cannot engage persons on temporary basis for long periods refusing to grant them benefits of regular employees. Suffice would be to refer to the judgment in case of ***Prem Singh vs. State of U.P. and others,*** (2019) 10 SCC 516. The Supreme Court in the said judgment, held:

"31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularised. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

.....

36. There are some of the employees who have not been regularised in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularised under the Government instructions and even as per the decision of this Court in State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one-time measure, the services be regularised of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularised. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension."

6. Therefore, in view of the law settled by the Supreme Court settled by the Supreme Court in the case of **Prem Singh (Supra)** and the period spent by the petitioner's husband and the fact that he was also getting all the service benefits at par with regular employees, the services of petitioner's husband are liable to be treated as regular service.

7. Learned counsel for petitioner further submits that he is entitled for pension under U.P. Development Authorities Centralized Services Retirement Benefit Rules, 2011 (Rules of 2011). Reference is made to Rule 2(jha), which reads as follows:

"(झ) "अर्हकारी सेवा" का तात्पर्य सेवा के किसी सदस्य की ऐसी सेवा से है जो निम्नलिखित शर्तों को पूरा करता होः-

(एक) सेवा किसी प्राधिकरण के अधीन अवश्य हो,

(दो) नियोजन मौलिक/नियमित/स्थायी अवश्य हो,

(तीन) सेवा का भुगतान किसी प्राधिकरण द्वारा अवश्य किया जाता हो,

(चार) किसी प्राधिकरण के अधीन गैर पेंशनयोग्य अधिष्ठान में अस्थायी या स्थानापन्न सेवा को छोड़कर सेवा की अवधि,

(पांच) किसी कार्य प्रभारित अधिष्ठान में सेवा की अवधि और,

(छह) आकस्मिक व्यय से भुगतान किये जाने वाले पद में सेवा की अवधि :

परन्तु यह कि सेवा के किसी सदस्य की सेवा क्षति पूर्ति उपदान के सिवाय पेंशन और उपदान के लिए तब तक अर्ह नहीं होगी जब तक कि उसने बीस वर्ष की सेवा पूरी न कर ली हो :

परन्तु, यह और कि किसी सुधारन्यास, प्राधिकरण, पालिका, बोर्ड, निगम, केन्द्र या राज्यसरकार के अधीन निरन्तर अस्थायी या स्थानापन्न सेवा की अवधि की गणना अर्हकारी सेवा के रूप में की जायेगी यदि उसी या किसी अन्य पद पर सेवा के किसी व्यवधान के बिना बाद में उसे स्थायी कर दिया जाय।

टिप्पणीः- यदि किसी पेंशन रहित अधिष्ठान, कार्य प्रभारित अधिष्ठान में या आकस्मिकता व्यय से भुगतान किये जाने वाले किसी पद पर की गयी सेवा किसी पेंशनयुक्त अधिष्ठान में अस्थायी सेवा की दो अवधि के बीच में या किसी पेंशनयुक्त अधिष्ठान में अस्थायी सेवा और स्थायी सेवा की अवधि के बीच में पड़ती हो तो वह सेवा का व्यवधान नहीं होगी।"

8. Further submission is that similar rules prevailed with regard to employees of the State Government which also provide non-counting of services performed on work charge basis. A three Judge's Bench of Supreme Court on reference in case of Prem Singh vs. State of U.P. and others, (2019) 10 SCC 516 considered their entitlement for pension. The relevant paragraphs of the said judgment reads:

"8. We first consider the provisions contained in the Uttar Pradesh Retirement Benefits Rules, 1961 (for short the 1961 Rules). Rule 3(8) of the 1961 Rules which contains the provisions in respect of qualifying service is extracted hereunder:

3. In these rules, unless is anything repugnant in the subject or context

*(1)-(7) * * **

(8) Qualifying service means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except

(i) periods of temporary or officiating service in a non-pensionable establishment;

(ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contingencies shall also count as qualifying service.

Note. If service rendered in a non-pensionable establishment work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service.

9. Regulations 361, 368 and 370 of the Uttar Pradesh Civil Services Regulations are also relevant. They are extracted hereunder:

361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:

First The service must be under Government.

Second. The employment must be substantive and permanent.

These three conditions are fully explained in the following Regulations.

368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post shall qualify, except

(i) periods of temporary or officiating service in non-pensionable establishment;

(ii) periods of service in work-charged establishment; and

(iii) periods of service in a post paid from contingencies.

10. The qualifying service is the one which is in accordance with the provisions of Regulation 368 i.e. holding a substantive post on a permanent establishment. The proviso to Rule 3(8) clarify that continuous, temporary or officiating service followed without interruption by confirmation in the same or any other post is also included in the qualifying service except in the case of periods of temporary and officiating service in a non-pensionable establishment. The service in work-charged establishment and period of service in a post paid from contingencies shall also not count as qualifying service.

11. The Note appended to Rule 3(8) contains a provision that if the service is rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies, falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service. Thus, the Note contains a clear provision to count the qualifying service rendered in work-charged, contingency paid and non-pensionable establishment to be counted towards pensionable service, in the exigencies provided therein.

12. The provisions contained in Regulation 370 of the Civil Services Regulations excludes service in a non-pensionable establishment, work-charged establishment and in a post paid from contingencies from the purview of qualifying service. Under Regulation 361 of the Civil Services Regulations, the services must be under the Government and the employment must be substantive and permanent basis.

.....

30. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No

material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In Narain Dutt Sharma v. State of U.P. [CA No. _____2019 arising out of SLP (C) No. 5775 of 2018] the appellants were allowed to cross efficiency bar, after "8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak with effect from 15-9-1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs 200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs 205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularised time to time by different orders. However, the services of some of the appellants in few petitions/appeals have not been regularised even though they had served for several decades and ultimately reached the age of superannuation.

31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularised. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

32. In view of the Note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work-charged, contingencies or non-pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularisation had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in the Note

to Rule 3(8) of the 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make Rule 3(8) valid and non-discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

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

36. There are some of the employees who have not been regularised in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularised under the Government instructions and even as per the decision of this Court in State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one-time measure, the services be regularised of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularised. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

37. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The

arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

9. He further submits that since similar rules for pensionary benefits exist in the respondent authority, therefore, the matter is squarely covered by the said judgment and petitioner herein should also be extended the benefit of the law settled in the case of **Prem Singh (Supra).**

10. Learned counsel for the respondent opposes the applicability of the judgment in the case of Prem Singh (Supra) on the ground that effect of the aforesaid judgment stands nullified because of the enactment of the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021.

11. So far as Act of 2021 is concerned, the same is applicable only upon the employees of State Government. There is no similar Act which is applicable with regard to employees of the Centralized Services of the Development Authority. Even otherwise Act of 2021 is already read down by this Court by judgment dated 17.02.2023 passed in **Writ-A No.8968 of 2022 (Dr. Shyam Kumar Vs. State of U.P. and others).** Relevant paragraphs of the same reads as:

"19. The very initial appointment letters show that petitioners were appointed against substantive posts on adhoc basis. Since their appointment is against a substantive post, hence, they are squarely covered even by Section 2 of the Act of 2021 as it stands. Further, in view of interpretation as given above to Section 2 of the Act of 2021 and it is held that the services performed in temporary or permanent nature need to be counted for pensionary purposes, otherwise, it again would be hit by the judgment of the Supreme Court in case of Prem Singh (supra), thus, there can be no dispute that all the petitioners are are entitled for counting of services rendered by them as ad-hoc employees for pensionary purposes.

In view of above, all the impugned orders are set aside."

12. The present Rules of 2011 are parallel to the Rules of State Government which have been read down by the Supreme Court, being held in violation of Article 14 of the Constitution of India, as they create an artificial categorization of similarly situated employees. In the present case also an artificial classification is created as admittedly, as the employees on adhoc appointments perform the same duties as the regular employees and are throughout treated as the regular employee. Thus, the matter is squarely covered by the law settled in case of Prem Singh (Supra).

13. Since grievance of the petitioner in the present petition is similar to one which has already been adjudicated by this Court in the aforesaid case, the benefit of the aforesaid judgment and order dated 17.2.2023 shall also be made available to the present petitioner in the same terms.

14. Accordingly, the writ petition is ***allowed*** and the impugned orders dated 22.11.2022 and 17.1.2023 are set aside. Respondents are directed to pay regular pension and other retiral benefits to the petitioner. However, petitioner shall be entitled to past pensionary benefits for last three years only.

(2023) 4 ILRA 1313
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.04.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 5545 of 2022

Renu Chaurasiya ...Petitioner
Versus
Punjab & Sind Bank & Anr. ...Respondents

Counsel for the Petitioner:
Praveen Kumar Singh, Avinash Chandra, Manish Vaish, Prashant Kumar Singh

Counsel for the Respondents:
Taranjeet Singh Makker, Sharad Kumar Shukla

Service Law- Order inflicting major punishment upon the petitioner-as well as appellate order-challenged- transaction of funds from her account- much higher than salary- misconduct- Regulations 3(1), 3(3), and Regulation 20(4) read with Regulation 24 of the Punjab and Sindh Bank Officers Employees (Conduct) Regulations, 1981-charge against the petitioner is not specific and vague in nature- no violation of Regulation 20(4)- appellate order does not deal with the submissions of the petitioner-order passed in cavalier manner- impugned order held to be unsustainable- petition allowed. (Paras 20 to 23)

HELD:

On the analysis of the proceedings, initiated and culminated, against the petitioner leading to the passing of the impugned orders of punishment, the same do not in any way demonstrate any violation of Regulation 20(4) or for that matter violation of Regulation 3(1) and Regulation 3(3) or Regulation 24 of the Employees Regulations. The proceedings are further bad in law in as much as nowhere did the petitioner ever admit the guilt and, thus, it was incumbent upon the disciplinary authority to record its findings on each such charge in terms of Regulation 4 of the Discipline and Appeal Regulations 1981 read with Regulation 8 of the 1981. For all the reasons recorded above, the impugned orders punishing the petitioner with a major penalty, are clearly unsustainable and are liable to be quashed. The impugned orders dated 11.2.2022 and 8.8.2022 are quashed. I am not remanding the matter as the charges levelled against the petitioner are as vague as they can be and subjecting the petitioner to give a reply to such vague charges would be further embarrassing the petitioner. (Para 22)

Petition allowed. (E-14)

List of Cases cited:

1.Ramesh Mohan Shukla Vs St. of U.P. & ors. reported 2015(7) ADJ 722 (DB)

2. Mahesh Narayan Gupta Vs St. of U.P. & ors. reported in 2011 (5) ADJ 177

3. St. of U.P. & ors.Vs Saroj Kumar Sinha reported in (2010) 2 SCC 772

4.Civil Appeal No. 8071 of 2014 in re: St. of Karnataka Vs M Gangaraj

5. B.C. Chaturvedi Vs U.O.I.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard learned counsel for the petitioner as well as learned counsel for the respondent.

2. The present petition has been filed by the petitioner challenging the order dated 11.2.2022 whereby a major punishment was inflicted upon the petitioner as well as the appellate order dated 8.8.2022 whereby the departmental appeal preferred by the petitioner was dismissed.

3. The brief facts that emerge are that the petitioner was employed as an officer

with the respondent-bank. On 14.11.2019, the petitioner was called upon to explain to tender an explanation in respect of the transactions in the statement of account of the petitioner for the period 2015 to 2019. The petitioner submitted a reply to the said explanation vide a letter dated 3.12.2019 stating that the father of the petitioner was suffering a paralytic attack and was on bed since 2009 and on account of medical and family exigencies certain amounts were borrowed from the family members.

4. It is argued, that after the reply was submitted by the petitioner, the petitioner was served with a show cause notice on 10.2.2021 wherein, it was alleged against the petitioner that the petitioner had made huge transactions of funds regularly in and from her account which are much higher than her salary while working as an officer for the period from 11.8.2015 to 23.1.2019 which would constitute a misconduct in terms of Regulation 3 (1), Regulation 3 (3) and Regulation 20 (4) read with Regulation 24 of the Punjab and Sindh Bank Officers Employees (Conduct) Regulations 1981 (hereinafter referred to as '1981 Regulations'). Along with the said chargesheet, the statement of account of the petitioner containing the transactions was appended as the proposed document to be relied upon to substantiate the charges. The single charge leveled against the petitioner is as under:-

"Ms Renu Chaurasiya (PF Code: R16432), Officer is charged for Major Penalty Proceedings under Regulation 6 of the Punjab & Sind Bank Officer Employees' (Discipline & Appeal) Regulations, 1981 (as amended time to time) for making huge transactions of funds regularly in and from her accounts much higher than her salary income while working as Officer at branches Rajajipuram Lucknow (L0779) from 11.8.2015 to 20.09.2015, Indra Nagar Lucknow (L0802) from 21.09.2015 to 22.01.2019 & Gomti Nagar Lucknow (L0917) from 23.01.2019 to till date under Lucknow zone as per articles of charges (ANNEXURE-I) based upon Statement of Allegations (ANNEXURE-II). A list of documents by which article of charges are proposed to be substantiated is also enclosed as per ANNEXURE III."

5. The petitioner moved an application dated 8.3.2021 stating that the chargesheet was vague and lacks clarity and the chargesheet is not accompanied by the list of documents and the list of witnesses and prayed that the relied upon documents be supplied so as to enable the petitioner to give a proper reply.

6. In response to the said letter, the respondent-bank gave a reply on 31.3.2021 stating that complete set of documents as mentioned in the list of documents (Annexure No.4) (wrongly referred as Annexure No.4 and appears to be Annexure No.3) in the chargesheet dated 10.2.2021. It was denied that at that stage no list of witnesses was annexed and, thus, a plea taken was found to be unfounded.

7. The petitioner once again wrote a letter stating that the charges are vague and the petitioner is unable to understand the charges. As the petitioner did not submit any reply, in fact, took a ground that the petitioner was being victimised for no fault of hers, an Inquiry Officer was appointed to inquire into the allegations.

8. The Inquiry Officer submitted his findings on 3.1.2022 recording that on the basis of documents marked as Management Exhibit-1 to Management Exhibit 10311,

the allegations with regard financial transactions as evidenced in the statement of account were true. With regard to each transaction, the Inquiry Officer recorded that the amount was deposited in her account and as the chargesheeted officer, the petitioner herein did not give any justification/reason or the source of cash so deposited in her account, he proceeded to record that the transaction remained unexplained by the chargesheeted officer. A similar finding was recorded in respect of each financial transaction which appeared in the statement of account of the petitioner. After recording the same, the Inquiry Officer recorded that on the perusal of management exhibits, it was clear that the transactions in various accounts of the petitioner are much higher than the salary income receipt of the petitioner. It further records that from the assets and liability statement of the C.S.O. for the corresponding period do not show any other sources which can justify the unreasonably high transactions in her account. It further records that the C.S.O. has not mentioned any details pertaining to the said transaction in her assets and liability statements of the relevant papers and after recording the same, held that the allegation no.1 is proved in totality.

9. The said inquiry report was forwarded to the disciplinary authority, on receiving the said report the disciplinary authority issued a show cause notice dated 19.1.2022 calling upon the petitioner to submit a written comment on the findings of the Inquiry Authority. In reply to the same, the petitioner sent a reply on 27.1.2022 taking a ground that the petitioner was unable to understand the charge which was framed against the petitioner, she also took a ground that the relied upon document and the list of witnesses were never provided to the petitioner as a result whereof the petitioner could not understand the charges and, thus, the petitioner was unable to answer. The petitioner also took a ground that the transactions referred to were the transactions in between the petitioner and her family members after the said reply was filed, the disciplinary authority proceeded to pass an order on 11.2.2022 wherein, the report of the Inquiry Officer was considered. The disciplinary authority consider the findings recorded by the Inquiry Officer in respect of each transaction and recorded that the petitioner had been making huge transactions of funds through the various accounts and despite giving opportunities to explain, the petitioner was reluctant and has not furnished any justification/reason in that regard. It further recorded that the salary income receipt by the petitioner from the bank does not commensurate with the amount involved in the corresponding period and went ahead to record that the petitioner was guilty of the misconduct as per the regulations of 1981 specially Regulation 3 (1), Regulation 3 (3) and Regulation 20 (4) read with Regulation 24 and after holding the petitioner guilty proceeded to award major punishment of reduction of four increments to a lower stage in time scale of pay for a period of 2 years. It further ordered that she will not earn increment of pay during the period of such reduction and on expiry of this period the reduction will have the effect of postponing the future increments of her pay, the said punishment was awarded under Regulation 4 (F) of the Discipline and Appeal Regulations 1981 as amended.

10. Challenging the said order of punishment awarded to the petitioner, the petitioner filed a comprehensive appeal

before the appellate authority. In the said appeal, the petitioner denied the allegation and pleaded that the petitioner could not be held guilty of misconduct. It was submitted that all the transactions referred to were in between the petitioner and her family members and details with regard to each deposit was specifically mentioned in paragraph 14 of the appeal. The petitioner also took other grounds in the appeal preferred by the petitioner. The appellate authority passed an order dated 8.8.2022 dismissing the appeal. Both the said orders are impugned in the present writ petition.

11. Sri Prashant Kumar Singh, learned counsel for the petitioner argues that in terms of the regulations under which the petitioner was working, the petitioner was under obligation to disclose the assets and liabilities in the prescribed form along with the format annexed to the said form, one such format is contained in Annexure No.13 to the writ petition. In the light of said submission, it is argued that it was incumbent upon the petitioner to disclose the carry home salary of the petitioner and apart from that, the petitioner was obliged to disclose details such as rent, receipt, interest/dividend, other receipts such as disposal of movable/immovable assets, gifts, encashment of NSE, NSS/PPF/FDRs/LIC, mutual fund, etc., and while filling the said form the petitioner had disclosed 'NIL'. The petitioner was also under an obligation to disclose the details of immovable properties and once again the petitioner disclosed the same as NIL.

12. The counsel for the petitioner draws my attention to the proceedings before the Inquiry Officer wherein the petitioner had made a specific statement that in terms of Regulation 20 (4) of the 1981 Regulation, it was an obligation of the petitioner to disclose every transaction 'concerning movable property' owned or held by the petitioner, if the value of such properties exceeds Rs. 25,000/- and the petitioner never owned any movable property of Rs. 25,000/- or more in between the financial year 2016 and 2020. He draws my attention to that Regulation 3(1), 3(3) and 20 (4) read with Regulation 24 are quoted hereinbelow:-

*"**Regulation 3(1):***

Every officer employee shall, at all times take all possible steps to ensure and protect the ineterests of the bank and discharge his duties with utmost integrity, honesty, devotion and diligence and do nothing which is unbecoming of an officer employee.

Regulation 3(3):

No officer employee shall, in the performance of his official duties or in the exercise of powers conferred on him, act otherwise than in his best judgement except when he is acting under the direction of his official superior.

Provided wherever such directions are oral in nature the same shall be confirmed in writing by his superior official.

Regulation 20(4):

Every officer employee shall report to the Competent authority every transaction concerning movable property owned or held by him either in his own name or in the name of a member of his family if the value of such a property exceeds Rs. 25,000/-.

Provided that the previous sanction of the competent authority shall be obtained if any such transaction is -

(a) With a person having official dealings with the officer employee or

(b) Otherwise than through a regular or reputed dealer.

Regulation 24:

A breach of any of the provisions of these regulations shall be deemed to constitute misconduct punishable under the Punjab & Sindh Bank Officer Employees' (Discipline & Appeal) Regulations, 1981."

13. The counsel for the petitioner argues that in terms of the mandate of Regulation 20 (4), the employee is liable to report every transaction concerning to movable property owned or held by him either in his own name or in the name of a member of his family if the value of the property exceeds Rs. 25,000/-. He argues that in the entire chargesheet there is no allegation of the petitioner failing to make a disclosure in respect of a movable property belonging to the petitioner or her family member. He further argues that in the form which was required to be filled, it was specifically stated that the statement need not include the transactions which have been entered into by the spouse or any other member of the family of the officer employee out of his own funds including stridhan, gifts, inheritance etc. as distinct from the funds of the officer employee. He argues that that the notes appended to the form which are required to be filled itself made it mandatory that all the transactions both purchase and sales of Rs. 5,000/- or more are required to be reported and in fact the investment above Rs. 25,000/- are required to be reported as per Annexure No.1. The notes as appended to the form which is required to be filled by the officer concerned which is being reproduced here-in-below:-

"The officers are required to intimate only the changes during the year, wherever, a particular set has already been reported in any of the previous years. All columns are required to be filled in and the details, wherever required, may be given by way of separate Annexure. Reference to the sanctions obtained from the competent authority shall be made against the relative transaction.

All the transactions, both purchases and sales, of '5000/- or more are required to be reported. So far as investment in shares, securities, debentures, mutual fund schemes etc. is concerned, even transactions of values of less than '5000/- are required to be reported. However, if the total transactions in such investments exceed 25000/- during the financial year, intimation is required to be given as per Annexure-I.

The statement need not include transactions which have been entered into by the spouse or any other member of the family of the officer employee out of his/her own funds including stridhan, gifts, inheritance etc. as distinct from the funds of the officer employee.

I hereby declare that I have read and understood the Regulation 14 to 20 of the PSB Officer Employees' Conduct Regulations-1981 and the particulars in the statement furnished here-in-above are in conformity with the said regulations and are complete and correct as of date and to the of my knowledge and belief."

14. In the light of said submission, he argues that the chargesheet never alleged that the petitioner did not make any true disclosures as are required to be made and in terms of Regulation 20 (4), transactions other than the one referred to in the said regulation are not required to be disclosed and as such the petitioner could not be held guilty on that account. He next argues that in any event, the petitioner never admitted the guilt and thus, it was incumbent upon the bank in terms of the Discipline and Appeal Regulations to establish the charges

levelled based upon documentary or oral evidence. In the present case, it is argued that that the charge has been held to be proved against the petitioner solely based upon the statement of account and without there being any other evidence to establish the violation of Regulation 20 (4). He further argues that in the appeal, all the transactions in the statement of account of the petitioner were duly explained and it was the duty of the appellate authority to have recorded a finding in respect of the grounds taken in the appeal whereas the appellate order concludes the proceedings without recording any finding in respect of the grounds as raised by the petitioner.

15. Learned counsel for the petitioner lastly draws my attention to the Discipline and Appeal Rules which provide for the manner in which the proceedings are to be concluded in the event of a major penalty being imposed which is contained in Regulation 6. He draws my attention to the Regulation 6 which prescribes that in the event the officer does not accept the guilt, it is incumbent upon the Inquiry Officer to record a finding of guilt in respect of each charge on the basis of the evidence. He also draws my attention to the Employees Conduct Regulations specifically Regulation 3 (1), 3 (3), 20 (4) and Regulation 24 which are quoted hereinabove to argue that, even if for the sake of arguments, all the allegations levelled are taken to be correct, there is no material to establish that there was violation of Regulation 20 (4) as the disclosure/reporting relate only in respect of 'transactions of movable property' which exceed Rs. 25,000/-.

16. Learned counsel for the petitioner has placed reliance on the revision and judgement of this Court in the case of ***Ramesh Mohan Shukla Vs. State of U.P. and others*** reported ***2015(7) ADJ 722 (DB)*** in particular places reliance on paragraph 4 of the said judgement which holds that irrespective of the defense, the burden of proving the charge is on the Inquiry Officer. He further places reliance on the judgement of this Court in the case of ***Mahesh Narayan Gupta Vs. State of U.P. and others*** reported in ***2011 (5) ADJ 177*** which is also to the same effect that the burden of proving the charge is on the employer. He next places reliance on the judgement of the Supreme Court in the case of ***Union of India Vs. Gyan Chand Chattar*** reported in ***(2009) 12 SCC 78*** where he places reliance on paragraph 35 to argue that the statutory rules are to the followed strictly and the charges should be specific and no inquiry can be sustained on vague charges and that every act or omission on the part of the delinquent cannot constitute a misconduct, paragraph 35 is quoted here-in-below:-

"In view of the above, law can be summarised that an enquiry is to be conducted against any person giving strict adherence to the statutory provisions and principles of natural justice. The charges should be specific, definite and giving details of the incident which formed the basis of charges. No enquiry can be sustained on vague charges. Enquiry has to be conducted fairly, objectively and not subjectively. Finding should not be perverse or unreasonable, nor the same should be based on conjectures and surmises. There is a distinction in proof and suspicion. Every act or omission on the part of the delinquent cannot be a misconduct. The authority must record reasons for arriving at the finding of fact in the context of the statute defining the misconduct."

17. Learned counsel for the petitioner next places reliance on the judgement of the Supreme Court in the case of *State of U.P. and others Vs. Saroj Kumar Sinha* reported in ***(2010) 2 SCC 772*** wherein the manner of conducting the inquiry was laid down emphasis by the Supreme Court, paragraph 27 to 30 are quoted here-in-below:-

"A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex-parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

Apart from the above, by virtue of Article 311(2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of natural justice. It is a basic requirement of the rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee.

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

18. Learned counsel for the respondent-bank, on the other hand, defends the order by arguing that the petitioner never filed any objection to the chargesheet, the petitioner never gave any statement with regard to such huge financial transactions which are reflected in the statement of account and, thus, the petitioner failed to raise the objections at the time when they were required to be raised. It is argued that an officer who is drawing a salary of Rs. 4 lakhs and all, has incoming transactions in excess of 70 lakhs in her account and outgoing transactions of Rs. 40 lakhs in her account, itself

demonstrates that the petitioner was receiving such huge amounts without making the necessary disclosures to the bank which according to the counsel for the respondent-bank is a clear violation of the Regulation of 1981. He further argues that in terms of the disclosures that were required to be made by all the officers, the details are required to be stated. He further argues that the emphasis of the petitioner that the details as are specified in the form pertaining to the gifts etc. are to be disclosed is worthy of rejection as the said heads are only examples and does not contain the exhaustive disclosures which are required to be made. He further argues that the Inquiry Officer after giving adequate opportunity to the petitioner recorded the findings of guilt in respect of the charge as framed against the petitioner and this Court in exercise of jurisdiction under Article 226 cannot sit over the said order as an appellate authority. He relies upon a judgement of the Supreme Court in the Case of ***Civil Appeal No. 8071 of 2014 in re: State of Karnataka Vs. M Gangaraj,*** therein Hon'ble Supreme Court had the occasion to consider this act of interference in disciplinary proceedings under Article 226 of the Constitution of India and after placing reliance on various judgements including the judgements of ***B.C. Chaturvedi Vs. Union of India***, followed the same and recorded that judicial review is confined to decision making process. He lastly argues that the appellate authority in its findings had recorded that the petitioner was guilty out of own disclosure of the huge transactions and it was not required by the appellate authority to deal with each and every submission in respect of each and every transaction in the statement of account as has been argued by the counsel for the petitioner. In the light of the said submission, it is argued that the petition lacks merit and liable to be dismissed. He further argues that in terms of the mandates Regulation 20 (4), it was incumbent upon the officer to disclose all the financial transactions as reflected in the statement of account which the petitioner had not done and in any case, should have come out clean in respect of each transaction, while filing the reply to the chargesheet which the petitioner has failed to do and has not even disclosed the same during the course of the inquiry.

19. In rejoinder, the counsel for the petitioner argues that before issuance of chargesheet, a notice was served on the petitioner and the petitioner, in reply to the said notice had specifically given the details in respect of the transactions in the statement of the account of the petitioner.

20. Considering the statement made at the bar and as recorded above, this Court is to consider as to whether the charge levelled against the petitioner is contrary to the mandate of Regulation 3(1), Regulation 3(3), Regulation 20(4) and Regulation 24 of the Employees Conduct Regulations 1981. The sole charge against the petitioner was of making huge transactions of funds regularly in and from her accounts much more than her salary income while working as an officer. In terms of the Regulation 20(4), every officer employee is bound to report to the competent authority for every transaction concerning to movable property owned or held by him/her either in his own name or in the name of members of his family if the value of the property exceeds Rs. 25,000/-. Thus, it is clear that the Regulation 20(4) is confined to disclosure of transactions concerning movable property owned or held by him/her, if the value of the property exceeds Rs. 25,000/-, the regulation does not prescribe for

disclosure of all the financial transactions taking place in the account of the officer concerned. This is also fortified by the forms prescribed for filling, by each and every officer concerned, one such form requiring the disclosures to be made is annexed as Annexure No. 13 to the writ petition, the same is qualified by the notes which do not provide for disclosure of the transactions entered into by the spouse or other members of the family by the officer employee out of his/her own funds. Thus to carry home the charge of violation of Regulation 20(4), it was incombent upon the petitioner to allege and substantiate that the transactions made and reflected in the statement of account of the value exceeding Rs. 25,000/- and were not in respect of transactions which have been entered into by the spouse or in the name of other member of the family of the officer employee out of his/her own funds. The charge levelled against the petitioner only alleged that huge transactions were made in the bank accounts which are much higher than the salary. On a plain reading, the said charge does not attract any infraction of Regulation 20(4) of the regulations. In the absence of any charge to the effect that the transactions reflected in the statement of account were in respect of movable property of the value exceeding Rs. 25,000/- and other than the transactions which are not bound to be disclosed, there was no occasion for the petitioner to give any reply to the said charge as on the face of it, the charge did not reflect any violation of Regulation 20(4). Thus, to that extent, the submission of the counsel for the petitioner that the charge should be specific and not vague is bound to be accepted.

21. In the inquiry report, the Inquiry Officer has gone through all the transactions and did not record any finding that they were in respect of transaction 'concerning movable property' of value exceeding Rs. 25,000/- or that the said transactions were other than what is required to be disclosed in the annual returns filed by the officer concerned. The disciplinary authority has also failed to record any finding as to how the transactions reflected in the statement of account violated Regulation 20(4). The appellate order clearly does not deal with any of the submissions made by the petitioner, wherein, for the first time the petitioner has specifically explained each and every financial transactions that it happened in the bank account to demonstrate that the same did not relate to movable property held by the petitioner of a value exceeding Rs. 25,000/-. The appellate authority has passed the order in a casual manner without dealing with the said averments and, thus, is clearly unsustainable.

22. On the analysis of the proceedings, initiated and culminated, against the petitioner leading to the passing of the impugned orders of punishment, the same do not in any way demonstrate any violation of Regulation 20(4) or for that matter violation of Regulation 3(1) and Regulation 3(3) or Regulation 24 of the Employees Regulations. The proceedings are further bad in law in as much as nowhere did the petitioner ever admit the guilt and, thus, it was incombent upon the disciplinary authority to record its findings on each such charge in terms of Regulation 4 of the Discipline and Appeal Regulations 1981 read with Regulation 8 of the 1981. For all the reasons recorded above, the impugned orders punishing the petitioner with a major penalty, are clearly unsustainable and are liable to be quashed.

The impugned orders dated 11.2.2022 and 8.8.2022 are quashed. I am not remanding the matter as the charges leveled against the petitioner are as vague as they can be and subjecting the petitioner to give a reply to such vague charges would be further embarrassing the petitioner.

23. The writ petition is **allowed**. No order as to costs. Consequential benefits shall follow in favour of petitioner.

(2023) 4 ILRA 1322
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Writ-A No. 7701 of 2021

Union of India & Ors. ...Petitioners
Versus
Nathan Singh ...Respondent

Counsel for the Petitioners:
Sri Manoj Kumar Singh, Sr. Advocate Sri Shashi Prakash Singh

Counsel for the Respondent:
Sri Ashish Kumar Srivastava, Sri Sunil

A. Service Law–Order of Central Administrative Tribunal-setting aside the order retiring the petitioner on 31.03.2019 instead of 20.08.1961-challenged.

B. Change in date of birth was never communicated to the respondent-no opportunity of hearing was granted to him before that-both contentions accepted by the petitioner in its counter affidavit filed in Original Application before CAT-date of birth of respondent corrected unilaterally sans intimation-Explanatory Note of Fundamental Rules, 1956- date of birth of Government Employee can be corrected within five years of entering service- or bonafide mistake-both defence not available to the petitioner in this case-principles of natural justice violated-impugned order upheld-petition dismissed . (Paras 5 to 11)

HELD:
Considering the above facts, it is the petitioners who entered the date of birth of the respondent in his service record as 20.08.1961, at the time of entering the service of respondent and they unilaterally corrected the same by mentioning the date of birth of respondent as 12.03.1959 without giving any opportunity of hearing to respondent or giving any intimation to him till 2018. Therefore, original application filed by the respondent before the Central Administrative Tribunal, Allahabad was well within time and duly maintainable and because of non-intimation or non-granting opportunity of hearing before correction of date of birth of the respondent, there is a clear violation of Articles 14 and 16 of the Constitution of India, therefore, the view taken by the Central Administrative Tribunal, Allahabad of setting aside the impugned order on the ground of violation of principles of natural justice, as no opportunity of hearing was given to the respondent before making correction in his date of birth and retiring him on 31.03.2019 on the basis of amended date of birth, cannot be said to be perverse or erroneous. (Para5)

Even otherwise, as per explanatory note of Fundamental Rules, 1956 clearly provides that date of birth of Government employee can be changed only within five years of entering into the service or it is clearly established that a genuine bona fide mistake has occurred and in the present case, correction was made by the petitioners in the date of birth of the respondent after 11 years of entering into service and the same also cannot be said to be correction of genuine bona fide mistake. (Para 6)

From the above decisions, it is established position that application of principles of natural justice in the decision-making process of the administrative body having civil consequences have been upheld. Therefore, rules of natural

justice are foundational and fundamental concepts. (Para 10)

. In the present case unilateral change in date of birth of respondent is having civil consequences upon respondent because same has affected the date of retirement of respondent, hence thereby causing prejudiced to respondent for non-grant of opportunity of hearing before making such correction in the date of birth of respondent in service record. Therefore, the order of Central Administrative Tribunal dated 18.11.2020 is well considered and absolutely correct and need no interference by this Court in exercising of its extraordinary jurisdiction under Article 226 of the Constitution of India. (Para 11)

Petition dismissed. (E-14)

List of Cases cited:

1. St. of U.P. Vs Sudhir Kumar Singh & ors. reported in AIR 2020 SC 5215

2. M/s. A.S. Motors Pvt. Ltd. Vs U.O.I. reported in 2013 AIR SCW 3830

3.Uma Nath Pandey Vs St. of U.P. reported in 2009 AIR SCW 3200

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

1. Heard Sri Manoj Kumar Singh, learned counsel for the petitioners and no one has appeared on behalf of the respondent.

2. Present writ petition has been filed on behalf of Union of India against the order dated 18.11.2020 passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad in Original Application No.330/00278 of 2019 by which application of the respondent has been allowed by the Central Administrative Tribunal by setting aside the order dated 24.12.2018 retiring him from service on 31.03.2019 on the basis of consideration of his date of birth as 12.03.1959, instead of 20.08.1961 by making correction on 27.01.1995.

3. The contention of learned counsel for the petitioners is that in the service record, date of birth of the respondent was incorrectly mentioned as 20.08.1961 though as per medical certificate issued by Chief Medical Officer, Allahabad dated 12.03.1984, age of the respondent was about 25 years at the time of entering into service in the year 1984 as majdur under Garrison Engineer, Bamrauli. Therefore, the same was corrected in the service record of the respondent in 1995. It was submitted by learned counsel for the petitioners that the respondent has filed time barred original application before Central Administrative Tribunal, Allahabad because as per Section 21 of the Central Administrative Tribunal Act, 1985, the limitation for filing the original application before the Central Administrative Tribunal is one year but, in the present case, the respondent has filed original application before the Central Administrative Tribunal, Allahabad in 2019, though correction in his date of birth was made in 1995. It was further mentioned that correction in the service record regarding the date of birth of the respondent was well in the knowledge of the respondent and he never made any objection or representation against the same to the competent authority. It was further contended by the petitioners that under the service rule, service book is required to be shown to Government servant every year and his signature should be obtained on the same. It was also submitted by learned counsel for the petitioners that it is the responsibility of the concerned Government servant that his service should have been duly verified by the competent

authority. It was also submitted by the petitioners that on 30.10.2018, a seniority list of Mason HS-II was circulated by Headquarter CWE Allahabad mentioning the date of birth of the respondent as 12.03.1959 on the basis of correction made in the year 1995 and only thereafter, the respondent made representation against the correction of his date of birth to Headquarter CWE Allahabad which was duly considered and replied by letter dated 14.12.2018 stating that correct date of birth of the respondent is 12.03.1959 but the respondent has not filed any objection against the letter dated 14.12.2018 of HQCWE Allahabad nor have challenged the same before any competent authority but at the verge of retirement i.e. on 02.03.2019, the respondent has moved a representation for restraining the superannuation from service w.e.f. 31.03.2019 and also requested for necessary correction of his date of birth mentioned in the service record. But that was duly replied by the competent authority vide letter dated 06.04.2019. Thereafter, prior to his retirement, when the order dated 24.12.2018 was issued by the office of GE (AF Division) Gorakhpur, the respondent had challenged the same by filing original application before the Central Administrative Tribunal, Allahabad.

4. On perusal of record, it is found that in paragraph nos.4.18 and 4.20 of O.A., it was contended by respondent that no information regarding the change of date of birth of the respondent in 1995 was ever communicated by his employer nor any opportunity of hearing was afforded to him before making any correction in his date of birth and same was intimated to the respondent by letter dated 14.12.2018. This fact of non-communication of correction of date of birth in the year 1995 and non-granting of opportunity, mentioned in original application of the respondent was not disputed but virtually admitted in paragraph no.16 of the counter affidavit of the petitioners before Central Administrative Tribunal. It was also admitted in counter affidavit by the petitioners that correction of date of birth in the service record of the respondent was intimated to him by letter dated 24.12.2018.

5. Considering the above facts, it is the petitioners who entered the date of birth of the respondent in his service record as 20.08.1961, at the time of entering the service of respondent and they unilaterally corrected the same by mentioning the date of birth of respondent as 12.03.1959 without giving any opportunity of hearing to respondent or giving any intimation to him till 2018. Therefore, original application filed by the respondent before the Central Administrative Tribunal, Allahabad was well within time and duly maintainable and because of non-intimation or non-granting opportunity of hearing before correction of date of birth of the respondent, there is a clear violation of Articles 14 and 16 of the Constitution of India, therefore, the view taken by the Central Administrative Tribunal, Allahabad of setting aside the impugned order on the ground of violation of principles of natural justice, as no opportunity of hearing was given to the respondent before making correction in his date of birth and retiring him on 31.03.2019 on the basis of amended date of birth, cannot be said to be perverse or erroneous.

6. Even otherwise, as per explanatory note of Fundamental Rules, 1956 clearly provides that date of birth of Government employee can be changed only within five years of entering into the service or it is

clearly established that a genuine *bona fide* mistake has occurred and in the present case, correction was made by the petitioners in the date of birth of the respondent after 11 years of entering into service and the same also cannot be said to be correction of genuine *bona fide* mistake.

7. The Apex Court has held in the judgement titled as **State of U.P. Vs. Sudhir Kumar Singh and Ors reported in AIR 2020 SC 5215 in paragraph no.39,** which reads as under:

"39. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."

8. Paragraph no.8 of the judgement titled as **M/s. A.S. Motors Pvt. Ltd. Vs. Union of India reported in 2013 AIR SCW 3830,** is quoted hereinbelow:

"8. It was argued on behalf of the appellant that termination of the contract between the parties was legally bad not only because the principles of natural justice requiring a fair hearing to the appellant were not complied with but also because there was no real basis for the respondent-authority to hold that the appellant had committed any breach of the terms and conditions of the contract warranting its termination. We find no merit in either one of the contentions. The reasons are not far to see. Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the Courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected

party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of audi alteram partem is thus aimed at striking at arbitrariness and want of fair play. Judicial pronouncements on the subject have, therefore, recognised that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the Tribunal and the rules and regulations under which it functions. A Court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are a legion. We may refer to only some of the decisions on the subject which should in our opinion suffice."

9. Paragraph no.15 of the judgement titled as **Uma Nath Pandey v. State of U.P. reported in 2009 AIR SCW 3200,** is quoted hereinbelow:

"15. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame-work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression `civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

10. From the above decisions, it is established position that application of principles of natural justice in the decision making process of the administrative body having civil consequences have been upheld. Therefore, rules of natural justice are foundational and fundamental concepts.

11. In the present case unilateral change in date of birth of respondent is having civil consequences upon respondent because same has affected the date of retirement of respondent, hence thereby causing prejudiced to respondent for non-grant of opportunity of hearing before making such correction in the date of birth of respondent in service record. Therefore, the order of Central Administrative Tribunal dated 18.11.2020 is well considered and absolutely correct and need no interference by this Court in exercising of its extraordinary jurisdiction under Article 226 of the Constitution of India.

12. Therefore, the present petition fails and deserves to be **dismissed**.

(2023) 4 ILRA 1327
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2023

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ-A No. 10247 of 2018

Jagat Narayan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nand Kishor Mishra, Sri Vijay Gautam, Sri Akhilesh Kumar, Sri L.P. Mishra, Sri Ashok Kumar Rai, Ms. Shilpa Ahuja

Counsel for the Respondents:
C.S.C., Sri Girijesh Kumar Tripathi, Standing Counsel

A. Service Law– order of compulsory retirement from service under challenge-under rule 56(c) of the U.P. financial Handbook, Volume II (Part II-IV)-arbitrariness- without sufficient material.

B. Non-adherence to the procedure of consideration by the Screening Committee-procedure duly followed-Absence of material to form opinion-held to be incorrect-sufficient material available-principle of *audi alteram partem* not applicable in cases of compulsory retirement-scope of judicial review is limited-impugned order legally sustainable-no arbitrariness in the impugned order-complete service records can be looked-to form subjective satisfaction-plea of *mala fides* not available-concerned officers not made parties *eo nomine*-petition lacks merit-impugned order upheld-petition dismissed. (Paras 17, 20 to 23, 25, 27, 29, 33, 35 and 42)

HELD:

Upon hearing learned Counsel for the parties and perusing not only the record annexed to the counter affidavit, but also the petitioner's service-book, produced in original before the Court, this Court finds that it is incorrect to say that there is no material against the petitioner, on the basis of which the Screening Committee, or for that matter the Appointing Authority, could not form their subjective satisfaction under Fundamental Rule 56(c). (Para 20)

The sufficiency of material and the subjective satisfaction of the Screening Committee or the Appointing Authority, based on existing material, cannot be interfered with by the Court, if there is relevant material on record. It is for the Screening Committee and the Appointing Authority, invested with the power under Fundamental Rule 56(c) to exercise it, based on their subjective satisfaction. It can, of course, still be interfered with, if shown to be the result of mala fides or the product of arbitrariness. (Para 21)

The ground here urged was total absence of adverse material against the petitioner, inasmuch as that is one ground on which an order of compulsory retirement may be judicially reviewed. But, the record here shows that material adverse to the petitioner and very tangible is available on record. Therefore, there is no force in the petitioner's submission on this count. (Para 27)

The submission of the learned Counsel for the petitioner, therefore, that the impugned order is vitiated, because no notice was issued to the petitioner or opportunity afforded to submit his reply before the impugned order was passed, is misconceived and, accordingly, rejected. (Para 30)

Upon hearing learned Counsel for the parties, this Court may say that arbitrariness for all that it would mean in the context of exercise of power of compulsory retirement is perversity of opinion. If the Screening Committee or the Appointing Authority or the Government, in reaching their conclusion to retire an employee compulsorily under Fundamental Rule 56(c), take a view of the material on record, which no reasonable person would subscribe to on the basis of that material, the order would be arbitrary. This was precisely the import of the word 'arbitrary' as enunciated in Baikuntha Nath

Das. The principles there were endorsed in Rajesh Gupta v. State of Jammu and Kashmir and others, (2013) 3 SCC 514. (Para 33)

It is to be remarked here that given the conduct of the petitioner, where he has exhibited indiscipline and misbehaviour on duty while drunk on numerous occasions is a serious matter. The petitioner is a member of a disciplined force, where discipline and rectitude are not only the hallmark of a member of such force but a sine qua non for the efficient discharge of their functions. For the said reason, in particular, the opinion of the Screening Committee, given the material on record, cannot be held to be arbitrary or vitiated by mala fides or an instance of a colourable exercise of power in any manner. (Para 42)

Petition dismissed. (E-14)

List of Cases cited:

1.Baikuntha Nath Das & anr. Vs Chief District Medical Officer, Baripada & anr., (1992) 2 SCC 299

2. St. of Guj. Vs Umedbhai M. Patel, (2001) 3 SCC 314

3. M.S. Bindra Vs U.O.I. & ors., (1998) 7 SCC 310

4. Pritam Singh Vs U.O.I. & ors., (2005) 9 SCC 748

5. Posts and Telegraphs Board & ors. Vs C.S.N. Murthy, (1992) 2 SCC 317

6. Central Industrial Security Force Vs HC (GD) Om Prakash, (2022) 5 SCC 100

7. Rajesh Gupta v. State of Jammu and Kashmir & ors., (2013) 3 SCC 514

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition is directed against an order of compulsory retirement from service passed by the Superintendent of Police, Mahoba against the petitioner, a Police Constable, in exercise of powers under Rule 56(c) of the U.P. Financial Handbook, Volume II (Part II-IV). The order impugned says that the Superintendent of Police is the Appointing Authority for the post held by the petitioner and that in public interest, he directs that the petitioner stands retired from service with effect from the date of the impugned order in the forenoon. The impugned order further says that the petitioner would be entitled to receive a sum equivalent to three months of his salary together with all allowances due, computed on the basis of his emoluments that he was receiving immediately before the date of retirement. The petitioner has come up challenging the aforesaid order of compulsory retirement dated 28th March, 2018, which shall hereinafter be referred to as 'the impugned order'.

2. It is the petitioner's case that his date of birth is 01.05.1963 and he is aged 55 years. He is physically and medically fit to perform his duties. The petitioner has been performing his duties with extraordinary devotion and integrity. His service record is unblemished and exemplary. The petitioner is an honest and diligent policeman. He has always discharged his duties with utmost responsibility and worked to the full satisfaction of his superiors. The petitioner was appointed as a constable on 20.02.1984 in the Uttar Pradesh Police, and after completing his training, has been discharging his duties regularly, until the date of the impugned order.

3. Pending admission, parties have exchanged affidavits in compliance with the orders of this Court dated 19.04.2018 - a counter on behalf of respondent Nos.3, 4

and 5 and a rejoinder to it. A personal affidavit of the Superintendent of Police, Mahoba was also required to be filed on an ancillary issue. That affidavit was filed and the matter dealt with. By an order dated 10.06.2022, the petition was admitted to hearing, which proceeded on that day.

4. On 16.07.2022, when the matter came up, this Court *vide* order of that date also summoned the petitioner's service-book and all other records, on the basis of which the impugned order has been passed. The petitioner's service-book was produced by the learned Standing Counsel on 21.07.2022. The service-book and the entries therein were perused by the Court. Thereafter, the records were directed to be placed in a sealed cover with the Registrar General.

5. The matter was adjourned on 04.08.2022 to 01.09.2022 without a hearing. The service-book that was forwarded to the Court in sealed cover by the Registrar General was not opened for the said reason on the dates that the matter was not heard. On 12.09.2022, a rejoinder affidavit was filed on behalf of the petitioner to a counter affidavit dated 3rd August, 2022 on behalf of respondent No.5. The service-book received in sealed cover from the Registrar General was opened for the purpose of perusal and duly perused. Learned Counsel for the petitioner and the learned Standing Counsel were heard and judgment reserved.

6. Heard Mr. Nand Kishore Mishra, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned Standing Counsel appearing on behalf of the State.

7. It is argued by Mr. Nand Kishore Mishra, learned Counsel for the petitioner that no Screening Committee was constituted in accordance with the Government Orders dated 26.10.1985, 06.07.2017 and 08.09.2017, and the impugned order was passed by the Appointing Authority without the Screening Committee's appraisal. It is further argued that the impugned order has been passed by the Superintendent of Police in colourable exercise of powers under Fundamental Rule 56(c), ordering the petitioner's compulsory retirement. It is also argued that the respondents have done a pick and choose while passing the impugned order and acted arbitrarily in invoking their powers under Fundamental Rule 56(c).

8. It is also argued that the petitioner has been compulsorily retired by the respondents abusing their powers under the law and in violation of the principles of natural justice. It is urged that the impugned order has been passed *mala fide* and vitiated by arbitrariness and perversity in decision making. It is the submission of the learned Counsel for the petitioner that an order of compulsory retirement if bad on any of the three grounds of *mala fides*, arbitrariness and perversity, is open to judicial review in view of the decision of the Supreme Court in **Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another, (1992) 2 SCC 299.** It is also argued that in this case, the petitioner has been retired compulsorily as a measure of punishment, which is not permissible. In support of this proposition, the learned Counsel for the petitioner has relied on the decision of the Supreme Court in **State of Gujarat v. Umedbhai M. Patel, (2001) 3 SCC 314.**

9. It is argued further that the impugned order is based on no evidence as

there is no material with the respondents to form an opinion that the petitioner ought to be compulsorily retired under Fundamental Rule 56(c). The absence of any material to proceed under the Rule vitiates the order. In this regard, reliance has been placed by the learned Counsel for the petitioner upon the guidance of the Supreme Court in **M.S. Bindra v. Union of India and others, (1998) 7 SCC 310.** Reliance has also been placed upon the authority in **Pritam Singh v. Union of India and others, (2005) 9 SCC 748.**

10. In the counter affidavit dated 13.08.2018 filed on behalf of respondent Nos.3, 4 and 5 jointly, it has been averred in Paragraph No.8 that a Screening Committee was constituted in terms of the Government Orders dated 26.10.1985, 06.02.1989, 21.05.1998, 23.09.2000, 25.01.2007 and 28.03.2018. It is not an uninformed decision of the 5th respondent, the Appointing Authority, without scrutiny by the Screening Committee. It is pleaded that the Screening Committee in this case had the Appointing Authority, the Superintendent of Police, Mahoha as its Chairman, the Additional Superintendent of Police, Mahoba and the Circle Officer, Sadar, Mahoba as Members. In addition, the Reserve Inspector was also associated with the proceedings before the Screening Committee. It is pleaded that the impugned order has been passed on the basis of material in the petitioner's service-book, which shows him to be a drunkard, who was found on more than one occasion inebriated while on duty. The petitioner has attained the age of 50 years and the Screening Committee acted within their right, for the purpose of maintaining discipline in the police force and in the interest of public safety, to compulsorily retire the petitioner. It is incorrect to say that there is no material, on the basis of which the Screening Committee and the Appointing Authority have formed an opinion and passed the impugned order.

11. A perusal of Paragraph No.11 of the rejoinder affidavit shows a somersault by the petitioner, where he has given up the stand that no Screening Committee was constituted, a plea very emphatically raised in Paragraph Nos.13 and 27 to 31 of the writ petition. The petitioner has acknowledged the fact in the rejoinder affidavit that there was a Screening Committee, but says that there was no material before them to find the petitioner unfit to be retained in service. In the rejoinder affidavit, another point that has been raised is that the petitioner was not afforded any opportunity or given a notice to show cause before the impugned order was passed. Denial of opportunity has been pleaded with much emphasis, as a fact, vitiating the exercise of jurisdiction under Fundamental Rule 56(c).

12. A further counter affidavit dated 4th August, 2022, that was filed on behalf of the fifth respondent with leave of the Court, has referred to the material that was taken into consideration by the Screening Committee, headed by the Appointing Authority. It is specifically pleaded in Paragraph No.9 that the Reserve Inspector was directed to produce the petitioner before the Screening Committee on 28.03.2018. There is a reference generally to the effect that there are consistent instances of the petitioner turning up for duty drunk and emphasizing that he was a habitual drunkard. There is a reference to an FIR lodged against the petitioner giving rise to Crime No.286 of 2017, under Section 354-A, Police Station Kotwali, District Mahoba, where he had misbehaved

with a woman, who had come to the police station. In addition, there is also reference to a case against the petitioner under Section 34 of the Police Act, Police Station Kotwali, District Jhansi, wherein the petitioner earned a technical acquittal, because the proceedings were abated in consequence of a notification issued by this Court dated 6th January, 2017 under The Uttar Pradesh Criminal Law (Composition of Offences and Abatement of Trails) (Amendment) Act, 1979 (for short, 'the Act of 1979'). The case under Section 34 of the Police Act was said to be registered because the petitioner had indulged in rioting with people in a public place while drunk. The Annual Confidential Roll of the petitioner too has been referred to in Paragraph No.14 of the counter affidavit under reference, where it is mentioned that he was punished with a censure entry *vide* order dated 28.01.2011.

13. There is then a reference to a suspension order passed against the petitioner on 04.09.2013, where he had misbehaved while drunk at Chowki New Basti, P.S. Kotwali, District Jhansi, hurling furniture at others. This had led to the case under Section 34 of the Police Act, that was later on abated. There is also a reference to an order dated 25.01.2014, awarding a severe censure entry to the petitioner. There is still again a reference to an order dated 31.07.2017, where the petitioner was given a censure yet again. The last is a reference to an order dated 27.04.2018, where the petitioner was punished with the penalty of deduction of his pay equivalent to 30 days under Rule 14(2) of the Uttar Pradesh Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991. All the orders carrying these entries have been annexed as Annexure No.6 to the counter affidavit. There is also a reference to four petty punishments that were awarded to the petitioner.

14. The stand of the respondents is that the petitioner's service record was scrutinized as a whole and he was found unfit to be retained in a disciplined force like the police. The petitioner has attained the age of 50 years. He fell into the age zone where he could be considered for compulsory retirement and the Screening Committee, on the basis of very tangible material, decided to retire him in public interest.

15. In the rejoinder affidavit, it has been averred in answer to the last mentioned counter affidavit that in the case registered with the Police at Jhansi, the Chief Judicial Magistrate, Jhansi *vide* order dated 19.03.2018 has ordered the proceedings to abate. So far as Crime No.286 of 2017, under Section 354-A IPC, Police Station Kotwali, District Jhansi is concerned, it is asserted in Paragraph No.5 that after investigation, the Police did not find any material to support the prosecution. A final report has been put in on 18.09.2017. A copy of the Magistrate's order dated 19.03.2018 and the final report put in by the Police dated 18.09.2017 have been annexed as Annexure Nos. RA-1 and RA-2, respectively. It is pleaded in Paragraph No. 13 of the rejoinder affidavit that the petitioner's character roll carries excellent entries continuously from 2007 to 2016. It is just that in a deliberate and *mala fide* buildup to tarnish the petitioner's otherwise good record, he has been awarded a few adverse entries. This has been done by the respondents *mala fide* in order to engineer the impugned order. The action of the respondents, therefore, is *mala fide* as asserted in the writ petition. Since

mala fide is a ground for judicial review, it is urged that the impugned order is vitiated.

16. It is appropriate to dispose of the various contentions urged on behalf of the petitioner in challenge to the impugned order under definitive heads as indicated hereinafter:

(i) Non-adherence to the procedure of consideration by the Screening Committee

17. Though urged as one of the principal grounds of challenge to the impugned order by the learned Counsel for the petitioner in the opening of his case, a short way into the hearing, the learned Counsel for the petitioner could not substantiate at all the fact that no Screening Committee, as required in terms of the Government Orders dated 26.10.1985 and 06.07.2017 was constituted in this case. Here, apparently, a Screening Committee was constituted, comprising the Superintendent of Police, Mahoba, as Chairman, the Additional Superintendent of Police, Mahoba and the Circle Officer, Sadar, Mahoba as its Members, who have scrutinized and screened the petitioner's case for compulsory retirement in accordance with the Government Orders under reference. It is in accordance with the resolve of the Screening Committee that the Appointing Authority has considered and passed the order impugned. An assertion to this effect has been made in Paragraph No.13 of the counter dated 9th August, 2018 filed on behalf of respondent Nos.3, 4 and 5, already noticed hereinbefore, which has not been denied in the rejoinder affidavit. Rather, the position that a Screening Committee was constituted has been acknowledged by the petitioner in Paragraph No.11 of the relative rejoinder, a fact also noticed earlier. Therefore, this submission of the petitioner's that the genesis of the impugned order is flawed, because the mandatory procedure of scrutiny by a Screening Committee has not been adhered to, is without substance.

(ii) Absence of material before the Screening Committee to form opinion against the petitioner under Fundamental Rule 56(c)

18. The substance of the contention urged on behalf of the petitioner on this count is that there is absolutely no material on record on the basis of which the Appointing Authority, or for that matter the Screening Committee, could form a subjective satisfaction that the petitioner is unfit to be retained in service.

19. Learned Standing Counsel appearing on behalf of the State has invited the attention of the Court to the material on record, which according to him is enough for the Screening Committee to form their subjective satisfaction about the petitioner to be considered for compulsory retirement.

20. Upon hearing learned Counsel for the parties and perusing not only the record annexed to the counter affidavit, but also the petitioner's service-book, produced in original before the Court, this Court finds that it is incorrect to say that there is no material against the petitioner, on the basis of which the Screening Committee, or for that matter the Appointing Authority, could not form their subjective satisfaction under Fundamental Rule 56(c). The fundamental principles, on the basis of which an order of compulsory retirement can be passed by the Government and the limited grounds on which it can be judicially reviewed, have been laid down in **Baikuntha Nath Das**

(*supra*) by the Supreme Court, where it has been held:

"34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) *mala fide* or (b) that it is based on no evidence or (c) that it is arbitrary -- in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter -- of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

21. The sufficiency of material and the subjective satisfaction of the Screening Committee or the Appointing Authority, based on existing material, cannot be interfered with by the Court, if there is relevant material on record. It is for the Screening Committee and the Appointing Authority, invested with the power under Fundamental Rule 56(c) to exercise it, based on their subjective satisfaction. It can, of course, still be interfered with, if shown to be the result of *mala fides* or the product of arbitrariness.

22. The scope of interference with the decision of the Screening Committee or the Appointing Authority or the Government in exercise of powers under Fundamental Rule 56(c), rather a provision corresponding to it, fell for consideration of the Supreme Court in **Posts and Telegraphs Board and others v. C.S.N. Murthy, (1992) 2 SCC 317,** where it was held:

"5. It will be clear from the extracts referred to above, that though the respondent's conduct was quite satisfactory till March 1970, his standard of work had declined in the last two years under review. In both these years, it was found that he was not taking adequate interest in his work and was responsible for delays of various kinds. As has already been pointed out, an order of compulsory retirement is not an

order of punishment. F.R. 56(j) authorises the Government to review the working of its employees at the end of their period of service referred to therein and to require the servant to retire from service if, in its opinion, public interest calls for such an order. Whether the conduct of the employee is such as to justify such a conclusion is primarily for the departmental authorities to decide. The nature of the delinquency and whether it is of such a degree as to require the compulsory retirement of the employee are primarily for the Government to decide upon. The courts will not interfere with the exercise of this power, if arrived at bona fide and on the basis of material available on the record. No *mala fides* have been urged in the present case. The only suggestion of the High Court is that the record discloses no material which would justify the action taken against the respondent. We are unable to agree. In our opinion, there was material which showed that the efficiency of the petitioner was slackening in the last two years of the period under review and it is, therefore, not possible for us to fault the conclusion of the department as being *mala fide*, perverse, arbitrary or unreasonable. The Division Bench seems to have thought that, since the adverse remarks mentioned in the earlier letter of April 29, 1971 were not repeated in the subsequent letter, it should be taken that they had been given up subsequently or that the respondent had improved in the subsequent year. We do not think that this is a legitimate inference, for the report for 1971-72 only shows that the respondents' propensity to delay matters persisted despite the warning of the previous year. But, even if one assumes that the High Court was correct on this, the adverse remarks made against the respondent in relation to the period 1971-72, standing by themselves, can constitute sufficient material for the department to come to a conclusion in the matter. It is true that the earlier record of the respondent was good but if the record showed that the standard of work of the respondent had declined and was not satisfactory, that was certainly material enabling the department to come to a conclusion under F.R. 56(j). We are of opinion that the High Court erred in setting aside the order of compulsory retirement on the basis that there was no material at all on record justifying the action against the respondent."

23. There is also valuable guidance in this regard to be found in a recent decision of the Supreme Court in **Central Industrial Security Force v. HC (GD) Om Prakash, (2022) 5 SCC 100.** There were some wider issues involved there about the effect of adverse entries awarded to the constable in that case, who had subsequently earned a promotion to the post of head constable with the objection being that old entries prior to promotion stood washed out. But, one of the fundamental issues that was considered was about the scope of the power of the Government in passing an order of compulsory retirement. It was observed in **HC (GD) Om Prakash** (*supra*):

"7. A three-Judge Bench of this Court reported as Union of India v. Dulal Dutt [*Union of India v. Dulal Dutt*, (1993) 2 SCC 179 : 1993 SCC (L&S) 406] examined the order of compulsory retirement of a Controller of Stores in Indian Railways. It was held that an order of compulsory retirement is not an order of punishment. It is a prerogative of the Government but it should be based on material and has to be passed on the subjective satisfaction of the Government and that it is not required to be a speaking

order. This Court held as under : (SCC pp. 184-85, para 18)

"18. It will be noticed that the Tribunal completely erred in assuming, in the circumstances of the case, that there ought to have been a speaking order for compulsory retirement. This Court, has been repeatedly emphasising right from *R.L. Butail v. Union of India* [*R.L. Butail v. Union of India*, (1970) 2 SCC 876] and *Union of India v. J.N. Sinha* [*Union of India v. J.N. Sinha*, (1970) 2 SCC 458] that an order of a compulsory retirement is not an order of punishment. It is actually a prerogative of the Government but it should be based on material and has to be passed on the subjective satisfaction of the Government. Very often, on enquiry by the Court the Government may disclose the material but it is very much different from the saying that the order should be a speaking order. No order of compulsory retirement is required to be a speaking order. From the very order of the Tribunal it is clear that the Government had, before it, the report of the Review Committee yet it thought it fit of compulsorily retiring the respondent. The order cannot be called either *mala fide* or arbitrary in law."

24. Here, this Court finds that though there are good entries earned by the petitioner for the years 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995-96, 1997, 1999, 2001, 2002/2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2013, 2014, 2015, 2016, and also a record of good service, besides awards earned by the petitioner in the years 1985, 1986, 1988, 1989, 1990, 1995 and 1999, yet there are definite adverse entries awarded to the petitioner on 28.01.2011, 25.01.2014 and 31.07.2017, all of which are censure entries. The entry dated 25.01.2014 is a severe censure. There is then an order of minor penalty dated 27.04.2018, ordering deduction of a sum of money equivalent to 30 days' pay passed against the petitioner. There are four petty punishments also awarded in the years 1985, 1986, 2000 and 2003.

25. There is suspension order passed against the petitioner on 04.09.2013, entered in the service-book in connection with the offence under Section 34 of the Police Act. There is also an FIR brought to the Court's notice regarding an offence under Section 354-A committed by the petitioner. About that the petitioner has indicated that a final report has been put in by the Police finding no substance. Since there is no case that the final report was not accepted, it can be safely assumed that the final report would have been accepted in due course. The registration of the FIR would, therefore, not count as adverse material. But, so far as the case of rioting with the public in the Police Chowki and inviting registration of a case under Section 34 of the Police Act is concerned, the petitioner's exoneration was one under a special statute for abatement of trials in certain matters under the Act of 1979. It does not cease to be material of which cognizance cannot be taken by the Screening Committee.

26. Quite apart, there are three adverse entries and one minor punishment order dated 28.01.2011, 25.01.2014, 31.07.2017 and 25.01.2014, respectively. This Court thinks that these must be set out in order to understand the nature of the material that was there before the Screening Committee. These are:

"ME
2010

"वर्ष 2005 में जब यह आरक्षी थाना कोतवाली जनपद झांसी में आरक्षी के पद पर नियुक्त था, तो पुलिस महानिरीक्षक इला0 जोन इलाहाबाद के माध्यम से प्राप्त शुभ चिंतक विभागीय कर्मचारी (गुमनाम) शिकायती प्रार्थना पत्र में अंकित थाना कोतवाली के कर्मियों द्वारा जनता को लूट कर अवैध तरीको से धन कमाने की जांच आदेश संख्या SSP-23(IG)05 दिनांक 14.06.05 द्वारा कराये जाने पर झांसी नगर में इस आरक्षी द्वारा अपना मकान बनवाया। इस मकान से सम्बंधित भूखण्ड वर्ष 1993-94 में इसकी पत्नी श्रीमती मीरा देवी के नाम से मोहल्ला पठौरिया थाना कोतवाली झांसी में लिया गया था, जिसके विषय में अग्रिम सूचना विभाग को नहीं दिया और भवन निर्माण की अनुमति प्राप्त नहीं हुआ पाया गया जो उ0प्र0 सरकारी कर्म0 आचरण नियमावली के प्रावधानों का उल्लंघन है, जिसके लिए इसको दो (फटा) जो इसका इसका अपने कर्तव्य के प्रति घोर लापरवाही, अनुशासनहीनता, आदेशों की अवहेलना, अकर्मण्यता एवं प्रमाद को प्रदर्शित करता है। इसके इसके इस कृत्य की परिनिन्दा की जाती है।

पत्रांक द-663/10 (अमित चन्द्रा)
Jans, 10 SSP
HOB-74 JSI
Dt. 28.1.11"

"2013

जब कान्स0 वर्ष-2013 में जी0आर0पी0 अनुभाग, झांसी के कंट्रोल रूम में नियुक्त थे, तो दिनांक 2.9.2013 को शराब के नशे में चौकी नईबस्ती थाना कोतवाली जनपद झांसी में जाकर कर्मचारी/अधिकारीगण से अभद्रता की तथा चौकी की कुरसिया फेंक दी एवं अभद्र भाषा का प्रयोग किया। कांस्ट0 के विरुद्ध मु0अ0सं0 निल/2013 धारा 34 पुलिस अधिनियम के तहत रपट नं0 50 समय 21:15 पीएम पर थाना कोत0 जनपद झांसी में पंजीकृत किया गया। डॉक्टरी परीक्षण कराए जाने पर अलकोहल का सेवन किए जाने की पुष्टि हुई। इस प्रकरण में प्रारंभिक जाँच पुलिस उपाधीक्षक, रेलवे, झांसी श्री सुरेंद्र सिंह तेवतिया कराये जाने पर जाँच से कांस्टे0 द्वारा किए गए उक्त की पुष्टि हुई है। कांस्टे0 का कृत्य लापरवाही, अकर्मण्यता एवं अनुशासनहीनता का द्योतक है जिसकी घोर परिनिंदा की जाती है।

पत्र सं0-26/2013
(Sd.)
दिनांक-25.1.2014
पुलिस अधीक्षक, रेलवे
HOBn-157
झांसी
12.2.14
प्रमाणित
ह0 अ0
पुलिस अधीक्षक
बांदा"

"परिनिन्दा प्रविष्टि

वर्ष-2017-प्रभारी निरीक्षक कोतवाली महोबा की आख्या दिनांकित 16.5.17 के अनुक्रम में दिनांक 16.5.17 को जरिए सीयूजी मोबाइल क्षेत्राधिकारी नगर द्वारा सूचना प्राप्त हुई कि लाकप ड्यूटी में कां0 जगत नारायण आरक्षी शराब के नशे में ड्यूटी में आया है जो ड्यूटी पर आने के बाद से काफी समय से अनुपस्थित है इस सूचना पर मैं प्रभारी निरीक्षक कोतवाली मय हमराही फोर्स के न्यायालय परिसर महोबा आया एवं उक्त आरक्षी पुलिस की तलाश करवाई, जो काफी देर बाद नशे के हालत में सड़क किनारे दुकान पर बैठा मिला जिससे वार्ता की गयी तो उसके मुंह से शराब की दुर्गंध आ रही थी तथा आंखें लाल थी जिसका डॉक्टरी परीक्षण जिला अस्पताल महोबा में कराया गया जिसमें एल्कोहल लेने की पुष्टि की गयी इनका यह कृत्य कर्तव्य के प्रति घोर अनुशासनहीनता, स्वेच्छाचारिता, उदासीनता को प्रदर्शित करता है, जिसकी परिनिन्दा की जाती है।

प0सं0 द-27/2017 प्रमाणित
SP
दिनांक-31.7.2017 ह0 अ0
MBA SP MBA"

"अर्थदण्ड

वर्ष 2017

जब आप वर्ष 2018 में पुलिस लाइन जनपद महोबा में नियुक्त थे, तब दिनांक 26.3.18 को पुलिस लाइन महोबा से आपकी ड्यूटी मेडिकल झांसी बन्दी सुरक्षा हर प्रसाद पुत्र खरजुवा के सुरक्षा गार्ड में शस्त्र इन्सास नं0 18630887 मय 02 मैगजीन व 40 अदद कारतूस बजाय आरक्षी शिवम कुमार के लगायी गयी थी, किंतु आप द्वारा ड्यूटी हेतु मेडिकल कॉलेज झांसी के लिए रवाना किए जाने के उपरांत सुरक्षागार्ड ड्यूटी पर न जाकर तथा अपने कर्तव्यों के प्रति सचेत न रहकर नशे की हालत में असलहा इन्सास आदि से बेपरवाह राठ रोड तिराहे की पुलिया के पास नाले में पड़े हुए पाए गए, जिससे आम जन-मानस में पुलिस की छवि धूमिल हुई। आपका यह कृत्य अपने पदीय कर्तव्य के प्रति घोर लापरवाही, अकर्मण्यता, अनुशासनहीनता, स्वेच्छाचारिता का द्योतक है।

अतः पुलिस अधिकारियो की (दण्ड एवं अपील) नियमावली 1991 के नियम 14(2) के अन्तर्गत प्रस्तावित 01 माह (30 दिवस) के वेतन के बराबर अर्थदण्ड से दण्डित किए जाने का आदेश पारित किया जाता है।

प0सं0 द-19/2018 प्रमाणित
SP
Date-27.4.2018
ह0 अ0 MBA SP
MBA"

27. The principles in **Baikuntha Nath Das** and the subsequent authorities make the entire service record relevant for the purpose of a decision by the

Government to compulsorily retire in public interest. In considering the entire record, according to the principles in **Baikuntha Nath Das**, more weight has to be attached to the performance of the employee during the later years. Here is a case, where the petitioner might have consistently earned good entries and rewards during the earlier period of his service, but from 2010-2017, his record has been marred by adverse entries, minor penalty and the commission of an offence under Section 34 of the Police Act. The older record of good entries or the rewards earned and the adverse material available against the petitioner between the years 2010-17, cannot give rise to an inference that it is a case where there is no material whatsoever on record for the Screening Committee or the Appointing Authority to act under Fundamental Rule 56(c). The sufficiency of material is not a matter for the consideration of the Court. The ground here urged was total absence of adverse material against the petitioner, inasmuch as that is one ground on which an order of compulsory retirement may be judicially reviewed. But, the record here shows that material adverse to the petitioner and very tangible is available on record. Therefore, there is no force in the petitioner's submission on this count.

(iii) **Violation of principles of natural justice**

28. It is argued by the learned Counsel for the petitioner, which is also the case pleaded in the writ petition that the impugned order is bad, because no notice was issued to the petitioner or opportunity afforded to submit a reply. It is argued that the impugned order being one which visits the petitioner with adverse civil consequences could not have been made without affording opportunity.

29. Mr. Girijesh Kumar Tripathi, learned Standing Counsel appearing on behalf of the State refuted the said submission and says that principles of nature justice have no application in a case of compulsory retirement under Fundamental Rule 56(c). The principles laid down in **Baikuntha Nath Das**, extracted hereinabove, make it evident that adherence to the requirement of natural justice has no place in the context of compulsory retirement. An order of compulsory retirement is neither stigmatic nor a punishment. Most of the remarks regarding exclusion of the principles of natural justice in **Baikuntha Nath Das,** considering older authority, have come in the context of uncommunicated adverse entries that have been later on taken into account by the Screening Committee or the Government to pass an order of compulsory retirement. It does not seem to have been suggested in the said authority, as done in the present case by the petitioner, that before passing an order of compulsory retirement, opportunity should be afforded in the form of a show cause. In **Baikuntha Nath Das**, there are some pertinent remarks, which form the basis of principles culled out in Paragraph No.34 of the report extracted hereinabove. The aforesaid observations in **Baikuntha Nath Das** read:

"30. On the above premises, it follows, in our respectful opinion that the view taken in J.N. Sinha [(1970) 2 SCC 458 : (1971) 1 SCR 791] is the correct one viz., principles of natural justice are not attracted in a case of compulsory retirement

under F.R. 56(j) or a rule corresponding to it. In this context, we may point out a practical difficulty arising from the simultaneous operation of two rules enunciated in *Brij Mohan Singh Chopra* [*Brij Mohan Singh Chopra v. State of Punjab,* (1987) 2 SCC 188 : (1987) 3 ATC 496] . On one hand, it is stated that only the entries of last ten years should be seen and on the other hand, it is stated that if there are any adverse remarks therein, they must not only be communicated but the representations made against them should be considered and disposed of before they can be taken into consideration. Where do we draw the line in the matter of disposal of representation? Does it mean, disposal by the appropriate authority alone or does it include appeal as well? Even if the appeal is dismissed, the government servant may file a revision or make a representation to a still higher authority. He may also approach a court or tribunal for expunging those remarks. Should the government wait until all these stages are over? All that would naturally take a long time by which time, these reports would also have become stale. A government servant so minded can adopt one or the other proceeding to keep the matter alive. This is an additional reason for holding that the principle of *M.E. Reddy* [*Union of India v. M.E. Reddy,* (1980) 2 SCC 15 : 1980 SCC (L&S) 179 : (1980) 1 SCR 736] should be preferred over *Brij Mohan Singh Chopra* [*Brij Mohan Singh Chopra v. State of Punjab,* (1987) 2 SCC 188 : (1987) 3 ATC 496] and *Baidyanath Mahapatra* [*Baidyanath Mahapatra v. State of Orissa,* (1989) 4 SCC 664 : 1990 SCC (L&S) 38 : (1989) 11 ATC 886] , on the question of taking into consideration uncommunicated adverse remarks.

35. Before parting with the case, we must refer to an argument urged by Sri R.K. Garg. He stressed what is called, the new concept of Article 14 as adumbrated in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] and submitted on that basis that any and every arbitrary action is open to judicial scrutiny. The general principle evolved in the said decision is not in issue here. We are concerned mainly with the question whether a facet of principle of natural justice -- audi alteram partem -- is attracted in the case of compulsory retirement. In other words, the question is whether acting upon undisclosed material is a ground for quashing the order of compulsory retirement. Since we have held that the nature of the function is not quasi-judicial in nature and because the action has to be taken on the subjective satisfaction of the government, there is no room for importing the said facet of natural justice in such a case, more particularly when an order of compulsory retirement is not a punishment nor does it involve any stigma."

(emphasis by Court)

30. The submission of the learned Counsel for the petitioner, therefore, that the impugned order is vitiated, because no notice was issued to the petitioner or opportunity afforded to submit his reply before the impugned order was passed, is misconceived and, accordingly, rejected.

(iv) **The impugned order is bad for arbitrariness**

31. It is next argued by the learned Counsel for the petitioner that the impugned order is arbitrary, because there is no material on record to show that the petitioner was a man of doubtful integrity or fit to be retained in service. It is also arbitrary because a policy of pick and choose has been followed on a punitive tenor, where the order has been passed for

the collateral purpose of securing immediate removal of the petitioner from service, rather than in public interest.

32. The learned Standing Counsel has refuted the above submission and says that after a thorough scrutiny of the petitioner's service record, where the different good entries and the adverse ones are written by different officials, a Screening Committee of three officers has come to a definitive opinion on the basis of tangible material that the petitioner deserves to be compulsory retired. There is nothing arbitrary about the decision.

33. Upon hearing learned Counsel for the parties, this Court may say that arbitrariness for all that it would mean in the context of exercise of power of compulsory retirement is perversity of opinion. If the Screening Committee or the Appointing Authority or the Government, in reaching their conclusion to retire an employee compulsorily under Fundamental Rule 56(c), take a view of the material on record, which no reasonable person would subscribe to on the basis of that material, the order would be arbitrary. This was precisely the import of the word 'arbitrary' as enunciated in **Baikuntha Nath Das**. The principles there were endorsed in **Rajesh Gupta v. State of Jammu and Kashmir and others, (2013) 3 SCC 514.**

34. The question here is whether the decision of the Screening Committee or the Appointing Authority can be held to be arbitrary. A careful look at the petitioner's service record shows that he has been given good entries recorded in his service-book in the part relating to 'General Conduct and Police Work for each year' for the years 2010, 2011, 2012, 2013, 2014, 2015 and 2016, mostly awarded by Deputy Superintendents of Police concerned. But, it is equally true that in the service-book relating to the part entitled 'particulars of misconduct and punishment', the petitioner has been given a censure entry *vide* order dated 28.01.2011, a severe censure *vide* order dated 25.01.2014, and still again, a censure *vide* order dated 31.07.2017. By a subsequent order dated 27.04.2018, the petitioner has been awarded a minor punishment of deduction equivalent to 30 days of his salary. All these orders awarding censure entries and minor penalty are reasoned orders, already quoted hereinabove. The good entries for the years 2010, 2011, 2012, 2013, 2014, 2015, 2016, have been awarded by different officers than those, who awarded censure entries or made the orders of minor punishment based on certain misconduct.

35. Apparently, the routine good entries by different officers in the part relating to General Conduct and Police Work each year for the period 2011-2016 ought not to have been there in the face of the orders dated 28.01.2011, 25.01.2014, 31.07.2017 and 24.07.2018, but this discord between the two sets of entries is no ground to hold the opinion of Screening Committee to be arbitrary. The Screening Committee has looked into the entire service record of the petitioner and on the basis of all material have formed a subjective satisfaction that the petitioner falls in the class of 'deadwood', who ought not to be retained in service having way long crossed his 50th birthday. Upon a look into the censure entries, that have been awarded, including the minor punishment, not for the purpose of judging the correctness of the impugned order, but for the limited purpose of ascertaining whether it is arbitrary, in our opinion, cannot be termed arbitrary. It is the entire service

record that has to be looked into to form a subjective satisfaction by the Screening Committee, the Appointing Authority or the Government. If all materials have not been considered, the decision may be vitiated.

36. Here, there is no case that the entire material was not considered. The stand of the respondents is that they have scrutinized the entire service record. There is no reason to doubt that assertion. The three censure entries and the order awarding minor punishment show that the petitioner has been a drunkard and misconducted himself on duty in an inebriated condition on more than one occasion. There is one entry reflecting on his integrity. He has exhibited lack of discipline and insubordination. It is this material, which the Screening Committee have taken into consideration apart from the other service record, which carry good entries. With this kind of material available on record, it is not possible to hold that the decision of the Screening Committee or its expression in the impugned order of compulsory retirement is a product of arbitrary decision making. The material on record read as a whole cannot lead this Court to the inference that the conclusion of the Screening Committee or the Appointing Authority is one that no reasonable person could have ever reached.

37. In the circumstances, it is held that the impugned order is not vitiated due to the vice of arbitrariness.

(v) **The plea of *mala fides***

38. It is argued by the learned Counsel for the petitioner that the impugned order is *mala fide* and has been passed in colourable exercise of powers in order to punish the petitioner. It is argued that the petitioner has all good entries up to the year 2016, but there is a sudden buildup of adverse material in order to provide edifice for the impugned action. This, the petitioner says, is a feature demonstrative of *mala fides* on the part of the officers passing the impugned order. It has been observed in **Baikuntha Nath Das** in the context of the way *mala fides* would work in the case of compulsory retirement, thus:

"31. Another factor to be borne in mind is this: most often, the authority which made the adverse remarks and the authority competent to retire him compulsorily are not the same. There is no reason to presume that the authority competent to retire him will not act bona fide or will not consider the entire record dispassionately. As the decided cases show, very often, a Review Committee consisting of more than one responsible official is constituted to examine the cases and make their recommendation to the government. The Review Committee, or the government, would not naturally be swayed by one or two remarks, favourable or adverse. They would form an opinion on a totality of consideration of the entire record -- including representations, if any, made by the government servant against the above remarks -- of course attaching more importance to later period of his service. Another circumstance to be borne in mind is the unlikelihood of succession of officers making unfounded remarks against a government servant."

39. What the petitioner argues in this case is *mala fides* in fact on the part of the officers, who passed the impugned order, in regard whereto the petitioner has pleaded in Paragraph No.13 of his rejoinder affidavit, filed in response to the counter affidavit on

behalf of respondent No.5. Paragraph No.13 of the rejoinder affidavit reads:

"13. That, the contents of the paragraph Nos. 13, 14 and 15 of the counter affidavit are misconceived hence denied and it is submitted that since the excellent character roll has been awarded to the petitioner continuously from 2007 to 2016 by his appointing authority thus other proceedings has been falsely developed against the petitioner by some police officers out of mala-fide attitude otherwise petitioner never disobeyed the command of his superior officers and never committed misconduct in any manner."

40. Now, if this plea of the petitioner were to be examined, it is immediately discernible that the petitioner's case about an excellent character roll from 2007-2016 is incorrect for a fact. It is true that routine entries during this period of time were good, but it is equally true that the petitioner for specific acts of misconduct received censure entries *vide* order dated 5th 28.01.2011, 25.01.2014 and 31.07.2017. He was also awarded a minor punishment by way of deduction of salary equivalent to 30 days salary. All these orders that were passed against the petitioner span across a period of 8 years from 2010 to 2018 and have been made by different officers of superior rank; in none of the cases, below the rank of a Deputy Superintendent of Police. Two of these orders, that is to say, the ones dated 28.01.2011 and 25.01.2014 were passed at Jhansi, whereas the later ones were passed at Mahoba. It is difficult, therefore, to accept the petitioner's contention that all these different officers were acting as if in concert to buildup a record against the petitioner out of malice, which would provide basis for later action. Also, the impugned order is founded on the opinion of a Screening Committee of three members. There is no reason why all members of the committee would join hands in acting *mala fide* against the petitioner. All this apart, a plea of malice in fact cannot be examined without giving particulars of the *mala fides* attributed to a named official or officials. Then the officials involved after pleading particulars of the *mala fides* attributed to them has/ have to be impleaded *eo nomine*. In this case the petitioner has neither pleaded particulars of the *mala fides* with reference to a named officer or officers or impleaded the officer/ officers concerned eo nomine. In the absence of all this being done by the petitioner, it is difficult to examine the plea of *mala fides* canvassed on the petitioner's behalf.

41. In the above conspectus of facts, this Court is of opinion that no case of *mala fides* vitiating the impugned order is made out.

42. It is to be remarked here that given the conduct of the petitioner, where he has exhibited indiscipline and misbehaviour on duty while drunk on numerous occasions is a serious matter. The petitioner is a member of a disciplined force, where discipline and rectitude are not only the hallmark of a member of such force but a *sine qua non* for the efficient discharge of their functions. For the said reason, in particular, the opinion of the Screening Committee, given the material on record, cannot be held to be arbitrary or vitiated by *mala fides* or an instance of a colourable exercise of power in any manner.

43. In the result, the petition **fails** and is **dismissed**. Costs easy.

44. Let the petitioner's Service Book be returned to the respondents through Mr. Girijesh Kumar Tripathi, learned Standing Counsel.

(2023) 4 ILRA 1342
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 15004 of 2022

Pushpa Devi ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Yashpal Yadav, Sri Sunil Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Kartikeya Saran, Sri Vinayak Ranjan

Service Law–order of recovery after the death of the government employee under challenge-chargesheet served upon the husband of the petitioner-death before he could submit reply to the chargesheet-disciplinary proceedings dropped-recovery order making deduction in terminal benefits-bad in law-no punishment can be imposed after the death of the employee-impugned recovery quashed-petition allowed.

HELD:
The Court has taken a very clear cut view that neither disciplinary proceeding can be initiated, nor any punishment order can be passed against a dead person.

The Apex Court is of the firm view that no disciplinary proceeding can be initiated or continued against a dead person.

Law is very well settled that, in case inquiry has not been completed and delinquent employee dies during the pendency of the inquiry, the same shall not continued and completed. It is very surprising that, here, respondents are well aware of the fact that before submission of reply of charge sheet, husband of petitioner died and they have not proceeded to complete the inquiry. It is only after receiving the representation dated 21.12.2021 of petitioner in compliance of order of this Court dated 07.12.2021 passed in Writ A No. 16683 of 2021, respondent has passed impugned order dated 27.05.2022, which amounts to re-initiation of departmental proceeding.

Petition allowed. (E-14)

List of Cases cited:

1.Smt. Rajeshwari Devi Vs St. of U.P. & ors. 2011(2) ADJ 643

2. Gulam Gausul Azam & ors. Vs St. of U.P. & ors. 2014 (5) ADJ 558

3.Durgawati Dubey Vs St. of U.P. & ors., decided on 08.10.2018, Writ A No. 47122 of 2016

4.Rajkishori Devi Widow(deceased) Vs St. of U.P. & ors.

5.Hirabhai Bhikanrao Deshmukh Vs St. of Mah. & anr. (1985) ILLJ 469 Bom

6. Jayanti Devi Vs St. of Bih. & ors. 2001(49) BLJR 2179

7. A.K.S. Rathore (Dead) Through Lrs. Vs U.O.I. & anr.; Civil Appeal No. 7028 of 2022

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioner, learned standing counsel for the respondent No. 1 and Sri Vinayak Ranjan, Advocate, holding brief of Sri Kartikeya Saran, learned counsel for the respondent No. 2.

2. The case was heard on 17.11.2022 and the Court has passed the following order:

"Shri Kartikeya Saran, learned counsel for the respondents prays for and is granted four weeks and no more time to file counter affidavit.

List this matter on 15.12.2022.

Interim order, if any, is extended till the next date of listing."

3. Despite order dated 17.11.2022, no counter affidavit has been filed on behalf of respondent No. 2 who has passed the impugned order dated 27.05.2022.

4. In such view of the matter, the Court proceeded to decide the case on merits.

5. Learned counsel for the petitioner submitted that husband of petitioner was working on the post of Jr. Engineer. During his posting at Shamli, a charge sheet dated 23.02.2021 was served upon him, but before submission of reply to the charge sheet, he died on 02.05.2021 due to heart failure (the date of death of husband of petitioner has been wrongly transcribed as 02.05.2022 in the order of this Court dated 21.09.2022). Ultimately, the inquiry committee came to the conclusion that as the husband of petitioner died during the pendency of the inquiry proceedings, therefore, it is required on the part of respondent authorities to drop the disciplinary proceedings pending against him. Relevant paragraph of the same is being quoted hereinbelow-

"जांच समिति का मत है की आरोपी सेवक स्व० गुरदयाल सिंह, तत्कालीन अवर अभियन्ता, अन्तर्गत विद्युत वितरण खण्ड-तृतीय, शामली सम्प्रति अवर अभियन्ता अन्तर्गत विद्युत वितरण खण्ड-द्वितीय, शामली (दिवंगत) के विरूद्ध अनुशासनात्मक कार्यवाही के लम्बित रहते हुए दिनांक 02.05.2021 को स्वर्गवास हो जाने के फलस्वरूप शासकीय पत्र सं० 1301/बी-2/2003-24 दिनांक 26.05.03 के आलोक में आरोपित सेवक को उक्त प्रकरण में किसी भी प्रकार दण्ड देना सम्भव न होने के दृष्टिगत अनुशासनात्मक कार्यवाही समाप्त करना विधिक दृष्टि से उचित होगा।"

6. After death of the husband of petitioner, no terminal dues were paid to her, therefore, she has preferred Writ Petition No. A16683 of 2021, which was disposed of on 07.12.2021 with direction to respondent to take decision upon the representation of the petitioner dated 21.12.2021. Pursuant to that, representation of the petitioner was decided and vide impugned order dated 27.05.2022 Rs. 10,14,594/- was deducted from the retiral dues of late husband of the petitioner.

7. Learned counsel for the petitioner submitted that order impugned is absolutely bad. He further submitted that it is undisputed that without submitting the reply to the charge sheet dated 23.02.2021, husband of petitioner died and considering this fact, inquiry committee also opined that disciplinary proceeding should have been dropped against the petitioner, but ignoring the recommendation of the inquiry committee, Rs. 10,14,594/- has been deducted from the terminal dues of husband of petitioner as punishment. He firmly submitted that in light of settled provision of law, no disciplinary proceeding can be continued against a dead person and, accordingly no punishment can

be awarded by the way of deduction of any amount.

8. Learned counsel for the petitioner in support of his contention, placed reliance upon the judgment of this Court in ***Smt. Rajeshwari Devi Vs. State of U.P. and Ors. 2011(2) ADJ 643*** decided on 07.01.2011, ***Gulam Gausul Azam and others Vs. State of U.P. and others 2014 (5) ADJ 558*** decided on 12.05.2014, ***Onkar Singh Verma Vs. State of U.P. and 2 Ors. 2018 (3) ADJ 272,*** decided on 09.01.2018, Writ A No. 40057 of 2013 ***Durgawati Dubey Vs. State of U.P. & 3 Ors.,*** decided on 08.10.2018, Writ A No. 47122 of 2016: ***Rajkishori Devi Widow(deceased) Vs. State of U.P. And 4 Ors,*** decided on 30.07.2019, judgment of Bombay High Court in the case of ***Hirabhai Bhikanrao Deshmukh Vs. State of Maharashtra and another (1985) ILLJ 469 Bom*** decided on 10.10.1984, judgment of Jharkhand High Court in the case of ***Jayanti Devi Vs. State of Bihar and Ors. 2001(49) BLJR 2179*** decided on 01.05.2001 and judgment of Apex Court in ***A.K.S. Rathore (Dead) Through Lrs. Vs. Union of India & Anr.,*** decided on 28.09.2022.

9. In view of the judgment so relied upon, learned counsel for the petitioner submitted that in these judgments, the Courts have considered this issue and came to the conclusion that against a dead person, neither disciplinary proceeding can be initiated, nor any punishment order can be passed.

10. Sri Vinayak Ranjan, Advocate, holding brief of Sri Kartikeya Saran, learned counsel for the respondent No. 2 could not dispute the factual and legal submissions made by the learned counsel for the petitioner.

11. I have considered the submissions made by the learned counsel for the parties, perused the record and judgments relied upon by the learned counsel for the petitioner.

12. It is undisputed that husband of the petitioner died on 02.05.2021 before submitting the reply of the charge sheet dated 23.02.2021. It is also undisputed that impugned recovery order dated 27.05.2022 has been passed after the death of husband of the petitioner upon the representation of petitioner dated 21.12.2021.

13. Facts of the case are not disputed, therefore, on facts, no finding of this Court is required.

14. So far as legal provisions are concerned, this issue came up before this Court in the case of ***Smt. Rajeshwari Devi Vs. State of U.P. and Ors. 2011(2) ADJ 643*** decided on 07.01.2011, the Court has held that as soon so as a person dies, he breaks all his connection with the worldly affairs, therefore, no disciplinary proceeding can be initiated against him. Relevant Paragraph Nos. 6 and 7 of the judgment are being quoted below:-

"6. Holding of departmental enquiry and imposition of punishment contemplates a pre-requisite condition that the employee concerned, who is to be proceeded against and is to be punished, is continuing an employee, meaning thereby is alive. As soon as a person dies, he breaks all his connection with the worldly affairs. It cannot be said that the chain of employment would still continue to enable employer to pass an order, punitive in nature, against the dead employee.

7. It is well settled that a punishment not prescribed under the rules,

as a result of disciplinary proceedings, cannot be awarded even to the employee what to say of others. The Court feel pity on the officers of Nagar Nigam, Bareilly in continuing with the departmental enquiry against a person who was already died and this information of death was well communicated to the enquiry officer as well as disciplinary authority. They proceeded with enquiry and passed impugned orders against a dead person. This is really height of ignorance of principles of service laws and shows total ignorance on the part of the officers of Nagar Nigam in respect to the disciplinary matters. This Court expresses its displeasure with such state of affairs and such a level of unawareness on the part of the respondents who are responsible in establishment matters. They have to be condemned in strong words for their total lack of knowledge of such administrative matters on account whereof legal heirs of poor deceased employee have suffered."

15. Again this issue came before this Court in the matter of ***Gulam Gausul Azam and others Vs. State of U.P. and others 2014 (5) ADJ 558*** decided on 12.05.2014, the Court has held held that before disciplinary authority could pass any order on the inquiry report, petitioner died ending the master and servant relationship, therefore, no punishment order can be passed. Relevant paragraph Nos. 10 to 13 of the judgment are being quoted below:-

"10. There is another aspect of the matter. In the present case Abdul Kareem expired on 15.7.2011, i.e. before the disciplinary authority could pass any order on the enquiry report dated 3.7.2011. In the circumstances therefore, the master and servant relationship between Late Abdul Kareem and the respondents also came to an end with his death and therefore, the impugned order dated 21.11.2011 could not have been passed after the death of Abdul Kareem.

11. In my opinion therefore the disciplinary authority could not have passed the order dated 21.11.2011 withholding the retiral dues and other benefits of late Abdul Kareem. When Abdul Kareem died on 15.7.2011 he could not have been said to be a government servant thereafter and therefore the order dated 21.11.2011 on the face of it is a wholly illegal and arbitrary order and has no basis in law and cannot survive.

12. So far as the matter of compassionate appointment of the petitioner no. 1 is concerned, for the same reasons that since the disciplinary authority has not taken any decision regarding the finding of guilt against late Abdul Kareem prior to his death, it could not be said that the charge had been established against late Abdul Kareem as disciplinary proceedings are concluded only with the passing of the order of disciplinary authority and not when the enquiry officer submits his report.

13. In this view of the matter, the writ petition is allowed and both the impugned orders dated 21.11.2011 and 1.3.2012 are quashed. The respondents are directed to take steps for payment of all retiral benefits to the legal heirs of late Abdul Kareem. So far as the order dated 1.3.2012 regarding rejection of the claim of petitioner no .1 for compassionate appointment is concerned, a direction is issued to the District Magistrate, Deoria-respondent no. 3 to take a decision afresh in this regard having regard to the educational qualification of the petitioner no. 1 and availability of vacancy within a period of two months from the date a

certified copy of this order is received in his office."

16. In the matter of ***Onkar Singh Verma Vs. State of U.P. and 2 Ors. 2018 (3) ADJ 272,*** decided on 09.01.2018, the court has again considered this issue and the relevant paragraph of the judgment is quoted below:-

"Finally, the petitioner has died on 14.03.2017, during the pendency of this writ petition and therefore, even if, there had been any power in the rules vested in respondent no.2 to conduct enquiry against the petitioner after superannuation, now it would not have been possible for him to conduct any enquiry. Therefore, the impugned order dated 21.09.2016, passed by respondent no.2, Secretary/General Manager, District Co-operative Bank Ltd., Etah, whereby, recovery of certain amounts have been directed against the petitioner from his gratuity, after his retirement from service is hereby quashed. The respondent no.2 is directed to release the amount of gratuity of the petitioner, by applying new pay scale, along with 7% simple interest for inordinate delay in making payment of the same to the petitioner from the date of his superannuation on 30.06.2013. The writ petition is allowed. No order as to costs."

17. In the aforesaid matter, the petitioner died on 14.03.2017 during the pendency of writ petition, therefore, the Court has held that even there had been any power in the rules vested to respondent No. 2 to conduct the inquiry after superannuation, now it would not have been possible for him to conduct inquiry and quashed the order impugned with direction to release the amount of gratuity.

18. Similar matter was also for consideration before the Bombay High Court in the case of ***Hirabhai Bhikanrao Deshmukh Vs. State of Maharashtra and another (1985) ILLJ 469 Bom*** decided on 10.10.1984, the Court has clearly held that provision with regard to dismissal, removal and suspension of the civil servant do not permit holding of any further enquiry into the conduct of such a civil servant after his death. Relevant Paragraph No. 6 of the judgment is being quoted below:-

"6. The provisions with regard to dismissal, removal and suspension of the civil servant do not permit holding of any further enquiry into the conduct of such a civil servant after his death. Such proceedings are intended to impose departmental penalty and would abate by reason of the death of civil servant. The purpose of proceedings is to impose penalty, if misconduct is established against the civil servant. That can only be achieved if the civil servant continues to be in service. Upon broader view the proceedings are quasi-criminal in the sense it can result in fault finding and further imposition of penalty. The character of such proceedings has to be treated as quasi-judicial for this purpose. In the light of the character of the proceedings and the nature of penalty like dismissal or removal, or any other penalties, minor or major, it has nexus to the contract of service. Therefore, if the person who has undertaken that contract is not available, it should follow that no proceedings can continue. Thus when the proceedings are quite personal in relation to such a contract of service, the same should terminate upon death of the delinquent. By reason of death, such proceedings would terminate and abate. We think that such a result is also inferable from the provisions

of Rule 152-B of the Bombay Civil Services Rules."

19. Similar dispute has also come before the Jharkhand High Court in the case of ***Jayanti Devi Vs. State of Bihar and Ors. 2001(49) BLJR 2179*** decided on 01.05.2001, the Court after following the decision of Bombay High Court had taken the same view and directed the respondents to pay all post retiral benefits to the widow. Relevant Paragraph Nos. 9 and 10 of the judgment are being quoted below:-

"9. In the instant case admittedly the delinquent- employee died on 24.3.1999 and the Enquiry Officer submitted his report on 30.8.1999. In the enquiry report (Annexure F) the Enquiry Officer took notice of the fact that the delinquent-employee died on 24.3.1999. The Enquiry Officer further took notice of the fact that the delinquent-employee had requested the respondents to keep the departmental proceeding in abeyance till the disposal of the case pending before him. However, the Enquiry Officer after the death of delinquent employee called upon the respondents and on the basis of documents produced by them submitted enquiry report and on the basis of that report a formal order of dismissal was passed. In my opinion therefore the manner in which respondents proceeded with the departmental proceeding against the delinquent- employee, the enquiry report as well as the order of dismissal is vitiated in law and is null and void. I am, further of the view that the widow of the deceased employee cannot be deprived of her legitimate claim of death-cum-retirement benefits on the ground of dismissal of the employee on the basis of departmental proceeding initiated after 6 years of the order of suspension and that to on the basis of enquiry report submitted by the Enquiry Officer after proceeding ex parte against the deceased-employee who died much before the date when the Enquiry Officer proceeded with the matter and submitted his report.

10. For the reasons aforesaid, this writ application is allowed and the respondents are directed to release all the death-cum-retirement dues in favour of the petitioner, who is widow of the deceased employee as expeditiously as possible and preferably within a period of 30 days from the date of receipt/production of copy of this order."

20. In the matter of ***Durgawati Dubey (Supra),*** decided on 08.10.2018, same issue was considered, and the Court has held as under:

"After going through the judgments and facts of the case, this Court is of the view that against a dead person, neither disciplinary proceeding can be initiated nor any punishment order can be passed. In the present case, facts are not disputed that disciplinary proceeding was initiated against husband of petitioner after his death, which suffers from non application of mind as well as contrary to the law laid down by this Court as well as other High Courts, therefore, the impugned order dated 10.06.2013 is not sustainable and is hereby quashed.

The writ petition is allowed. No order as to costs."

21. The Court has taken a very clear cut view that neither disciplinary proceeding can be initiated, nor any punishment order can be passed against a dead person.

22. This Court vide judgment and order dated 30.07.2019 in Writ A No. 47122 of 2016: ***Rajkishori Devi Widow(deceased) Vs. State of U.P. And 4 Ors.*** has again decided the same issue and held as under:

"It follows that punishment provided under the Disciplinary Rules can be imposed upon the government servant and not on the family member of the government servant. As soon as an incumbent ceases to be a government servant upon death, no penalty under the rules could have been imposed upon him. That being so, the question of passing an order, which may have the effect of punishing legal heirs of the deceased employee would not arise. In the facts of the instant case, disciplinary proceeding was initiated against the employee immediately before his retirement and before the disciplinary enquiry could conclude he died. The disciplinary enquiry, thereafter, could not have been proceeded under Section 351A of the Civil Service Regulations, accordingly, the competent authority dropped the enquiry. By the impugned order, recovery was sought to be made from the post retiral dues from the legal heir for the misdemeanour and misconduct of the delinquent employee, which was not permissible in view of Rule 54-B of the Fundamental Rules.

Learned standing counsel, in rebuttal, does not dispute the fact that the enquiry was dropped as the employee died and the enquiry could not be concluded before death of the employee. In the circumstances, no recovery could have been made from the post retiral dues without a finding being recorded against the deceased/employee under the Rules that he was responsible for having caused loss to the government.

The order dated 17 June 2016 passed by the second respondent-Finance Controller and Chief Accounts Officer, Foods and Civil Supplies, Lucknow, is unsustainable, accordingly, set aside and quashed.

The recovered sum of the post retiral dues shall be released to the petitioner by the second respondent--Finance Controller and Chief Accounts Officer, Foods and Civil Supplies, Lucknow, within two months from the date of filing of certified copy of this order along with interest @ 7% per annum on the sum from the date of recovery.

The writ petition stands allowed.

No Cost."

23. Recently, the Apex Court by its order dated 28.09.2022 passed in Civil Appeal No. 7028 of 2022: ***A.K.S. Rathore (Dead) Through Lrs. Vs. Union of India & Anr.*** Has considered this issue and has held as under:

"8. Today even if we dismiss the above appeal, no final order can be passed in the disciplinary proceedings, against a dead person. The disciplinary proceedings have actually abated. In other words the dismissal of the above appeal will have the same consequences as the appeal being allowed.

9. In view of the above, the above appeal is disposed of holding that the disciplinary proceedings initiated against the original appellant stand abated. As a consequence, the legal representatives of the original appellant will be entitled to all the benefits that the original appellant would have been entitled to, as per the rules. The respondents may pass orders in accordance with the rules, about the benefits lawfully admissible to the original appellant and disburse the same within a

period of 12 weeks. There will be no order as to costs."

24. The Apex Court is of the firm view that no disciplinary proceeding can be initiated or continued against a dead person.

25. So far as, present case is concerned, inquiry proceeding was initiated, charge sheet was issued, but before submission of reply of the charge sheet, husband of petitioner died. Inquiry officer came to the conclusion that, as husband of petitioner (employee) died during the pendency of inquiry proceeding, therefore, it is required on the part of of disciplinary authority to drop the disciplinary proceeding. Thereafter, no further order has been passed upon the inquiry proceeding. Only after filing of writ petition by the petitioner, order was passed to decide the representation of petitioner dated 21.12.2021, upon which order of recovery dated 27.05.2022 has been passed for recovery of amount of Rs. 10,14,594/-. In fact, it is nothing, but re-initiation of earlier inquiry, which has not been completed in light of recommendation made by the inquiry committee.

26. Law is very well settled that, in case inquiry has not been completed and delinquent employee dies during the pendency of the inquiry, the same shall not continued and completed. It is very surprising that, here, respondents are well aware of the fact that before submission of reply of charge sheet, husband of petitioner died and they have not proceeded to complete the inquiry. It is only after receiving the representation dated 21.12.2021 of petitioner in compliance of order of this Court dated 07.12.2021 passed in Writ A No. 16683 of 2021, respondent has passed impugned order dated 27.05.2022, which amounts to re-initiation of departmental proceeding.

27. Under such circumstances, passing of impugned order shows that respondents are fully unaware with the service law. Therefore, this Court depreciate and condemns the act of respondents and a warning is also issued to them to be conscious in future while dealing with such matters.

28. Under such facts of the case, impugned order dated 27.05.2022 is contrary to the settled provisions of law, therefore, writ petition is **allowed** and impugned order dated 27.05.2022 is hereby quashed.

29. Respondent No. 2 is directed to pay the deducted amount of Rs. 10,14,594/- forthwith to the petitioner within two months from the date of submission of certified copy of this order, alongwith interest as @ 6 % from due date to the date of actual payment.

(2023) 4 ILRA 1349
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 16860 of 1991

Shri Naunihal Haider ...Petitioner
Versus
Asst. Settlement Officer Consolidation, Budaun & Ors. ...Respondents

Counsel for the Petitioner:
Sri Hari Bhawan Pandey, Sri Harish Chandra, Sri Mata Prasad, Sri R.P.S.

Chauhan, Ms. Sufia Saba, Sri Y.K. Singh, Sri M.A. Qadeer

Counsel for the Respondents:
Sri N.B. Tewari, SC

Service Law – Petitioner appointed as Lekhpal (Consolidation) as a substitute-services continued as stopgap arrangement -no authorisation or regularisation of appointment as per the procedure-services continued on the strength of interim orders of the court-appointment illegal as it was not followed by regularisation-petition dismissed.

HELD:
As discussed above, the words "permanent" so far as relating to services of any establishment are concerned, must be followed with the process of regularization which has to be culminated in shape of formal orders for regularization of services of any incumbent who has already been inducted in the services from any mode either its temporary/daily wager/work charge/contractual/ or as the case may be.

Application allowed. (E-14)

List of Cases cited:

1. Dr. Chanchal Goyal (Mrs.) Vs St. of Raj. (2003) 3 SCC 485

2. Secy., St. of Karnataka & ors. Vs Umadevi & ors. (2006) 4 SCC 1

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

1. Heard Shri Mata Prasad, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. It is case of the petitioner that he has been engaged for the post of Lekhpal (Consolidation) way back on 08.12.1987 as a substitute and on the basis of the work and experience his services were again accepted vide order dated 20.03.1989 under the short term vacancy for considering the training of the petitioner and the same has been considered at the later stage.

3. Certain matters of the similarly situated candidates who rendered their services for more than a year for the post of Lekhpal (Consolidation) the same has been considered in pursuance to the letter dated 25.03.1989 issued by the Commissioner (Consolidation), in lieu of the same the services of the petitioner has been again considered under the Stop Gap Arrangement vide order dated 20.05.1989.

4. Vide order dated 01.05.1991, in pursuance to the order dated 29.04.1991, the services of the petitioner came to an end which impugned the present petition.

5. While challenging the aforementioned order passed by respondent no. 1, the grounds relied upon by the counsel for the petitioner as narrated in the petition with regard to the competency of the authority who passed the order dated 01.05.1991 it is alleged that the same is contrary to the Government Order dated 16.09.1988 circulated by the respondent no. 2 and the appointment of the petitioner was against the substantive vacancy and the same has been treated as Stop Gap Arrangement and after the passage of time the same has been confirmed also.

6. Per contra, the stand taken in the present petition has been diluted by the respondents by way of preferring the detailed counter affidavit wherein the prayer as made in the petition has been opposed on the ground that the services of the petitioner has never been regularized and the entire services whatsoever has been rendered by the petitioner is only on the basis of Stop Gap arrangement and under

capacity of substitute arrangement. Moreover, after the order dated 01.05.1991 the continuance as mentioned by the petitioner over the same post was under the strength of interim orders of the Court.

7. So far as the Government Order dated 25.03.1989 is concerned, it has been stated by the learned counsel for the respondent, the same is misconstrued as a Government Order. By bare perusal of the Annexure No. 5 to the petition which is said to be a Government Order is issued by the Consolidation Commissioner. The Authority under the business rules pertaining to the State of U.P. a Government Order is a specific orders issued under the signatures/instructions of the Chief Secretary/Additional Chief Secretary and at the time when the order has been passed way back in the year 1989, it is the Principal Secretary who was competent to pass any Government Order under the delegated power permitted by the Chief Secretary.

8. The narration of the petition does not disclose any statutory rights accrued in favour of the petitioner to be continued over the same post for a long time and as such, the indulgence made by the competent authority while issuing the order dated 01.05.1991 has been defended by the learned counsel for the respondents on the ground that the same was justified since perpetuating the continuance over the substantive vacancy in favour of the persons who has not been inducted as per proper procedure for recruitment over the post concerned may create complexities for those who have already inducted in the services over the same post after due process of law.

9. Learned counsel for the petitioner relied upon the orders passed during rendering services of the petitioner which have already been appended along with the supplementary affidavit as Annexure No. 2 available at page No. 50. Order dated 20.03.1999 through which the services of the petitioner declared as permanent subject to outcome of the pendency of the writ petition and thereafter the above mentioned order dated 20.03.1999 was passed by the Settlement Officer, Consolidation, District-Badaun in pursuance of the order dated 03.06.1991 passed by this Court through which the interim protection has been granted in favour of the petitioner with regard to only continuance of the services till 29.07.1991 and the same has been extended from time to time.

10. During pendency of the present petition certain event took place in shape of dismissal of the petition and thereafter the Special Appeal has been preferred by the petitioner through which the matter has been restored and the same has been come up for adjudication on merits before this Court.

11. The reliance over the order dated 20.03.1991 is only for the conferment of services over post of Lekhpal on the strength of the interim protection as granted by this Court in favour of the petitioner, whereas on the precise query as made before the learned counsel for the petitioner with regard to the confirmation, regularization or the mandatory training which has been defined under the statutory provisions contained in the services of the Lekhpal (Consolidation) is concerned, the same are missing in the records meaning thereby the services of the petitioner has never ever been regularized by formal

order passed by any of the competent authority of the responding department.

12. The basic principle of service law pertaining to the confirmation over the respective post against the substantive vacancy must be followed with the order of regularization. In the present case the petitioner had been inducted in services on 08.12.1987 under the capacity of substitute and later on continued till the impugned order dated 01.05.1991 in stop gap arrangement, the services of the petitioner were never been regularized and as such, the confirmation as defined by the service law does not take place.

13. In the instant matter, it is apparent from the records that the services of the petitioner has never ever been regularized by any of the competent authority after adopting the due process of law and as such, "Sthahi" (confirmation) cannot be treated as confirmation over the post whereas it is only upon the strength of the interim protection as granted way back in the year 1991 at the time of admission of the instant writ petition and the authority was conscious about the same and as such, the endorsement of this confirmation was subject to outcome of writ petition has been duly mentioned in the order dated 20.03.1999, which has been stated by the learned counsel for the petitioner as the order of confirmation over the respective post.

14. After hearing the rival submissions advanced by the learned counsel for the parties, it is crystal clear that the services of the petitioner has been initiated and accepted over the post of Lekhpal (Consolidation) without adopting the due process of recruitment as prevailing in the year 1989 and after certain gaps the same were adjusted only on the basis of experience gained by the petitioner over the respective post by conduction and rendering the services for the similar nature.

15. By bare perusal of the different orders issued in favour of the petitioner for the post of Lekhpal (Consolidation) clearly shows that the services of the petitioner were taken only against the Stop Gap Arrangement or under substitute arrangement.

16. So far as regarding the "Sthahi (Permanent) is concerned, the same is only at the strength of the interim protection as granted in favour of the petitioner.

17. As discussed above, the words "permanent" so far as relating to services of any establishment are concerned, must be followed with the process of regularization which has to be culminated in shape of formal orders for regularization of services of any incumbent who has already been inducted in the services from any mode either its temporary/daily wager/work charge/contractual/ or as the case may be.

18. It has been informed by the learned counsel for the petitioner that under the strength of the interim order as passed by this Court at the admission stage the petitioner rendered his services up to the highest satisfaction of the authorities and attained the age of superannuation on 30.01.2014 and thereafter he is no more in services and as such, there is hardly any ground available for seeking any retiral benefit since the services of the petitioner has not been regularized and the order dated 29.04.1991 is justified. Learned

counsel for the respondents has placed reliance upon the following judgments of the Apex Court:-

1. Dr. Chanchal Goyal (Mrs.) vs. State of Rajasthan (2003) 3 SCC 485.

2. Secretary, State of Karnataka and Others versus Umadevi and Others (2006) 4 SCC 1.

19. It is made clear that the services of the petitioner has never been regularized by any specific formal order issued by the competent authority. The instant petition does not warrant any interference by this Court and is accordingly **dismissed**.

(2023) 4 ILRA 1353
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 19079 of 2018

Kumari Poonam Nijhawan ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Nandan

Counsel for the Respondents:
Sri Vivek Kumar Rai, Sri Gopal Verma

Service Law – order of Central Administrative Tribunal under holding the petitioner to be not dependent on her mother- under challenge- dependency to be determined on the basis of the minimum family pension- petitioner's salary was less than the payable family pension- petitioner held to be entitled to the family pension- impugned order quashed-petition allowed with costs.

HELD:

In the given facts, it is admitted that the minimum family pension computed as per the Railways was at Rs. 11776/- inclusive of dearness allowance as applicable on the date of death of the pensioner and on the said date the monthly salary of the petitioner was at Rs. 10912/-. (Para 16)

In the circumstances, we are of the opinion that the petitioner has been subjected to unnecessary harassment by the respondent-Railway authorities. Accordingly, the writ petition is allowed. (Para 17)

Petition Allowed. (E-14)

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

1. Heard Sri Siddharth Nandan, learned counsel appearing for the petitioner/original applicant and Sri Goptal Verma, learned counsel appearing for the respondent/Railways.

2. Petitioner/original applicant is seeking quashing of the impugned judgment and order dated 9 May 2018, passed by the Central Administrative Tribunal, Allahabad Bench Allahabad, (for short "Tribunal') in Original Application No. 1330/01512 of 2015 whereby, the original application (for short "OA') came to be dismissed.

3. Father of the petitioner was an employee of the respondent-railways and retired on 30 April 1985. Pension of the employee was duly computed and the employee received pension until his death on 13 December 2007. Thereafter, wife of the employee and mother of the petitioner received family pension till her death until 23 October 2013. Petitioner, is the unmarried daughter of the deceased employee who was living with her parents,

applied for family pension being dependent on the pensioner.

4. The respondent by the impugned order dated 22 May 2015, rejected the claim of the applicant for family pension which was subject matter of challenge before the Tribunal. The claim of the petitioner came to be rejected on a report submitted by the Welfare Inspector that the petitioner was employed as a teacher in Nirmala Convent School, Jhansi, at consolidated salary of Rs.10,912/- per month. As per the respondent-railways pursuant to Railway Board instructions dated 11 September 2013, since the dependent/widow of the employee was getting minimum pension at Rs. 3500/- per month, therefore, petitioner was not entitled to pension since her monthly salary was more than the minimum pension on the date of death of her mother. Accordingly, pursuant to the Railway Board letter dated 11 September 2013, the respondent-railways rejected the claim of the petitioner that since her salary was more than that of the pension of her mother on the date of her death i.e. 23 October 2013 at Rs. 10,912/-, accordingly, petitioner was not entitled to pension. In other words, it was held that petitioner was not dependent upon her mother as per the Railway Board circulars.

5. The office memorandum dated 11 September 2013, provides for eligibility of widow/divorced daughters for grant of family pension. In para-4 of the office memorandum, it has been clarified that family pension is payable to the children of the deceased employee as they are considered to be dependent on the government servant/pensioner or his/her spouse. The eligibility criteria is that a child, who is not earning equal to or more than the sum of minimum family pension and dearness relief thereon, is considered to be dependent on his/her parents. Similarly, family pension to a widow/divorced daughter is payable, provided, she fulfils all eligibility conditions at the time of death/ineligibility of her parents and on the date of her turn to receive family pension comes. Para-4 reads thus:

"It is clarified that the family pension is payable to the children as they are considered to to dependent on the Government servant/pensioner or his/her spouse. A child who is not earning equal to or more than the sum of minimum family pension and dearness relief thereon is considered to be dependent on his/her parents. Therefore, only those children who are dependent and meet other conditions of eligibility for family pension at the time of death of the Government servant or his/her spouse, whichever is later, are eligible for family pension. **If two or more children are eligible for family pension at that time, family pension will be payable to a child on his/her turn provided he/she is still eligible for family pension when the number comes.** Similarly, family pension to a widowed/divorced daughter is payable provided she fulfils all eligibility conditions at the time of death/incligibility of her parents and on the date her turn to receive family pension comes."

6. It has not been disputed by the respondents either before Tribunal or before this Court that petitioner is the unmarried daughter of the deceased employee and she is entitled to pension but the claim of the petitioner was rejected only on the ground that she did not fulfil the eligibility criteria i.e. she was earning

salary more than the minimum family pension plus dearness relief thereon, on the death of the widow of the employee i.e. 23 October 2013.

7. A categorical stand has been taken by the respondents that the minimum pension of the widow of the employee on the date of death is at Rs. 3500/- plus dearness relief admissible on the pension.

8. As per the records of the railways filed before the Tribunal, family pension of the widow of the deceased employee computed as on 1 January 2006 is at Rs. 5165/-. This is reflected as per Pension Payment Order (PPO) dated 20 December 2010 (R.A.-1), Rs. 1033/- was computed as enhanced pension being 20% additional pension as on 20 March 2013 i.e. the date of death. Additional pension is payable to the pensioner on reaching the age of 80 years, accordingly, on 20 March 2013, the minimum family pension admissible to the mother of the petitioner was at Rs. 6198/- (Rs. 5165 + Rs. 1033) and the admissible dearness relief at 90% was at 5598/-, accordingly, the total pension admissible to the mother of the petitioner on the date of her death i.e. on 20 March 2013, works out at Rs. 11776/-. The computation is as per the report of the railway authorities dated 9 March 2015, which is admitted by the railways. On the said report an endorsement has been made by the competent authority that since the petitioner was earning less than the minimum pension on the date of death, of the pensioner, she is entitled to pension being unmarried daughter. The relevant portion of the endorsement of the authority is extracted:

"As per para-8.5 at page-288 and para-4 of the RBE 99/2013 at page 274 P274 earning of daughter is less than the pension + DA so pension to daughter, is agree to."

9. Learned counsel appearing for the respondent-railways has filed supplementary affidavit on the direction of this Court along with the computation admitting the computation of pension noted herein above. However, it appears that an erroneous stand was taken before the Tribunal, as well as, before this Court in their counter objection/counter affidavit and supplementary affidavit, wilfully and deliberately against their own records. The Pension Payment Order (PPO) dated 20 December 2010, communicated to the State Bank of India, by the railway authority categorically records the minimum family pension at Rs. 5165 w.e.f. 1 January 2006, noted herein above, admissible to the mother of the petitioner.

10. Communication of the Board dated 15 September 2008, has been relied upon by the respondent-Railways which communicates the Government's decisions for implementation of the recommendations of the Sixth Central Pay Commission - revision of provisions regulating pension/family pension etc. The effective date for the revised provisions is on and after 1 January 2006. Reliance has been placed on para 8.1 pertaining to family pension, which reads as follows:

8.1 Family pension shall be calculated at a uniform rate of 30% of basic pay in all cases and shall be subject to a minimum of Rs. 3500/-p.m. and maximum of 30% of the highest pay in the Government. (The highest pay in the Govt. is Rs. 90,000 since 1.1.2006). Rule 75(2) relating to Family Pension, 1964 under

Pension Rules shall stand modified to this extent.

11. Para 8.3 further provides that the quantum of family pension available to old family pensioners would be increased as follows:

The quantum of family pension available to the old family pensioners shall be increased as follows:

Age of family pensioners	Additional quantum of family pension
From 80 years to less than 85 years	20% of basic family pension

12. Para 8.4 for the purposes of grant of family pension, the family shall be categorized as under:

8.4 For the purpose of grant of Family Pension, the "Family' shall be categorized as under:

Category-I

(a) ....

(b) Son/daughter (including widowed daughter), upto the date of his/her marriage/remarriage or till the date he/she starts earning or till the age of 25 years, whichever is the earliest.

13. Para 5 provides for the dependency criteria for the purpose of family pension, which shall be the minimum family pension along with dearness allowance thereon. Para 5 reads thus:

The dependency criteria of the purpose of family pension shall be the minimum family pension along with dearness relief thereon.

14. The respondents had computed the pension of the deceased employee and the family pension w.e.f. 1 January 2006 as noted earlier. In view of the Office Memorandum dated 11 September 2013, pertaining to eligibility for grant of family pension, a child/daughter, who is not earning equal to or more than the sum of minimum family pension and dearness relief thereon is considered to dependent on his/her parents. The eligibility of the daughter child/daughter is to be considered on the date of death of the pensioner. It is admitted by the respondent-Railways that on the date of death of the pensioner, the petitioner was receiving less emoluments than the family pension plus dearness allowance thereon being received by the petitioner.

15. The stand of the respondent-Railways that the minimum family pension admissible to a pensioner is at Rs. 3500/- per month and maximum 30% of the highest pay of the Government, therefore, the petitioner would not be eligible as admittedly her monthly salary was higher than Rs. 3500/- per month. The submission is on misreading of the Rule/Railway Board order dated 15 September 2008. Para 8.1 of the memorandum merely mandates that no pensioner would be entitled to family pension below Rs. 3500/- month. In other words, upon computation of family pension, if the pension works out to be less than 3500/-, the same shall be raised to Rs. 3500/-. In respect of other pensioners upon computation whose pension is over and above Rs. 3500/- that would be the minimum family pension for the purpose of determining the eligibility/dependency of the son/daughter for their claim for family pension. The eligibility of a dependent child/daughter is to be computed on the minimum family pension that was being received by the pensioner at the time of his/her death.

16. In the given facts, it is admitted that the minimum family pension computed as per the Railways was at Rs. 11776/- inclusive of dearness allowance as applicable on the date of death of the pensioner and on the said date the monthly salary of the petitioner was at Rs. 10912/-.

17. In the circumstances, we are of the opinion that the petitioner has been subjected to unnecessary harassment by the respondent-Railway authorities. Accordingly, the writ petition is allowed.

18. The respondents shall compute the pension admissible to the petitioner w.e.f. 23 October 2013 and the same shall be paid month to month. The arrears of pension shall be released within one month from date along with interest @ 8% per annum, on the due amount from the due date.

19. Cost of litigation assessed at Rs. 25,000/- to be paid by the second respondent-General Manager, North Central Railway, Allahabad to the petitioner within the same period.

(2023) 4 ILRA 1357
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2023

BEFORE

THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-A No. 29075 of 2009

Hari Ram Meena ...Petitioner
Versus
The General Manager & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satish Mandhyan, Sri Kuldeep Kumar, Sri Kumar Anish, Sri Pankaj Misra, Sri Ram Chandra Tripathi

Counsel for the Respondents:
Sri Govind Saran, Sri Govind Srivastava, Sri Rajnish Kumar Rai, Sri Sudhir Bharti, Sri P.N. Rai

Service Law – dismissal order under challenge- appointment obtained wrongly on the strength of reservation-Article 342 of the Constitution of India-President notifies the tribes of State as Scheduled Tribes-caste certificate not invalid only because the petitioner does not reside in the village-being a central government service-benefit of reservation available throughout the State-verification of caste certificate to be carried out by District Level and State Level Screening Committee-no such determination made in the instant case-impugned orders held to be illegal-quashed- petition allowed.

HELD:
After hearing the rival contentions as raised by the learned counsel for the parties the controversy as raised in the present petition has to be testified on the basis of the proposition of law as enunciated by the Hon'ble Apex Court in the case of Kumari Madhuri Patil vs. Additional Commissioner AIR 1995 Supreme Court 94 wherein it is specifically held that in case of verification of caste certificate with regard to its genuineness the District Level and State level screening committee as already been constituted by the Government of India, in case if any establishment is having doubt with regard to the caste certificate pertaining to SC/ST the same may be referred to District level screening committee which is the only competent authority to comment upon the caste certificate of SC/ST.

There is hardly any reference of any Inquiry Report or the determination made by the District Level Screening Committee over the issue of Caste certificate of the petitioner as such the entire proceedings as initiated in the shape of disciplinary proceedings which

culminated into the order dated 31.10.2007 through which the services of the petitioner has been dismissed and the same has been upheld at the level of appeal vide order dated 20.2.2009.

Petition allowed. (E-14)

List of Cases cited:

1. U.O.I. Vs Doodh Nath Prasad AIR 2000 SC 525

2.Sanjay Kumar Singh Vs St. of U.P. (2000) 1 UPLBEC 729

3.Kumari Madhuri Patil Vs Addl. Commissioner AIR 1995 Supreme Court 94

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

1. Heard Kuldeep Kumar, learned counsel for the petitioner and Shri P.N. Rai, learned counsel for the respondents.

2. This writ petition has been preferred mainly with the following prayers:

1. to issue a writ order or direction in the nature of certiorari quashing the order dated 20.2.2009 passed by the Appellate Authority i.e, respondent no.2 and the order dated 31.10.2007 passed by respondent no.3 dismissing the petitioner from service.

2. to issue a writ, order or direction in the nature of mandamus directing the respondent not to give effect the orders dated 20.2.2009 and 31.10.2007.

3. The case of the petitioner is that during recruitment year 1993, he applied for the post of constable in the Railway Protection Force against the reserved category of scheduled tripe candidate, after due process as defined under the statutory provisions and recruitment rules, the petitioner was appointed as constable vide order dated 20.8.1994, considering the satisfactory services he has been promoted for the post of head constable.

4. The petitioner is scheduled tribe candidate belonging to village Sikar, State of Rajasthan having valid scheduled tribe certificate issued way back on 12.3.1991 since the ancestors of the petitioner had been living in the said village for a long time, for livelihood the father of the petitioner settled at District Bulandshahar but remained permanent resident of village Gangvas, Neem Ka Khana, District Siker State of Rajasthan, the caste of the petitioner has been mentioned in Part-13 of the schedule of the Constitution (S.T) Order 1950 and Meena community has been shown in S.T in Item No.9 of Part-13 of the said schedule.

5. In support of seeking reservation in pursuance to the caste certificate as issued to the petitioner the reliance has been placed to the judgement passed by Hon.Apex Court in the case of Union of India vs. Doodh Nath Prasad AIR 2000 SC 525 and in the case of Sanjay Kumar Singh vs. State of U.P. (2000) 1 UPLBEC 729 wherein it has been held that if a person belongs to Scheduled Tribe of different State, can still claim reservation under the SC/ST quota if there is no prohibition in that respect.

6. As per Article 342 of the Constitution of India the President notified the tribes of the State as S.T, it is quite possible that in that State such trial on account of dis-advantage and social hardship suffered by that caste or group in that State, is entitled for declaration that they belonged to SC/ST but in another

State such hardship or social dis-advantage may not exist and as such State may not treat such Caste or Tribe as SC/ST, it may also be that such caste/ tribe is not residing in another State, if a person belonging to S.T of another State cease appointment on the basis of the advertisement issued in another State and as such advertisement does not at all prevent a person of SC/ST of another State, there is no bar that such person may be permitted to appear in the examination for selection to the post advertised, meaning thereby that the advertisement and the conditions thereof are important.

7. In the present case when the Railway Protection Force is an all India organization, therefore, wherever the post is advertised it has to have all India notification and would apply to all the citizens of India and in such circumstances the bar of being a S.T of one State would not be entitled to employment in another state would not be an absolute bar.

8. Apart from the legal embargo of taking any such action against the petitioner of belonging to a particular ST of a particular State being not entitled to obtain employment in another State under that ST certificate, nevertheless the position would not be same in case of all India service, otherwise no quota can be applied towards ST candidates as all ST are in particular State where they are facing exceptional hardships, therefore, the benevolence face of the Constitution is towards the side that once a particular set is held to be a ST mainly in that particular State, but he would remain the same for the reserved category in all India service, particularly when there is no such embargo specifically given in the advertisement.

9. The action initiated against the petitioner with regard to cross verification of his status being the ST at the behest of some general directions issued in a litigation adjudicated by the Delhi High Court, whereupon on the basis of the report that the petitioner is not residing in his original village at Rajasthan does not confer the caste certificate pertaining to the petitioner as doubtful.

10. Inspite of the same the department issued a charge sheet dated 30.3.2007 duly served on the petitioner in which the only charge is a report of C.B.I. which has not negated the certificate issued by Tehsildar, Neem Ka Thana for major punishment under Section 153(2) (a) of the Railway Protection Force Regulations 1987. Petitioner replied to the said charge sheet on 22.10.2007 categorically stating that the certificate dated 12.3.1991 was issued by the Tehsildar after verifying due process of law and which was even certified by the incumbent Tehsildar vide his report dated 10.9.2007, at the same time it was also stated that Tehsildar himself had also given a report earlier on 26.10.2006 clearly specifying that the certificate issued on 12.3.1991 is recorded in the register as such the same cannot be faulted with from any angle, moreover Tehsildar has subsequently issued a duplicate copy of the certificate dated 12.3.1991 on 21.12.2006 which also proves that the certificate was issued and it was not against any false document.

11. The entire episode has taken a peculiar turn as inspite of the certificate dated 12.3.1991 being found to be correct is having entry in the register, still the S.T. category is being sought to be denied only on the basis of that he is not resident of that place whereas it is an absolutely misnomer and as such the S.T. certificate can be

issued to wards whose ancestors also if living in a particular village from where a person of particular tribe was declared to be ST, therefore, going by any stretch of imagination the certificate issued in favour of the petitioner having even found to be valid and legitimately issued the benefit cannot be deprived only on the basis that he is not at present resident of that village and this is absolutely fallacious proposition which has given rise to the impugned order taking away very source of livelihood of the petitioner without there being any fault on his part.

12. Without considering the grounds taken up by the petitioner, the District Authority held the charges to be proved against the petitioner on absolutely incorrect facts and illegal appreciation of facts brought on record, however, the disciplinary authority gave show cause notice on 28.9.2007 as received by the petitioner on 29.9.2007 alongwith the Inquiry Report, and the same has been replied by the petitioner on 22.10.2007.

13. Without considering the matter in its right perspective, riding on its wings the disciplinary authority passed an order of dismissal from service against the petitioner on 31.10.2007.

14. Being aggrieved by the order of dismissal the petitioner preferred appeal through proper channel before respondent no.2 which was a composite appeal giving out point wise details even assailing in the enquiry made with a prayer to get order of dismissal from service, the appellate authority without any application of mind has reiterated finding of the disciplinary authority without considering the appeal on valid grounds taken therein by way of rejecting the same vide order dated 20.2.2009.

15. Per contra, learned counsel for the respondents vehemently opposed the prayer alongwith the grounds taken for quashing the impugned orders and relied upon the stand taken up in the detailed counter affidavit which has been preferred in rebuttal of the contentions as raised in the present petition.

16. The maintainability of the writ petition was also challenged by the learned counsel for the respondents on the ground of alternative remedy, learned counsel for the respondents raised his arguments by way of narrating the provisions under Rule 219 of Railway Protection Force Rules 1987 wherein the remedy by the statutory provision is available against the appellate order.

17. The attention of the court has been sought over the verification report issued by the certificate issuing authority dated 26.10.2006 which has been appended as Annexure-2, available at page -22 of the counter affidavit which reveals that neither the name of the petitioner has been mentioned in any register nor he is the permanent resident of the village as mentioned in the caste certificate which gives the impression that the caste certificate submitted by the petitioner dated 21.12.2006 is not a genuine certificate.

18. After hearing the rival contentions as raised by the learned counsel for the parties the controversy as raised in the present petition has to be testified on the basis of the proposition of law as enunciated by the Hon'ble Apex Court in the case of **Kumari Madhuri Patil vs. Additional Commissioner AIR 1995**

Supreme Court 94 wherein it is specifically held that in case of verification of caste certificate with regard to its genuineness the District Level and State level screening committee as already been constituted by the Government of India, in case if any establishment is having doubt with regard to the caste certificate pertaining to SC/ST the same may be referred to District level screening committee which is the only competent authority to comment upon the caste certificate of SC/ST.

19. On the precise quarry as made before Shri P.N.Rai appearing for respondents regarding the regarding the genesis of the disciplinary proceedings whatsoever has been initiated against the petitioner, in reply the learned counsel for the respondent relied upon the narration in the counter affidavit wherein it has also apprised the court that the genuineness of the said caste certificate shall only be determined by the District Level Screening Committee, but the counter affidavit as preferred by the responding authorities lacking any report determined by the District Level Screening Committee over the issue of caste certificate as submitted by the petitioner at the time of seeking appointment over the post concerned and as such the appreciation of the law as well as fact could not be stated properly by Shri P.N. Rai, learned standing counsel.

20. There is hardly any reference of any Inquiry Report or the determination made by the District Level Screening Committee over the issue of Caste certificate of the petitioner as such the entire proceedings as initiated in the shape of disciplinary proceedings which culminated into the order dated 31.10.2007 through which the services of the petitioner has been dismissed and the same has been upheld at the level of appeal vide order dated 20.2.2009.

21. In view of the above, writ petition is **allowed**. Both the orders i.e, order dated 20.2.2009 passed by the appellate authority i.e, respondent no.2 and the order dated 31.10.2007 passed by respondent no.3 are hereby quashed and set aside.

(2023) 4 ILRA 1361
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.04.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No. 283 of 2023

Shivraj Singh & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Kapil Misra

Counsel for the Opposite Parties:
G.A.

A. Criminal Law–Application under Section 482 CrPC- entire proceedings of Sessions Trial under Sections 120B, 121, 121A, 420, 467, 468 IPC- Sections 13, 18, 20, 21, 23(2), 38, 39 and 40 the Unlawful Activities (Prevention) Act, 1967- challenged-validity pf sanction for prosecution challenged- *de hors* Section 45(2) of the Act of 1967-supplemntary case diary submitted after a gap of about 12 years-sanction also given.

B. Difference between a invalid sanction for prosecution-and absence of prosecution-sanction for prosecution was given way back in 2010- grant of sanction-administrative sanction-sanctioning authority required to ensure -

at first hand the acts and facts- constitute offence-question of validity of sanction can be raised before the trial court-application dismissed. (Paragraphs 23 to 26)

HELD:

When this Court examined this case on facts and law, it is decipherable that the Investigating Agency undoubtedly has power to proceed with further investigation and the prior approval for proceeding with such investigation is not required under the law. Of course, time and again, it has also been the view of the Hon'ble Apex Court, therefore, the supplementary case diary appending the order 3.3.2022, has rightly been submitted by the Investigating Officer before the trial court. (Para 23)

So far as the order dated 3.3.2022 passed by the review authority is concerned, the matter pertains to year 2010 and about 12 years have been passed. Further, it is settled that the grant of sanction is merely an administrative function and sanctioning authority is required to reach over satisfaction, at the first hand that acts and facts would constitute the offence and, now, after lapse of 12 years, it would not be just and fair to initiate proceeding of grant of sanction to put the applicants and other side for another innings of litigations and keep the trial pending indefinite long period. (Para 24)

It has been enunciated that there is distinction between 'absence of sanction' and 'invalidity of sanction'. Absence of sanction can be raised and agitated at the very inception but the invalidity or illegality of the sanction is to be raised during the trial. (Para 25)

Admittedly, the sanction was granted on 3.8.2010 and, thus, prima facie it is not a case of absence of sanction but the applicants-accused persons have raised certain illegality and invalidity in grant of sanction for prosecution and those are three folds. Firstly, the Review authority was not in existence at the time of grant of sanction; secondly, there was no material before the sanctioning authority; and thirdly Section 173 (8) is not meant for filling the lacunaes. All the pleas are with respect to invalidity said to be creeping in the impugned order of sanction. As has been discussed in preceding paragraphs, the instant matter is not a case of absence of sanction and if there is any alleged invalidity prevailing in the order of sanction, the same can be raised/assailed before the trial court. (Para 26)

Application dismissed. (E-14)

List of Cases cited:

1.Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari Vs St. of UP & anr., 2021 LawSuit(All) 1115

2. Mansukhlal Vithaldas Chauhan Vs St. of Guj. (1997) 7 SCC 622

3.C.B.I. & anr. Vs Dhirendra Kumar Agrawal & anr., (2020) 17 SCC 664

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

1. Heard Sri Jyotindra Mishra, learned Senior Advocate, assisted by Sri Kapil Mishra, learned counsel for the applicants, Sri Shiv Nath Tilhari, learned A.G.A.-I for the State and perused the material placed on record.

2. By means of instant application, the applicants have assailed the sanction orders dated 3.8.2010 & 3.3.2022 and entire proceedings in Sessions Trial Nos.1245 of 2010 and 13 of 2013 arising out of Case Crime No.30 of 2010 under Sections 120B, 121, 121A, 420, 467, 468 I.P.C. & 13, 18, 20, 21, 23 (2), 38, 39, 40 UAPA (State Vs. Shivraj Singh and another) & (State Vs. Rajendra Kumar @ Arvind) relating to Police Station Kidwai Nagar, District Kanpur Nagar pending in the court of ASJ-3/Special NIA/ATS Court, Lucknow.

3. Factual matrix of the case is that on 8.2.2010, three persons, namely, Shivraj Singh, Rajendra Kumar @ Arvind Kumar

and Kripa Shankar were arrested by Uttar Pradesh State Task Force team, headed by Sub Inspector Rajeev Dwivedi at 4.50 pm. The First Information Report was lodged at Police Station Kidwai Nagar on the complaint of Sub Inspector Rajeev Dwivedi. Thereafter, a letter was sent by Investigating Officer to DIG (ATS) on 7.7.2010 for grant of sanction of prosecution and the DIG (ATS) sent a letter on 12.7.2010 to the Secretary, Department of Home, Government of UP making a request for grant of sanction for prosecution.

4. After considering the aforesaid request, sanction for prosecution was granted by the State Government, vide letter dated 3.8.2010. The charge sheet was filed by the Investigating Officer and on 4.8.2011, charges were framed against accused Shivraj Singh and Kripa Shankar in Sessions Trial No.1245 of 2010 and against the co-accused Rajendra Kumar @ Arvind on 8.3.2023 in Sessions Trial No.13 of 2013. The prosecution witnesses, i.e., P.W. 1 to P.W. 13 were examined and while cross-examination of witnesses, they admitted that neither there was any literature in hand writing of the accused persons nor there was any evidence of extorting money thereof at Kanpur Nagar and further addmitted that techinically somebody has printed or published these materials other than the accused persons.

5. On 8.6.2016 the applicants moved an application before the trial court for disposal of the case. On 10.2.2021, they also filed an application for framing of question under Section 313 of Cr.P.C. and statement of the accused was recorded on 15.2.2021. On 8.1.2022 all files of Sessions Trial No.1245 of 2010, 13 of 2013, 1265 of 2010, 1265A of 2010 were transferred to the learned ASJ-3/Special NIA/ ATS Court, Lucknow. On 4.8.2022, the accused persons came to know that vide application dated 22.3.2022, supplementary case diary and amended order of sanction for prosecution dated 3.3.2022 has been submitted before the court and, thereafter, on 29.9.2022, an objection was filed by the co-accused with a request that trial court may cancel the supplementary case diary and the sanction order. Reply to the objection dated 29.9.2022 was also filed by the Investigating Agency on 24.11.2022 and, thereafter, on 24.11.2022 itself, the trial court granted permission to the prosecution upon the application under Section 311 Cr.P.C. and, thus, the applicant being aggrieved by the sanction orders dated 3.8.2010 and 3.3.2022 including the entire proceedings initiated in Sessions Trial Nos.1245 of 2010 and 13 of 2013, has instituted the instant application.

6. Learned Senior Counsel appearing for the applicants contends that at the very initial stage, intent of the prosecution is dubious, as on the basis of unconfirmed information, the applicants were arrested without cogent piece of evidence; as the First Information Report was lodged against the applicants and the charge sheet has also been filed. Thereafter, without prior intimation to the applicants, the case was transferred from Kanpur to Lucknow and, while taking the perplexing action supplementary case diary and the amended order of sanction dated 3.3.2022 was filed before the trial court. Although as soon as this fact came into knowledge of the applicants, they filed objections on 29.9.2022 but the trial court, without applying its judicial mind, has accepted the supplementary case diary and issued order

of sanction for prosecution on 3.3.2022 which was about 12 years after the first sanction was granted.

7. Adding his arguments, he submits that from several dates fixed before the trial court and the order impugned passed thereafter, it is evident that the trial court has acted in a very cavaliar and supine manner. He submtis that first of all, when the matter was transferred from Kanpur to Lucknow, it was not intimated to the applicants and, thereafter, when the objection was filed by the applicants on 29.9.2022 for cancellation of supplemetary case diary and order of sanction on the ground of being unlawful sanction, the trial court granted time to the Investigating Agency to file objection, which was filed on 24.11.2022, and, thereafter, on 2.12.2022, an application on behalf of the accused was filed for haziri mafi on the ground of illness but on the same day, the trial court recorded statement of witness Prashant, who was Special Secretary, Home Government of U.P. and denied the opportunity of cross-examination. He submits that it is on 15.12.2022, when it came in the knowledge that on 24.12.2022, the prosecution is granted permission by the trial court upon its application under Section 313 of Cr.P.C. and that too without intimating the accused and without disposal of objection dated 29.9.2022.

8. Continuing with his arguments, he submits that provision of Section 45 (2) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'the Act 1967') clearly provides that 'sanction of prosecution shall be given only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government, which shall make an independent review of evidence'. He submits that from the aforesaid provision, it is very clear that sanction of prosecution can be given only after considering the report of authority. Meaning thereby that the sanctioning authority must have gone through the report of the authority appointed by the Central Government or the State Government as the case may be but in the instant matter the first sanction was granted in the year 2010 and there was no any review authority at the very point of time and, suddenly, on 3.3.2022 in the garb of provisions of Section 173 (8) of Cr.P.C., the sanction for prosecution was granted and supplementary case diary was submitted before the trial court along with the order of sanction for prosecution, which is totally unlawful and against the mandate of Sub Section (2) of Section 45 of the Act 1967. He added that first sanction dated 3.8.2010 is invalid as the authority was not appointed by the Government for independent review of evidences gathered in the course of inviestigation and further there was no material before the sanctioning authority for considering the same as per the mandate of Sub Section (2) of Section 45 of the Act 1967.

9. Further argued that Investigating Officer filed the charge sheet against the applicants in a mechanical manner and that is without collecting any evidence and further no offence under Sections under Sections 120B, 121, 121A, 420, 467, 468 I.P.C. & 13, 18, 20, 21, 23 (2), 38, 39, 40 UAPA are made out against the applicants and the instant matter is an example of sheer abuse of process of law and, therefore, the entire criminal proceedings initiated against the applicants are liable to be quashed.

10. In support of his contention, he has placed reliance on a Judgment reported in ***2021 LawSuit(All) 1115, Sheikh Javed***

Iqbal @ Ashfaq Ansari @ Javed Ansari Vs. State of UP & Another and has referred paras 35, 36 and 37 of the aforesaid Judgment. Paras 35, 36 and 37 of the aforesaid Judgment are quoted as under:-

"35. The main object of imposing condition of independent review by an authority appointed by the Central Government or the State Government as the case may be, was to prevent the misuse of the stringent provisions of UAPA by the law enforcing agencies. Further, when legislature in its wisdom has prescribed a specific mandatory procedure to accord sanction, it was the duty of sanctioning authority to follow that statutory procedure. But unfortunately, there is no material on record to show even prima-facie that the recommendation of any authority who have independently reviewed the evidence collected by the investigating authority was ever placed before the competent authority at the time of obtaining sanction under sub-section (1) of Section 45 of the UAPA. In other words, the competent authority while granting sanction, in the present case was deprived of the relevant material i.e. recommendation of independent authority that was mandatory to consider as to whether sanction should or should not be granted.

36. Now coming to the question as to whether this inherent violation of the mandatory procedure is to be taken care of by the trial Court in trial, as in this case trial has moved forward and many prosecution witnesses have been examined by the prosecution, or the defect in the sanction granted in this case is of such a nature, which should not wait till the conclusion of the trial. In order to appreciate this point it is desirable to have a look at the law with regard to the sanction.

37. Hon'ble Supreme Court in C.B.I. vs. Ashok Kumar Aggarwal , MANU/SC/1220/2013,relied on by Ld Additional Government Advocate, while deliberating the validity of sanction held as under:-

"7. The prosecution has to satisfy the court that at the time of sending the matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority. This may also be evident from the sanction order, in case it is extremely comprehensive, as all the facts and circumstances of the case may be spelt out in the sanction order. However, in every individual case, the court has to find out whether there has been an application of mind on the part of the sanctioning authority concerned on the material placed before it. It is so necessary for the reason that there is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. Grant of sanction is not a mere formality. Therefore, the provisions in regard to the sanction must be observed with complete strictness keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

It is to be kept in mind that sanction lifts the bar for prosecution. Therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. Further, it is a weapon to discourage

vexatious prosecution and is a safeguard for the innocent, though not a shield for the guilty.

Consideration of the material implies application of mind. Therefore, the order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that those facts were placed before the sanctioning authority and the authority had applied its mind on the same. If the sanction order on its face indicates that all relevant material i.e. FIR, disclosure statements, recovery memos, draft charge sheet and other materials on record were placed before the sanctioning authority and if it is further discernible from the recital of the sanction order that the sanctioning authority perused all the material, an inference may be drawn that the sanction had been granted in accordance with law. This becomes necessary in case the court is to examine the validity of the order of sanction inter-alia on the ground that the order suffers from the vice of total non-application of mind.

8. In view of the above, the legal propositions can be summarised as under:

(a) The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.

(b) The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.

(c) The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

(d) The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.

(e) In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

11. Placing reliance on the aforesaid Judgment, learned counsel for the applicant submits that object of the provision regarding independent review by an autority appointed by the Central Government or State Government, is to prevent misuse of the stringent provisions of the Act 1967. Thus, the pvoisions of Sub Sections (1) and (2) of Section 45 of the 1967 are more relevant and important.

12. Further placing reliance upon a Judgment of the Apex Court rendered in case of **Mansukhlal Vithaldas Chauhan Vs. State of Gujarat (1997) 7 SCC 622**,

he has referred paras 38 and 39 of the aforesaid Judgment. Paras 38 and 39 of the aforesaid Judgment are quoted as under:-

"38. From the notings of the Secretariat file, contained in Exhibit 70, as also the conflicting statement made by the Secretary and the Under Secretary, it is not possible to hold as to who actually granted the sanction. The Gujarat High Court has held that the Sanction was granted by the Deputy Secretary, Shri Lade (PW-8), ignoring the fact that the file was also placed before the Secretary and he had also put his signature thereon. The file had, admitted, been sent to the office of the Chief Minister from where it was received back on 30th January, 1985 and as such it is not understandable as to how sanction could be granted on 23rd January, 1985. This confusion also appears to be the result of the order passed by the High Court that the sanction must be granted within one month. Secretary being the head of the Department stated on oath that he had granted the sanction, particularly as the mandamus was directed to him and he had to comply with that direction Deputy Secretary, who actually issued the order of sanction, had signed it and, therefore, he owned the sanction and stated that he had sanctioned the prosecution. Both tried to exhibit that they had faithfully obeyed the mandamus issued by the High Court and attempted to save their skin, destroying, in the process, the legality and validity of the sanction which constituted the basis of appellant's prosecution with the consequence that whole proceedings stood void ab initio.

39. Normally when the sanction order is held to be bad, the case is remitted back to the authority for re-consideration of the matter and to pass a fresh order of sanction in accordance with law. But in the instant case, the incident is of 1983 and therefore, after a lapse of fourteen years, it will not, in our opinion, be fair just to direct that the proceedings may again be initiated from the stage of sanction so as to expose the appellant to another innings of litigation and keep him on trial for an indefinitely long period contrary to the mandate of Article 21 of the Constitution which, as a part of right to life, philosophizes early and of criminal proceedings through a speedy trial."

13. Referring the aforesaid, he added that it is trite law that once it is found that sanction is not as per the law, the matter must be sent back to the authority for reconsideration of the matter and to pass fresh order but in the instant matter, contrary to the aforesaid proposition of law, even after passing of about 11 to 12 years, the order dated 3.8.2010 has been validated by way of further investigation, thereby filing supplementary charge sheet and a review order.

14. While concluding his argument, he contended that sanction for prosecution as envisaged in Sub Section (2) of Section 25 of the Act 1967 is materially different than the provision of sanction for prosecution provided under Section 19 of the Prevention of Corruption Act, 1947 (hereinafter referred to as 'the Act 1947'). He further added that looking into the stringent law, it appears that the intent of the legislature was very clear to specifically put the provisions that 'only after considering the report of such authority', the authorities would take decision with respect to sanction for prosecution and this provision is not given in 'the Act, 1947'. Thus, both the provisions are not similar and any ratio of Judgment, which was held,

considering the provisions of Act 1947 would not be applicable in the present matter. Therefore, the order dated 3.8.2010 and 3.3.2022 including the entire proceeding of sessions trials aforementioned vitiate in the eyes of law and thus, the same are liable to be quashed.

15. Per contra, Sri Shiv Nath Tilahari, learned counsel appearing for the State has opposed the conention aforesaid with fullest vehemence and added that learned counsel for the applicants has tried to twist the actual fact and law and has interpreted the same in his own manner. He submits that provision of Section 45 of Act 1967 is very clear in its meaning and that mandates that the sanction for prosecution under Sub Section (1) of Section 45 shall be given within such time as may be prescribed considering the report of the authorities appointed by the Central or State Government who will have independently reviewed the evidences gathered during the course of investigation and then the recommendation is to be made to the Central Government or State Government as the case may be.

16. He further submits that the Investigating Agency has power to gather the evidence by further investigation and even prior permission by the trial court is not required. The Investigating Agency filed supplementary case diary including the letter dated 3.3.2022 and that was considered by the trial court as the same is permissible under the law. He further contended that vilidity of the sanction for prosecution can be considered during the trial and also submitted that there is material difference in between the 'invalid sanction' and 'absence of sanction'. He submits that it is settled law that absence of sanction can be looked into at the threshhold but as far as the validity of sanction is concerned that is the subject matter of the trial and so far as the present matter is concerned, admittedly, it is not a case of absence of sanction as evidently the prosecution sanction has been done and, therefore, it is not the stage where allegedly invalid sanction can be challenged.

17. In support of his submissions, he has placed reliance on a Judgment of the Apex Court reported in **(2020) 17 SCC 664, Central Bureau of Investigation and another Vs. Dhirendra Kumar Agrawal and another** and has referred on paragraph 11 of the above said Judgment. Para 11 of the aforesaid Judgment is quoted as under:-

"11. Further the issue relating to validity of the sanction for prosecution could have been considered only during trial since essentially the conclusion reached by the High Court is with regard to the defective sanction since according to the High Court, the procedure of providing opportunity for explanation was not followed which will result in the sanction being defective. In that regard, the decision in the case of Dinesh Kumar Vs. Chairman, Airport Authority of India, (2012) 1 SCC 532 relied upon by the learned Additional Solicitor General would be relevant since it is held therein that there is a distinction between the absence of sanction and the alleged invalidity on account of nonapplication of mind. The absence of sanction no doubt can be agitated at the threshold but the invalidity of the sanction is to be raised during the trial. In the instant facts, admittedly there is a sanction though the accused seek to pick holes in the manner the sanction has been granted and to claim that the same is defective which is a matter to be considered in the trial."

18. Placing reliance on the aforesaid Judgment, he added that ratio of the Judgment aforesaid is very clear that validity of the sanction for prosecution could be considered during the course of trial and distinction has also been drawn in between 'absence of sanction' and 'invalidity of sanction' including non-application of mind. He further added that this is a case where the applicants have been charged for waging war against the Government of India and, thus, is of serious concern and, therefore, no liberal interpretation can be given so far as the procedure prescribed under the Act, 1967 is concerned.

19. He finally submits that law is very clear on this point and this case is not of 'absence of sanction' and if there is any invalidity or defect in 'the sanction for prosecution', the applicants have opportunity to raise it before the trial court at the time of trial, therefore, submission is that instant application is liable to be dismissed.

20. Having heard learned counsel for the parties and after perusal of the material placed on record, the conundrum is that whether the first sanction granted on 3.8.2010 and, later on, supplemented vide review order dated 3.3.2022, is a valid sanction of prosecution or not. At the very inception, when the sanction for prosecution was sought, the State Government, vide order dated 3.8.2010 granted sanction for prosecution with respect to the applicants. The matter proceeded and, thereafter, the Investigating Officer started further investigation and a supplementary case diary was submitted before the trial court appending therewith the copy of the order dated 3.3.2022 of the review authority and, thus, further question is that by way of deriving powers under Section 173 (8) of Cr.P.C., whether the further investigation can be done to fill up the gaps/lacunaes of the investigation.

21. It is borne out from the arguments advanced by the learned counsel for the applicants that on 3.8.2010, first sanction of prosecution was granted by the State. So far as the present matter is concerned, the provisions with respect to the sanction of the prosecution contains in Section 45 (1) and (2) of the Act 1967 wherein the mandate of the provision is that at the time of grant of sanction of proseution, the authority granting such sanction, shall proceed 'only after considering the report' of an authority appointed by the Central Government or the State Government. The contention of the learned counsel for the applicants is that on 3.8.2010, there was no report of the authority appointed by the Central Government or the State Government before the sanctioning authority, as the review autyhority was appointed after the first sanction granted by the State Government on 3.8.2010 and further submission is that the provision of Section 45 (2) of the Act 1967 is not similar to the provisions of Section 19 of the Act 1947.

22. The crux of the contention of the State is that the sanction for prosecution has been granted and that too is in consonance with the provision of the Act 1967. Further since the matter was proceeded after framing of charges and, admittedly, there is an order of sanction for prosecution, thus, this cannot be said that there is absence of sanction and if there is any invalidity, which is being raised at this stage, the same can be looked into by the trial court.

23. When this Court examined this case on facts and law, it is decipherable that the Investigating Agency undoubtedly has power to proceed with further investigation and the prior approval for proceeding with such investigation is not required under the law. Of course, time and again, it has also been the view of the Hon'ble Apex Court, therefore, the supplementary case diary appending the order 3.3.2022, has rightly been submitted by the Investigating Officer before the trial court.

24. So far as the order dated 3.3.2022 passed by the review authority is concerned, the matter pertains to year 2010 and about 12 years have been passed. Further, it is settled that the grant of sanction is merely an administrative function and sanctioning authority is required to reach over satisfaction, at the first hand that acts and facts would constitute the offence and, now, after lapse of 12 years, it would not be just and fair to initiate proceeding of grant of sanction to put the applicants and other side for another innings of litigations and keep the trial pending indefinite long period.

25. It has been enuntiated that there is distinction between 'absence of sanction' and 'invalidity of sanction'. Absence of sanction can be raised and agitated at the very inception but the invalidity or illegality of the sanction is to be raised during the trial.

26. Admittedly, the sanction was granted on 3.8.2010 and, thus, prima facie it is not a case of absence of sanction but the applicants-accused persons have raised certain illegality and invalidity in grant of sanction for prosecution and those are three folds. Firstly, the Review authority was not in existence at the time of grant of sanction; secondly, there was no material before the sanctioning authority; and thirdly Section 173 (8) is not meant for filling the lacunaes. All the pleas are with respect to invalidity said to be creeping in the impugned order of sanction. As has been discussed in preceding paragraphs, the instant matter is not a case of absence of sanction and if there is any alleged invalidity prevailing in the order of sanction, the same can be raised/assailed before the trial court.

27. In view of the aforesaid submissions and discussions, this Court does not find any merit in this application.

28. Consequently, the application is hereby **dismissed.**

29. However, the applicants-accused persons are at liberty to raise their grievance with respect to the invalidity of the sanction, if any, before the trial court concerned.

(2023) 4 ILRA 1370
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.04.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Civil Misc. Review Application Defective No. 5 of 2022

Jai Singh ...Applicant
Versus
The State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Raj Vikram Singh, In Person

Counsel for the Respondents:

Civil Law – Review Application- filed by a counsel other than the one who argued the petition-practice deprecated-valid ground for dismissal of the review application-even otherwise the application lacks merit-no error apparent on face of record-plea of applicability of amended bye laws never pleaded before the writ court-plea of no *locus standi* taken for the first time in review application-not maintainable-scope of review application is very limited-review application dismissed. (Paras 23, 24 and 27)

HELD:

In view of the law laid down by the Hon'ble Supreme Court in T. N. Electricity Board (Supra) and by this Court in U. P. State Agro Industrial Corporation Ltd. versus Anil Kumar Mishra and Vinita Bhatnagar versus Union of India (Supra), the review application filed by the opposite party no.4 Tej Narayan Soni through Sri Raj Vikram Singh, Advocate, who had not filed the pleadings in the Writ Proceedings and who had not advanced submissions on behalf of the opposite party no. 4 Tej Narayan Soni at any stage and who filed his Vakalatnama in the Writ Petition when nothing was pending before the Writ Court, cannot be entertained and the same is liable to be dismissed on this ground alone. (Para 23)

Application dismissed. (E-14)

List of Cases cited:

1.T. N. Electricity Board Vs N. Raju Reddiar, (1997) 9 SCC 736

2. Review Petition Defective No. - 281 of 2008 titled U. P. State Agro Industrial Corporation Ltd. Vs Anil Kumar Mishra decided on 30.03.2012

3.Vinita Bhatnagar Vs U.O.I. 2018 SCC OnLine All 6411

(Delivered by Hon'ble Subhash Vidyarthi, J.)

Order on C.M. Application No. 1 of 2022:

1. This is an application for condonation of delay in filing the review application. The application is supported by an affidavit, in which reasons for delay have been explained sufficiently.

2. Accordingly, the application is *allowed*. Delay, if any, in moving review application is hereby condoned.

Order on memo of Review Application:

3. The instant application has been filed seeking review of the judgment and order dated 29.08.2019, passed by a Division Bench of this Court consisting of Hon'ble Mr. Justice Pankaj Kumar Jaiswal and Hon'ble Mr. Justice Jaspreet Singh in Writ-C No.13864 of 2019, with the following description of the array of parties: -

"Jai Singh son of K. S. Arya R/o House no. B-216, Rajajipuram Lucknow

.....Petitioner

VERSUS

1. State of U.P. through its Principal Secretary Housing and Urban Planning U.P. Secretariat (Govt.) IIIrd Floor, Bapu Bhawan Lucknow.

2. Housing Commissioner, U.P. Awas Vikas Parishad 104 Mahatma Gandhi Marg, Lucknow

3. Executive Engineer, Nirman Khand-12, II Floor, Vrindavan Yojna Telibagh, Lucknow

4. Tej Narayan Soni son of unknown R/o House no.B-218, Rajajipuram Lucknow.

.....Opposite Parties."

4. No Vakalatnama has been filed with the review application and in the index, it is mentioned that "Vakalatnama already on record". Sri. Raj Vikram Singh Advocate had filed his Vakalatnama on behalf of the opposite party no. 4 Tej Narayan Soni in Writ-C No.13864 of 2019 on 03.01.2022 alongwith I.A. No. 22 of 2022, which was supported by an affidavit stating that earlier he had filed a modification application through Ms. Pushpila Bisht, Advocate and the matter was argued by Sri Jaideep Narayan Mathur, Senior Advocate; that the opposite party no.4 had paid fee to both of them and now he wanted to file a review application, for which he has engaged Sri Raj Vikram Singh, Advocate. The Vakalatnama in favour of Sri. Raj Vikram Singh Advocate was filed when the Writ Petition as well as the subsequent review application filed by Jai Singh and an application for modification / recall of the order dated 31.08.2021 filed by the opposite party no. 4 Tej Narayan Soni had already been decided and nothing was pending before this Court.

5. Sri. Jai Singh, who has wrongly been described as the petitioner in the Review Petition, raised a preliminary objection before this Court that he has not filed the review application and he has wrongly been described as the review applicant.

6. On 07.04.2022 Sri. Raj Vikram Singh, the learned counsel for the opposite party no. 4 Tej Narayan Soni, had sought time to move an application to correct the array of parties. He filed an application for correction in the memo of parties seeking permission to mention the name of Tej Narayan Soni as applicant in the review application. The aforesaid application was *allowed* by means of an order dated 25.07.2022 and a direction was issued for carrying out the necessary corrections within ten days. However, the learned Counsel for the opposite party no. 4 Tej Narayan Soni did not incorporate the corrections in the memo of the review application and the description of the petitioner, mentioned in the review petition is still "Jai Singh'. Even during hearing of the review application, when an objection to this effect was raised by Sri. Jai Singh, the learned Counsel for the opposite party no. 4 Tej Narayan Soni did not make any prayer for extension of time granted to him for carrying out the necessary corrections in the array of parties. Therefore, the review application as framed, is liable to be rejected for non-prosecution by non-compliance of the order dated 25.07.2022.

7. However, we proceed to examine the review on its merits in the interest of justice.

8. The aforesaid Writ Petition was filed by the Petitioner Jai Singh seeking a direction to the Uttar Pradesh Avas Evam Vikas Parishad for demolition of the illegal constructions raised in the house of the opposite party no.4 - Tej Narayan Soni.

9. The Avas Evam Vikas Parishad had filed a counter affidavit in the Writ Petition stating that some parts of the construction had been marked by the officials as compoundable and some other parts were marked as non-compoundable in the compounding map. The review applicant had submitted a compounding map and the Parishad had already indicated about the compoundable and non-compoundable portions of the structure. In case the opposite party no. 4 Tej Narayan Soni fails to demolish the non-compoundable structure and pay the compounding fee, the

Parishad will take suitable action against him.

10. The opposite party no. 4 in the Writ Petition Tej Narayan Soni had put in appearance by filing a Vakalatnama executed in favour of Sri. Suresh Kumar Singh and Sri. Umesh Singh Advocates. Thereafter he had engaged Sri. Balkeshwar Srivastava and Sri. Pankaj Kumar Srivastava Advocates. He had filed a counter affidavit through Sri. Balkeshwar Srivastava, Advocate.

11. After taking into consideration the aforesaid pleadings, this Court had disposed off the Writ Petition by means of an order dated 29.08.2019 observing that the matter was being taken by the Parishad and at this stage, the Court was not inclined to pass any order or direction to demolish the portion which is non-compoundable and this Court had put on record its expectation that the Parishad will take appropriate decision in accordance with law.

12. The aforesaid order was challenged by Sri Jai Singh - the petitioner in Writ C No.13864 of 2019, by filing Review Application No. 153668 of 2019. The review application was filed with delay and the opposite party no. 4 Tej Narayan Soni had filed an application for rejection of application for condonation of delay in filing the Review Application an Application for dismissal of review application, through Sri. Pankaj Kumar Srivastava, Advocate and a supplementary counter affidavit was also filed through the aforesaid Advocate.

13. The aforesaid review petition was dismissed by means of an order dated 31.08.2021 by holding that the order dated 29.08.2019 did not suffer from any error apparent on the face of the record. However, while dismissing the review application this Court observed that once an undertaking had been given by the opposite party no. 4 Tej Narayan Soni that he will remove the non-compoundable portion of the building which had been illegally constructed, then that undertaking shall be honored by him and he shall immediately remove the illegal constructions. This Court further observed that since the opposite party no. 4 has not removed the said construction, therefore, Avas Vikas Parishad shall immediately remove the illegal construction which is non-compoundable and no further opportunity shall be given to the opposite party no. 4 to remove the construction. Although, the review petition was dismissed by the aforesaid order, the Court directed that an action taken report be submitted before the Court.

14. On 16.09.2021, the opposite party no. 4 Sri. Tej Narayan Soni filed C.M.An.No. 120260 of 2021 through Sri. Pankaj Kumar Srivastava, Advocate for modification / recall of the order dated 31.08.2021 passed in the Writ Petition, to the extent it directs the Awas Ewam Vikas Parishad to immediately remove the illegal construction which is non compoundable.

15. Subsequently the opposite party no. 4 engaged Ms. Pushpila Bisht Advocate, who assisted Sri. J. N. Mathur Senior Advocate. At the time of hearing of the aforesaid application for modification/recall of the order dated 31.08.2021, it was submitted on behalf of the opposite party no. 4 Tej Narayan Soni that in the order dated 31.08.2021 it was provided that the unauthorized construction which can be removed, is to be removed,

therefore, he has got the construction removed which could be removed and the portion of unauthorized construction which could not be removed, was not removed otherwise the entire building will collapse.

16. The aforesaid application for modification / recall of the order dated 31.08.2021 was rejected by means of an order dated 29.09.2021 by observing that *"once an undertaking was given to remove the unauthorized construction and that unauthorized construction was not removed, the Avas Evam Vikas Parishad who is the overall controlling authority has been directed to remove the illegal construction. We do not filed any reasons to modify the order dated 31.08.2021 as we cannot permit any unauthorized construction to continue to exist."*

17. The opposite party no. 4 Tej Narayan Soni, challenged the aforesaid order dated 31.08.2021 by filing Special Leave Petition (Civil) No. 13769 of 2021. At the time of hearing for the aforesaid S.L.P., the learned counsel representing him submitted before the

Hon'ble Supreme Court that whatever could be demolished in terms of the undertaking given before the High Court, has already been demolished and an appropriate application will be moved before the High Court seeking modification. Subsequently, the aforesaid S.L.P. has been dismissed as withdrawn on 08.02.2022, without any liberty having been granted by the Hon'ble Supreme Court for availing any other remedy.

18. During pendency of the aforesaid S.L.P., the instant application was been filed on 10.01.2022 by the opposite party no.4 Tej Narayan Soni, through Sri Raj Vikram Singh, Advocate, seeking review of the order dated 29.08.2019.

19. In **T. N. Electricity Board v. N. Raju Reddiar,** (1997) 9 SCC 736, the Hon'ble Supreme Court deprecated the practice of filing successive applications after decision of the case and that too, by engaging different Counsel. The aforesaid judgment is being reproduced below:

"1. It is a sad spectacle that a new practice unbecoming and not worthy of or conducive to the profession is cropping up. Mr Mariaputham, Advocate-on-Record had filed vakalatnama for the petitioner-opposite party when the special leave petition was filed. After the matter was disposed of, Mr V. Balachandran, Advocate had filed a petition for review. That was also dismissed by this Court on 24-4-1996. Yet another advocate, Mr S.U.K. Sagar, has now been engaged to file the present application styled as "application for clarification", on the specious plea that the order is not clear and unambiguous. When an appeal/special leave petition is dismissed, except in rare cases where error of law or fact is apparent on the record, no review can be filed; that too by the Advocate-on-Record who neither appeared nor was party in the main case. ***It is salutary to note that the court spends valuable time in deciding a case. Review petition is not, and should not be, an attempt for hearing the matter again on merits. Unfortunately, it has become, in recent time, a practice to file such review petitions as a routine; that too, with change of counsel, without obtaining consent of the -on-Record at earlier stage. This is not conducive to healthy practice of the Bar which has the responsibility to maintain the salutary practice of profession.*** *In Review Petition No. 2670 of*

1996 in CA No. 1867 of 1992, a Bench of three Judges to which one of us, K. Ramaswamy, J., was a member, had held as under:

"The record of the appeal indicates that Shri Sudarsh Menon was the Advocate-on-Record when the appeal was heard and decided on merits. The review petition has been filed by Shri Prabir Chowdhury who was neither an arguing counsel when the appeal was heard nor was he present at the time of arguments. It is unknown on what basis he has written the grounds in the review petition as if it is a rehearing of an appeal against our order. He did not confine to the scope of review. It would not be in the interest of the profession to permit such practice. That apart, he has not obtained "No Objection Certificate' from the Advocate-on-Record in the appeal, in spite of the fact that Registry had informed him of the requirement for doing so. Filing of the "No Objection Certificate' would be the basis for him to come on record. Otherwise, the Advocate-on-Record is answerable to the Court. The failure to obtain the "No Objection Certificate' from the erstwhile counsel has disentitled him to file the review petition. Even otherwise, the review petition has no merits. It is an attempt to reargue the matter on merits.

On these grounds, we dismiss the review petition."

2.Once the petition for review is dismissed, no application for clarification should be filed, much less with the change of the Advocate-on-Record. This practice of changing the advocates and filing repeated petitions should be deprecated with a heavy hand for purity of administration of law and salutary and healthy practice.

3. The application is dismissed with exemplary costs of Rs 20,000 as it is an abuse of the process of court in derogation of healthy practice. The amount should be paid to the Supreme Court Legal Aid Services Committee within four months from today. If the amount is not paid, it should be recovered treating this direction as decree of the Court by the Supreme Court Legal Services Committee. The Registry is directed to communicate this order to the Supreme Court Legal Services Committee."

20. In Review Petition Defective No. - 281 of 2008 titled **U. P. State Agro Industrial Corporation Ltd. versus Anil Kumar Mishra** decided on 30.03.2012, this Court dismissed a review petition filed by a subsequently engaged counsel. The relevant portion of the aforesaid judgment is reproduced below: -

"Shri Umesh Chandra, learned senior Counsel has raised a preliminary objection that in view of law laid down by Hon'ble the Apex Court in the case of Tamil Nadu Electricity Board and Another vs. N. Raju Reddiar and Another (1997) 9 Supreme Court Cases 736, the review petition is not maintainable as Shri Manoj Singh, Advocate who has filed the review petition was neither appeared as a counsel on behalf of the review petitioner nor argued on their behalf in the writ petition. So, the review petition is not maintainable, liable to be dismissed on the said ground.

* * *

Applying the abovesaid settled proposition of law in the present case, I don't find any good ground and reason taken by review petitioner in the matter in question for review of judgment and order dated 3.12.2004 passed in Writ Petition No. 1827 (SS) of 1997, and also in view of the

law laid down by Hon'ble the Apex Court in the case of Tamil Nadu Electricity Board and Another vs. N. Raju Reddiar and Another (1997) 9 Supreme Court Cases 736, same is liable to be dismissed.

21. The aforesaid decision of the Hon'ble Supreme Court was followed by a Division Bench of this Court in **Vinita Bhatnagar versus Union of India** 2018 SCC OnLine All 6411, in which this Court held that: -

*"It is well-settled that a review application ought not to have been filed by a Counsel who has not argued the matter but ought to have been filed by the same Counsel who has earlier argued the matter. In **T. N. Electricity Board** v. N. Raju Reddiar (1997) 9 SCC 736 the Apex Court has deprecated the practice of arguing the matter by one Counsel and review by another Counsel and has observed that the review application ought to have been filed by the, same Counsel who has argued the matter."*

22. In the present case also, earlier the review petitioner had initially engaged Sri. Suresh Kumar Singh and Sri. Umesh Singh Advocates. Thereafter he had engaged Sri. Balkeshwar Srivastava and Sri. Pankaj Kumar Srivastava Advocates. He had filed a counter affidavit through Sri. Balkeshwar Srivastava. Sri Jai Singh - the petitioner in Writ C No.13864 of 2019, had filed Review Application No. 153668 of 2019 and the opposite party no. 4 Tej Narayan Soni had filed an application for rejection of application for condonation of delay in filing the review petition, an Application for dismissal of review application and a supplementary counter affidavit through Sri. Pankaj Kumar Srivastava, Advocate. On 16.09.2021, the opposite party no. 4 Sri. Tej Narayan Soni had filed C.M.An.No. 120260 of 2021 through Sri. Pankaj Kumar Srivastava, Advocate for modification / recall of the order dated 31.08.2021 passed in the Writ Petition. Subsequently the opposite party no. 4 engaged Ms. Pushpila Bisht Advocate, who assisted Sri. J. N. Mathur Senior Advocate. The application for modification / recall of the order dated 31.08.2021 was rejected by means of an order dated 29.09.2021. The opposite party no. 4 Tej Narayan Soni, challenged the aforesaid order dated 31.08.2021 by filing Special Leave Petition (Civil) No. 13769 of 2021, but during pendency of the aforesaid S.L.P., on 10.01.2022 the opposite party no.4 Tej Narayan Soni filed the instant application through Sri Raj Vikram Singh, Advocate, seeking review of the order dated 29.08.2019

23. In view of the law laid down by the Hon'ble Supreme Court in **T. N. Electricity Board** (Supra) and by this Court in **U. P. State Agro Industrial Corporation Ltd. versus Anil Kumar Mishra and Vinita Bhatnagar versus Union of India** (Supra), the review application filed by the opposite party no.4 Tej Narayan Soni through Sri Raj Vikram Singh, Advocate, who had not filed the pleadings in the Writ Proceedings and who had not advanced submissions on behalf of the opposite party no. 4 Tej Narayan Soni at any stage and who filed his Vakalatnama in the Writ Petition when nothing was pending before the Writ Court, cannot be entertained and the same is liable to be dismissed on this ground alone.

24. Moreover, earlier the opposite party no. 4 Tej Narayan Soni had filed an application for modification / recall of the order dated 31.08.2021 passed in the Writ Petition, which was rejected by means of

an order dated 29.09.2021. The opposite party no. 4 Tej Narayan Soni, challenged the aforesaid order dated 31.08.2021 by filing Special Leave Petition (Civil) No. 13769 of 2021 and the aforesaid S.L.P. has been dismissed as withdrawn on 08.02.2022, without any liberty having been granted by the Hon'ble Supreme Court for availing any other remedy. In substance, the prayer made in the Review Petition is the same as was made in the application for Modification / recall of the order. For this reason also, the Review Petition does not deserve to be entertained in view of the law laid down in **T. N. Electricity Board** (Supra) that *"Once the petition for review is dismissed, no application for clarification should be filed, much less with the change of the Advocate-on-Record. This practice of changing the advocates and filing repeated petitions should be deprecated with a heavy hand for purity of administration of law and salutary and healthy practice."*

25. However, we proceed to examine the Review Petition to ascertain as to whether any failure of justice would be caused by dismissal of the Review Petition.

26. The first ground pressed by the learned counsel for the review petitioner is that the petitioner of the Writ Petition has got no locus-standi as he is not the registered owner of House No. 216. This plea is not open to be raised for the first time in a review petition because a review is not a rehearing in disguise.

27. The scope of review jurisdiction is no longer res-integra and it is well settled through a catena of decisions and it has been summarized Vinita Bhatnagar versus Union of India (Supra) in the following manner: -

"3. An application for review cannot be treated to be an opportunity to argue the case on merits afresh. In the garb of a review application re-argument on merits of the case cannot be allowed.

4. In Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh, AIR 1964 SC 1372 the Court said:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

5. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389 the Court said:

"... there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of, Appeal. A power of review is not to be confused with appellate powers which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

6. Again, in Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170 while quoting with approval the above passage from Abhiram Taleshwar Sharma

v. Abhiram Pishak Shartn (supra), the Court once again held that renew proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1, C.P.C.

7. In Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715 it was held that an error, which is not self evident and has to be detected by process of reasoning, can hardly be said to be error apparent on the face of the record justifying the Court to exercise powers of review in exercise of review jurisdiction.

8. In Rajendra Kumar v. Rambai, (2002) 48 ALR 331 (SC) the Apex Court has observed about limited scope of judicial intervention at the time of review of the judgment and said:

"The limitations on exercise of the power of review are well-settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed."

9. Thus, Review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In Lily Thomas v. Union of India (2000) 6 SCC 224 : AIR 2000 SC 1650, the Court said that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in Inderchand Jain v. Motilal (2009) 76 ALR 782 (SC). In Kamlesh Verma v. Mayawati, (2013) 8 SCC 320 the Court said:

"19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1 of C.P.C. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the Principles:

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in Chhajju Ram v. Neki,AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese and Iron Ores Ltd. (2013) 8 SCC 337

22.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the Appellate Court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

28. Examining the facts of the present case in light of the law regarding scope of review, we find that the petitioner of the Writ Petition brought certain facts before this Court by filing Writ Petition No.13864 (MB) of 2019 and after inviting counter affidavit, this Court was satisfied that some illegal constructions have been raised by the present review petitioner - some of which some are compoundable and some are non- compoundable and the Writ Petition was disposed of without issuing any direction, by merely expressing an expectation that the Parishad will take a decision in accordance with law. Whether the petitioner of the aforesaid Writ Petition is the owner of House No.216 or not, would not make any difference on the legality or otherwise of the structures raised by the review petitioner and we do not find any error, what to say about an error which is apparent on the face of the record, in the order dated 29.08.2019 disposing of the Writ Petition without issuing any direction to demolish the premises which is non-compoundable and merely recording an expectation that the Parishad will take appropriate decision in accordance with the law.

29. The second ground pressed by the learned counsel for the review applicant is that earlier the Compounding Bye-laws 2010 were in force which required a larger area to be left as set-back, including side set-back and back set-back. In the year 2020, a new Compounding Scheme has been framed, under which the requirement of side set-back and rear set-back has been done away with. The learned counsel for the petitioner has submitted that the constructions in question are compoundable under the amended Scheme and the same are not liable to be demolished.

30. Replying to the aforesaid submissions, Sri Ratnesh Chandra, the learned counsel for the U.P. Avas Evam Vikas Parishad has submitted that operation of the Amended Rules of has been stayed by means of an order dated 07.10.2020 passed by this Court sitting at Allahabad in Writ-C No.15757 of 2020. Sri Chandra has very fairly submitted that under the amended Scheme, the review application would be entitled to some benefits as the compoundable area under the amended Rules will be larger than that under the un-amended Rules.

31. Be that as it may, the petitioner has already filed Writ C No.1362 of 2022 and

on 05.03.2022 a coordinate Bench of this Court has passed the following order in that Writ Petition: -

"Accordingly, in our opinion, the review application filed by the petitioner needs to be heard at an early date.

Having regard to the totality of the facts and circumstances of the case, we find it appropriate to provide that till the next date of listing, pursuant to the impugned notice dated 02.03.2022, no demolition/eviction in respect of House No.B-218, Sector 17, Rajajipuram, Lucknow shall take place."

32. Thus, the validity of the demolition notice dated 02.03.2022 is under question before this Court in Writ C No.1362 of 2022 and the petitioner has already been granted interim protection in the aforesaid

Writ Petition and these grounds cannot be raised as a ground of review for the order dated 29.08.2019, passed in Writ C No.13684 of 2019, wherein the review petitioner had filed a counter affidavit and the plea of amendment in the relevant Rules had not been raised and, therefore, this Court has not decided that plea. Failure of this Court to decide a plea that has not been raised, cannot be termed as an error apparent on the face of the record.

33. As such, having considered the submissions made on behalf of the parties, we find ourselves unable to agree with the submissions made by the learned counsel for the review petitioner and we do not find any error, much less an error apparent on the face of the record, in the order dated 29.08.2019, passed in Writ C No.13864 of 2019.

34. The review petition/ application lacks merit and the same is accordingly ***dismissed.***

(2023) 4 ILRA 1380
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.03.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 1292 of 2021

Ravi Shankar Saini & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Mukteshwar Mishra, Sri Abhay Nath Misra

Counsel for the Opposite Parties:
G.A., Sri Onkar Singh

Criminal Law–Application under Section 482 CrPC– quashing of proceedings-under Sections 498A, 323, 504, 506 IPC and Sections 3/4 Dowry Prohibition Act-compromise deed executed between the parties-withdrawal of all cases between them- Petition for mutual divorce under Section 13B of the Hindu Marriages Act, 1956 is pending before the Family Court-cooling off period of six months waived- in light of compromise between the parties-criminal proceedings under challenge quashed-Application allowed.

HELD:
High lighting the aforesaid facts, learned counsel for the applicants, learned counsel for the opposite party no.2 and learned AGA for the State submit that they have no objection if this Court may direct the Principal Judge, Family Court, Faizabad to decide the petition filed under section 13B of the Hindu Marriage Act, 1955 expeditiously within short period, waiving the cooling off period of six months in view of the judgement passed by Hon'ble Supreme

Court in the case of Amardeep Singh Vs. Harveen Kaur: AIR 2017 SC 4417 and further order passed by the Division Bench of this Court in First Appeal Defective No. 392 of 2019: Shalini Massey Vs. Neeraj Samuel Dass, decided on 07.01.2020. They further submit that the provision of cooling off period is not mandatory but is a directory provision and the Family Court where the petition is pending under Section 13-B of the Hindu Marriage Act can waive off the period of six month as the parties have decided for judicial separation.

Application allowed. (E-14)

List of Cases cited:

1. Amardeep Singh Vs Harveen Kaur: AIR 2017 SC 4417

2. First Appeal Defective No. 392 of 2019: Shalini Massey Vs. Neeraj Samuel Dass, decided on 07.01.2020

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Mukteshwar Mishra, learned counsel for the applicants, Shri Onkar Singh,learned counsel for the opposite party No.2 and Shri Diwakar Singh, learned A.G.A. for State.

2. This application under Section 482 Cr.P.C. has been filed with a prayer to quash the impugned summoning order dated 05.01.2021 passed by the Civil Judge (Junior Division)4th, Faizabad in Criminal Case No. 04 of 2021 arising out of case crime No. 103 of 2020, under sections 498A, 323, 504, 506 IPC and 3/4 Dowry Prohibition Act, Police Station-Ram Janam Bhoomi, District Ayodhya and the impugned chargesheet as well as the proceeding of the aforesaid Criminal CaseNo. 04 of 2021 pending in the court of Civil Judge (Junior Division) 4th, Faizabad.

3. In Compliance of this Court's order dated 14-03-2023 applicant no.1- Ravi Shankar Saini and opposite party no.2-Smt. Mamta Suman alongwith her minor daughter namely Dipti Saini are present in person before this Court. They are identified by their respective counsels.

4. Applicant no.1-Ravi Shankar Saini has handed over copy of original daft of Rs. 7,00,000/- bearing no. 140963 dated 10-03-2023 of Punjab National Bank and also copy of original certificate of Fixed Deposit (F.D.) of Rs.3,00,000/- of State Bank of India, Branch Urdu Bazar, Gorakhpur dated 17.03.2023 in the name of Dipti Saini under the guardianship of her mother Smt. Mamta Suman, to opposite party no.2-Smt Mamta Suman in Court today through her advocate Shri Onkar Singh as one time final alimony for settlement. The receipts of the aforesaid draft andFixed Deposit certificate are taken on record.

5. Applicant No.1-Ravi Shankar Saini stated before this Court that he is ready to return the Grand i-10 car which he received at the time of marriage as gift, in a good condition to the opposite party no.2-Smt. Mamta Suman.

6. Applicant No.1-Ravi Shankar Saini and opposite party no.2-Mamta Suman have also stated before this Court that they shall withdraw their cases either civil or criminal filed against each other or their family members.

7. Learned counsel for the applicants submits that in compliance of this Court's order dated 14.03.2023, both the parties appeared before the Senior Registrar, High Court, Lucknow Bench, Lucknow on 27.03.2023 for verification of compromise

deed. The Senior Registrar, High Court, Lucknow Bench, Lucknow verified the compromise deed on 27.3.2023 and submitted its report dated 27.3.2023 which is reproduced herein-below:-

"Vide Hon'ble Court's order dated 14-03-2023, both parties were directed to appear before the undersigned today for verification of compromise deed. The said compromise deed is annexed as Annexure No. A-1 to C.M. Application No. IA 9 of 2023.

Today, Petitioners, namely (1) Ravi Shankar Saini S/o Rajendra Prasad Saini, (2) Rajendra Saini S/o Late Gulab Chandra Saini, (3) Smt. Laxmi Saini W/o Rajendra Saini and (4) Smt. Roma Saini W/o Praveen Saini alongwith their learned counsel Shri Muketeshwar Mishra, Advocate and opposite party no. 2 Smt. Mamta Suman W/o Ravi Shankar Saini D/o Nand Lal Suman alongwith her learned counsel Shri Onkar Singh, Advocate are present before me. Vakalatnama of both the counsels are on record. The proof of identity i.e. Aadhar Card is produced by both the parties, at the time of verification.

The contents of said compromise deed have been read over and explained to both the parties to the compromise deed and they have stated that they have executed the same according to their free will and as a token there of they have affixed their photographs, put RTIs and signatures, which are duly attested and verified by their respective counsels.

In view of the said facts, the compromise between petitioners, namely (1) Ravi Shankar Saini S/o Rajendra Prasad Saini, (2) Rajendra Saini s/o Late Gulab Chandra Saini, (3) Smt. Laxmi Saini W/o Rajendra Saini and (4) Smt. Roma Saini W/o Praveen Saini and opposite party no. 2 Smt. Mamta Suman W/o Ravi Shankar Saini D/o Nand Lal Suman is being verified by me today i.e. 27th day of March, 2023.

The report is submitted before Hon'ble Court for orders."

8. Learned counsel for the applicants further submits that in compliance of this Court's order dated 14.3.2023 the parties have filed a petition under section 13-B of the Hindu Marriage Act, 1955 in the court of Principal Judge, Family Court, Faizabad on 21.3.2023, a certified copy thereof is given to this Court, which is taken on record.

9. Thus, the parties have already entered into compromise and the terms of compromise have already been verified by the Senior Registrar, High Court, Lucknow Bench, Lucknow on 27-03-2023 and the parties have already filed a petition under section 13B of the Hindu Marriage Act, 1955 in the court of Principal Judge, Family Court, Faizabad on 21-03-2023,

10. High lighting the aforesaid facts, learned counsel for the applicants, learned counsel for the opposite party no.2 and learned AGA for the State submit that they have no objection if this Court may direct the Principal Judge, Family Court, Faizabad to decide the petition filed under section 13B of the Hindu Marriage Act, 1955 expeditiously within short period, waiving the cooling off period of six months in view of the judgement passed by Hon'ble Supreme Court in the case of **Amardeep Singh Vs. Harveen Kaur: AIR 2017 SC 4417** and further order passed by the Division Bench of this Court in **First Appeal Defective No. 392 of**

2019: Shalini Massey Vs. Neeraj Samuel Dass, decided on 07.01.2020. They further submit that the provision of cooling off period is not mandatory but is a directory provision and the Family Court where the petition is pending under Section 13-B of the Hindu Marriage Act can waive off the period of six month as the parties have decided for judicial separation.

11. As the dispute between the parties have almost settled and only legal impediment is being done for their separation, thus no useful purpose will be served in delaying the proceedings of the petition filed under Section 13-B of the Hindu Marriage Act, 1955 in the court of Principal Judge, Family Court, Faizabad.

12. Learned counsel for the opposite party no.2 and learned AGA for the State submit that as the dispute between the parties have already been settled by way of compromise and the compromise deed has been verified by the Senior Registrar, High Court, Lucknow Bench, Lucknow, they have no objection if the proceeding of the aforesaid case pending before court below is quashed.

13. Accordingly, in view of the arguments as advanced by the learned counsel for the parties as well the statements of the parties and also in view of the judgment referred to above, the Principal Judge, Family Court, Faizabad is hereby directed to decide and pass the order expeditiously in accordance with law in the petition filed by both the parties under Section 13-B of the Hindu Marriage Act by waiving off the cooling period of six months, in view of the judgement of Hon'ble Supreme Court passed in **Amardeep Singh (Supra)** and the judgment of the Division Bench of this Court passed in **Shalini Massey (supra)**, without granting any unnecessary adjournment to either of the parties unless there is some legal impediment or unless there is any order passed by the higher court staying the proceedings of the case.

14. Applicant no.1-Ravi Shanker Saini is directed to return the Grand i-10 car which he received at the time of marriage as gift, in a good condition to the opposite party no.2-Smt. Mamta Suman, within 15 days after passing of the decree under Section 13-B of the Hindu Marriage Act, 1955.

15. It is also directed that any case either civil or criminal filed by both the parties against each other or their family members shall be withdrawn by the parties within 15 days after passing of the decree under Section 13-B of the Hindu Marriage Act, 1955.

16. The parties are free to live their independent lives after the decree is passed under section 13-B of the Hindu Marriage Act, 1955. The applicant no.1-Ravi Shankar Saini is free to visit and meet her minor daughter Dipti Saini on 4th Sunday of each month between 10.00 AM to 1.00 PM. Opposite party no.2-Smt. Mamta Suman shall not make any hindrance in their meeting.

17. In view of the above, the present application under section 482 Cr.P.C. stands **allowed** and the impugned summoning order dated 05.01.2021 passed by the Civil Judge (Junior Division) 4th, Faizabad in Criminal Case No. 04 of 2021 arising out of case crime No. 103 of 2020, under sections 498A, 323, 504, 506 IPC and 3/4 Dowry Prohibition Act, Police Station- Ram Janam Bhoomi, District Ayodhya and the impugned chargesheet as well as the proceeding of the aforesaid Criminal Case No. 04 of 2021 pending in the court of

Civil Judge (Junior Division) 4th, Faizabad are quashed so far as its relates to applicants.

18. The party shall file computer generated copy of such order downloaded from the official website of High Court, Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

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

(2023) 4 ILRA 1384
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

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

Criminal Appeal No. 1092 of 2005
With
Criminal Appeal No. 1884 of 2005

Shyam Behari Mishra & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Jagdish Singh Sengar, Sri Anuj Srivastava, Sri Mohd. Raghib Ali Ac, Sri Saghir Ahmad (Sn. Adv.)

Counsel for the Opposite Party:
G.A., Sri V.K. Barawal, Sri Vivek Kumar Shukla

Criminal Law–Appeal-Conviction under Section 302 and 307 read with section 34 IPC-old enmity regarding land between the parties-motive behind the crime-defence could not create any doubt about the FIR being lodged ante-dated and ante-timed-investigation started just after lodging of FIR-inquest is not a substantive piece of evidence-no need of previously lodged FIR-contents of FIR, inquest and oral evidence-conformity with each other-no contradiction between ocular and medical evidence-testimony of related and family members can be relied upon-proper scrutiny and cautious appreciation of evidence necessary-report of FSL admissible in evidence under Sectio 293 of CrPC-mere non-recording of statements of some witnesses does not create doubt-mere faulty investigation-delay in recording statement of witness not fatal for the prosecution-defective framing of charge of no consequence-unless it results in failure of justice-plea of alibi rejected-all defence witnesses are colleagues of the accused-prior meeting of mind present-conviction rightly under Section 34 IPC-no infirmity in judgement of the trial court-conviction upheld-appeal dismissed. (Paras 28, 29, 30, 33, 34, 44, 49,60,63 and 67)

HELD:
In this case defence could not create any doubt about the F.I.R. being lodged ante-dated and ante-timed. The investigation started just after the F.I.R. was lodged. After few hours the deceased had been declared brought dead and the proceeding of inquest and post-mortem had been started. The I.O. had visited the spot and prepared map and had also recorded statement of informant, therefore, only delay in sending the report/copy of the F.I.R. to the Magistrate under Section 157 Cr.P.C. is not fatal for the prosecution and in no way affects the merit of the case. (Para 28)

This Court is of the opinion that for inquest there is no need of previously lodged F.I.R. Suppose an unidentified dead body is found and no FIR is being lodged, in that case, the police shall visit the place and shall take the dead body in its possession and shall conduct inquest and post-mortem and shall publish news in media and newspaper, if after few days any person comes and claims the dead body and moves written complaint to lodge the F.I.R., it cannot

be said that there was no occasion to conduct the inquest proceeding. In this case F.I.R. had already been lodged though copy of the chick F.I.R. was not with the Kotwali police while conducting the inquest. Hence, according to this court there is no scope of argument at this point. (Para 29)

On 11.4.2000 at 2:00 pm autopsy was conducted by P.W.5 Dr. K.N. Joshi wherein he found fire arm wound of entry on the right side of chest 4 cm below right nipple size 3 cm X 1 cm, margins inverted, charring, blackening and tattooing present, 63 small pellets with one wad recovered from the thorax cavity. According to the doctor, the cause of death was shock and haemorrhage as a result of ante -mortem injury. Thus the contents of F.I.R., inquest and oral evidence and post-mortem report and evidence of the doctor are in conformity with each other. It is also established that deceased was shot at a very close range. (Para 30)

In this case it has been concluded that witnesses observed the commission of crime from behind and due a little distance between the accused and the deceased they thought that the deceased had been shot from a contact range but virtually it was a close range shot by the accused. Therefore, the charring, blackening and tattooing were found on the wound of entry. (Para 33)

On the basis of the overall discussion this Court is of the considered view that there is no infirmity in the judgment and order of conviction passed by the learned trial Court. The prosecution has proved its case beyond all reasonable doubts. The order of sentencing is also proper. It is neither harsh nor punitive and has been awarded the minimum sentence which meets the ends of justice. The appeals lack merit and are liable to be dismissed. (Para 67)

Appeal dismissed. (E-14)

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2.Harphool and Ramjeevan Vs St. of Raj., 2002 SCC Online, Raj 988

3.Saddik @ Lalo Gulam Hussein Shaikh & ors. Vs St. of Guj., (2016) 10 SCC 663

4.Rajkishori Devi Widow(deceased) Vs St. of U.P. & ors.

5.Raj Gopal Vs Muthupandi @ Thavakkalai & ors., (2017) 11 SCC 120

6.Girish Yadav & ors. Vs St. of M.P. (1996) 8 SCC 186

7.Prem Nath Yadav Vs St. of U.P. 2022 (2) ACR 1065 (L.B.)

8.Maharaj Singh Vs St. of U.P. (1994) 5 SCC 188

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10. St. of U.P. Vs Gokaran & ors., AIR 1985 SC 131

11.Pala Singh Vs St. of Pun., AIR 1972 SC 2679

12. Anil Rai Vs St. of Bih., 2001 7 SCC 318

13.St. of Pun. Vs Hakam Singh (2005) 7 SCC 408

14. St. of Karnataka Vs Moin Patel, (1996) 8 SCC 167

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16.Radha Mohan Singh alias Lal Saheb Vs St. of U.P., 2006 (54) ACC 86

17.Podda Narain Vs St. of A.P., AIR 1975 SC 1252

18. Budh Singh Vs St. of MP, AIR 2007 SC (Suppl) 267

19.Swaran Singh Vs St. of Pun., AIR 2000 SC 2017

20.Bharat Singh Vs St. of UP, AIR 1999 SC 717

21.Sarvesh Narain Shukla Vs Daroga Singh, AIR 2008 SC 320

22.Ram Swaroop Vs St. of U.P. 2000, (40) ACC 432 (SC)

23.Ramjee Rai Vs St. of Bih., 2007, (57) ACC 385 (SC

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

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27.Sucha Singh Vs St. of Pun., (2003) 7 SCC 270

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30.Ramesh Harijan Vs St. of U.P., (2012) 5 SCC 777

31.Shahaja @ Shahajan Ismail Mohd. Shaikh Vs St. of Mah., 2022 0 Supreme (SC) 569

32.Maqbool Vs St. of A.P., AIR 2011 SC 184

33.Sheo Shankar Singh Vs St. of Jhar., 2011, CrLJ 2139 (SC)

34. Dhanaj Singh Vs St. of Pun., (2004) 3 SCC 654

35.Keshav Lal Vs St. of M.P., (2002) 3 SCC 254

36.M.K. Upadhyaya Vs St. of A.P., (2012) 3 SCC (Cri.) 42

37. Leela Ram Vs St., (1999) 9 SCC 525,

38.Anand Mohan Vs St. of Bih., (2012) 3 SCC (Cri.) 328

39.Mohd. Mian Vs St. of U.P., (2011) 2 SCC (Cri.) 694

40.Krishna Pal Vs St. of U.P. AIR 1996 SC 733

41.Ramdev & anr. Vs St. of Raj. 2003 CrLJ (1680)

42.Suradhani Darbar Vs St. of West Bengal 2004 (3) Crimes 196 Culcutta High Court DB

43. State (NCT of Delhi) Vs Navjot Sandhu, AIR 2005 SC 3820

44.Commissioner of I.T. Vs Kamla Town Trust, (1196) 7 SCC 349

45. Binay Kumar Singh Vs St. of Bih., AIR 1997 SC 322

46.Sandeep Vs St. of U.P, (2012) 6 SCC 107

47.Shaik Sattar Vs St. of Mah., (2010) 8 SCC 430

48.Om Prakash Vs St. of Raj. & anr., (2012) 5 SCC 201

49. Adalat Pandit Vs St. of Bih. (2010) 6 SCC 469

50.Saidu Khan Vs St., AIR 1951 All. 21 (FB)

51.Pyare Lal Vs St. of U.P., 1987 SC 852

52.Nand Kishore Vs St. of M.P. (2011) 4 Cri LJ 4243 (SC)

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54. Barendra Kumar Ghosh Vs King Emperor, AIR 1925 PC 1

55.Pyarelal Vs St. of U.P, AIR 1987 SC 852

56. Jagdish Murav Vs St. of U.P. 2006 Law Suit (SC) 686

57. Maruti Rama Naik Vs St. of Mah., 2003 0 Supreme (SC)

58. Sampath Kumar Vs Inspector of Police Krishnagiri, AIR 2011 SC 1249

59.St. of U.P. Vs Parshuram Yadav, 2005 0 Supreme (All.) 1309 DB

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61. Samsul Haque Vs St. of Assam AIR 2019 SC 4163

62. Ganesh Bhavan Patel & anr. Vs St. of Mah., 1978 0 Supreme (SC) 323

63.Sukh Dev Vs St. of U.P., 2017 SCC Online All 2992

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

1. These two appeals have been preferred against the judgment and order dated 2.3.2005 passed by Additional Sessions Judge Court No.5, Allahabad, in S.T. No. 807 of 2000 State Vs. Shyam Bihari Mishra and Others, under Section 302 read with Section 34 IPC and Section 307 read with Section 34 IPC. Police Station Sarai Inayat, District- Allahabad, convicting and sentencing the appellants under Section 302 read with Section 34 IPC for life imprisonment and under Section 307 read with Section 34 IPC for 3 years rigorous imprisonment. Both sentences were directed to run concurrently.

2. In brief, the facts of the case are that informant Shiv Prakash Tiwari r/o Kotwa, police station- Sarai Inayat, Allahabad presented a tehrir Ex. Ka-1 on 10.4.2000 at 9:30 a.m. stating therein that today at about 8:30 am, his brother Jai Prakash Tiwari was returning after worshiping at Goddess Maa Endree Devi Temple with nephew (Bhanja) Kuldeep Mishra on a scooter when he reached near his house, he slowed down his scooter due to drain, Shyam Bihari Mishra exhorted to kill him, his son Bimal Kumar Mishra stopped his scooter from the front and Kamal Mishra, placed a country made fire-arm on the chest of his brother Jai Prakash and fired. Hearing the sound of the fire he, Pawan Tiwari and Jai Hind reached the spot and saw the occurrence and chased the accused persons. In the meantime, Vimal Kumar Mishra with the intention to kill him also fired at him (confront). He ducked behind a pile of new bricks. Therefore, the bullet did not hit him. According to the informant there was old land enmity between the parties. His brother Jai Prakash is in a serious condition, he requested to lodge the F.I.R.

3. On the basis of Tehrir Ex. Ka-1, Chick F.I.R. Ex. Ka-8 was prepared. P.W.6 S.O. Kripa Shankar Dixit started investigation. He reached on the spot and took sample of blood stained and plain soil and prepared recovery memo Ex. Ka-4 and spot map Ex. Ka-4. He searched the house of accused persons and prepared recovery memo Ex. Ka-5. The injured Jai Prakash Tiwari was first of all taken to the police station wherefrom he was sent to Swaroop Rani Nehru Hospital, Allahabad, where he was declared brought dead. There, Chauki Incharge Kotwali, Sant Kumar Chaturvedi prepared inquest report and body was sent for post-mortem to Mortuary on 11.4.2000 at 2:00 p.m. where Dr. K.N. Joshi conducted the autopsy. On 20.4.2000 after getting information about the basement in the house of the accused persons the I.O. visited and searched the house of the accused persons but nothing incriminating was recovered.

4. On 28.4.2000, alleged weapon used in commission of crime was recovered upon the pointing of accused persons from their house containing one country made fire arm of 303 bore, two live cartridges of 303 bore and 12 bombs of which recovery memo Ex. Ka 5 was prepared.

5. After investigation, charge-sheet was submitted under Section 302, 307 and 504 /34 of IPC. The case was committed to

the Court of Sessions and thereafter it was transferred to the Court of Additional Sessions Judge, Court No.6, Allahabad, who framed the charges under Section 302/34 and 307/34 IPC. Accused persons denied the charges and sought trial.

6. Prosecution examined following witnesses to prove the charges

P.W.1	Shiv Prakash Tiwari, informant
P.W.2	Satya Prakash Tiwari, scribe, independent witness
P.W.3	Jai Hind Singh, Independent witness
P.W.4	Pawan Tiwari, son of the deceased.
P.W.5	Dr. K.N.Joshi, who did autopsy.
P.W.6	Kripa Shankar Dixit, the then S.O and I.O. of the case,
P.W.7	Badri Prasad Mishra, constable moharrir,
P.W.8	Sant Kumar Chaturvedi, who prepared inquest

Documentary evidence:

Ex. Ka-1	Tehrir
Ex. Ka-2	Post-mortem report
Ex. Ka-3 & Ex. Ka- 6	Site plans
Ex. Ka-4	Blood stained soil
Ex. Ka-5	Search memo
Ex. Ka-7	Charge-sheet
Ex. Ka-8	Chick F.I.R.
Ex. Ka-9 & Ex. Ka- 10	G.D. and return G.D.
Ex. Ka-11	Inquest
Ex. Ka-12 & Ex. Ka-18	Letter to R.I., letter to C.M.O., challan nash, photo nash

7. Paper no. 10, F.S.L. Report which is not exhibited but is admissible in evidence under Section 293 Cr.P.C.

8. Defence witness:

D.W.1	Surendra Prasad Mishra
D.W.2	Radhey Shyam Sharma
D.W.3	Mahesh Chandra Mishra
D.W.4	Shitla Prasad

9. Documentary evidence :

Ex. Kha-1	Order tax officer
Ex. Kha-2	Report dated 10.4.2000
Ex. Kha-3	Receipt of Rs. 570 dated 10.4.2000
Ex. Kha-4	Photo copy of the attendance register.

10. In criminal appeal no. 1092 of 2005, accused Shyam Bihari Mishra and Vimal Kumar Mishra and in criminal appeal no. 1884 of 2005, accused Kamal Mishra, have taken the ground that the conviction of the appellants is against the weight of evidence on record and bad in the eyes of law, the sentences are too severe, therefore, the appeal be allowed and judgment and order dated 2.3.2005 be set-aside.

11. P.W.1, Shiv Prakash Tiwari, deposed that on 10.4.2000 at 8:30 am, his elder brother Jai Prakash Tiwari accompanied by nephew (Bhanja), Kuldeep Mishra, was returning after worshiping at the Goddess Maa Endree Devi Temple. When he reached near the shop of Meenu Malviya and slowed down his scooter due to drain, Shyam Bihari Mishra who along with his two sons namely Kamal Mishra and Bimal Mishra, was standing in the nearby street, exhorted his sons Bimal Mishra and Kamal Mishra, to kill Jai Prakash Tiwari. At this point, Bimal Mishra caught the scooter from the front and Kamal Mishra, shot him with a country made fire arm which hit Jai Prakash Mishra on the chest. Thereafter, P.W.1 along with Jai Hind Singh and Pawan Tiwari ran towards the place of the incident; he was at the fore so Bimal Mishra also tried to kill him and fired at him but he hid himself behind the pile of new bricks. The accused persons ran towards their home in a Marshal Jeep No. UP 70 K 9145 driven by Kamal Mishra and escaped. Thereafter, they brought Jai Prakash Singh home and P.W.1, got a tehrir (Ex. Ka-1) scribed by Satya Prakash Tiwari. This witness recognized the tehrir, its contents, his signature thereon and proved it. He along with the report and the injured went to police station Sarai Inayat, presented it to the constable-clerk and lodged the F.I.R. Thereafter constable 1740 Jeet Bahadur Singh was sent along with the injured to Swaroop Rani Hospital but on the way his brother succumbed to fire arm injury. There was old enmity on account of purchase of land Arazi No. 1005 from Sudarshan s/o Sundar for which accused persons killed his brother by shooting him. I.O. had recorded his statement at his house.

12. This witness further deposed that he is driver in R.T.O. Allahabad. There was no duty scheduled, he used to go to duty on call. He lives in a rented house in Allahabad. At the time of the incident he was posted in Pratapgarh and on the date of incident he was present at his house. On 9.4.2009 he had come from Pratapgarh after taking two days casual leave for Darshan of Goddess Vindhyachal as Navratri was going on. He had informed his office for extension of leave due to the murder of his brother. He admits that there was government hospital in his village. P.W.1 further deposed that between the hospital and the government road, 18 biswa land of Sudarshan is situated which was purchased through registered agreement by three persons including Senior Vajpayi son of Kalika Vajpayi. He got sale deed executed from Sudarshan, rest two persons had also purchased 3 biswa land each through sale deed. He denied that he got the remaining 5 biswa land in the name of his sister but he and Vinay Vajpayee had executed sale deed from their share. He expressed ignorance that Sudarshan had also executed sale deed for about 4 biswa of land in favour of Purushottam Dubey and name of vendee had been mutated. He also expressed ignorance that on 31.1.2000 Purushottam Dubey had executed power of attorney in favour of accused Kamal Mishra. He admits that Kuldeep Mishra (not examined) son of his sister has purchased 5 biswa land of the aforesaid plot. He denied that he alongwith Kuldeep Mishra wanted to grab the land illegally which was prevented by Purshottam Dubey.

13. Shyam Bihari Mishra, does service in Nagar Mahapalika, Allahabad, he does not know whether he was working there as an Inspector. This witness further deposed that at the time of occurrence he was present on the spot. Maa Indree Devi Temple is 2-1/2 km away towards south. His brother Jai Prakash Tiwari had gone for worshiping at about 7:45 am. Jai Prakash used to go there regularly with Dolchi and other worship materials which were hanging on the scooter and had not fallen down.

14. In cross-examination this witness deposed that after death of his brother at about 11:30 a.m., he directly returned to his house and had not gone to the police station. He had not informed the police station Sarai Inayat about the death of his brother. The constable who accompanied him to the hospital had not come with him. He does not know as to when the constable reached the police station. He spent a day and night at his house. I. O. was also there who had recorded his statement the next day. He had come to the post-mortem house next day. He admits that he had mentioned in his Tehrir that accused were standing in the street adjacent to Meenu Malviya's shop. He did not remember as to whether this fact was stated by him to the I.O. as he was perturbed due to the murder of his brother. He deposed that he had mentioned the fact that Bimal had caught the scooter, if this fact is not written in Tehrir, he cannot assign any reason. He further deposed that Bimal had stopped the scooter but had not stated about the catching of the scooter. On being asked as to whether Bimal had caught the scooter or not, he replied that Bimal had stopped the scooter by standing in front of it. He admitted that he had mentioned the fact that at the time of incident, he was standing at his door and had seen the occurrence, if it was not written in tehrir or in his statement, he cannot assign the reason. He has admitted that Kamal Mishra had run away by plying vehicle, if this fact was not recorded by the I.O, he cannot assign the reason. He deposed that the house of the accused persons is 150 meter away towards north-east from the place of occurrence. He further deposed that from the place of occurrence the house of the accused persons is towards which direction and how many yards away can be told by Lekhpal. He further deposed that it would have taken 15-20 minutes in writing the Tehrir. Jai Prakash Tiwari was laying at the door on a cot. There was no blood on the door. There must have been blood on the cot which was seen by the I.O. After writing Tehrir, the injured was carried in a Commander Jeep of Chandra Dev Tripathi. There was no blood on his clothes because the body was kept above. They reached police station at 9:00 am and from there at about 9:30 they were sent to the hospital in the same Commander Jeep. At the same time his brother's condition had also become critical. He thought information at the police station is more important than taking brother to the hospital. He repeatedly stated that his brother's condition was serious but was allowed to go to the hospital only after writing the FIR, it would have taken about one hour in reaching the hospital. They reached hospital at about 10:30 am, and they had come after crossing the crowded Shastri Bridge. They remained in the hospital for a mere five minutes and returned home from Sumo Car of his friend Agan Singh. He deposed that he had not taken his brother to the health center situated at his village as no staff was there. When deceased was shot, he was standing at his house about 40-45 steps away from the shop of Meenu Malviya. The pile of

brick belonged to Pancham Kant and was kept 4-5 months before the date of incident on a 7 feet wide lane.

This witness further deposed that when he reached, the I.O. met him at about 11;30 am. He dug the earth. Thereafter, the I.O. recorded his statement. On the place of occurrence there was brick and soil both. The scooter was left on the spot. When he reached home, the I.O. brought the scooter to the house. The I.O. remained in the village up to 2-2:30 pm. Senior officials had also visited the spot. He denied that he had not seen the incident. He also denied that report has been lodged after consultation and was ante-timed.

15. ***P.W.2, Satya Prakash Tiwari,*** deposed that on 10.4.2022, on the dictation of Shiv Prakash Tiwari, he had written the tehrir (Ex. Ka-1). After writing it was read out to him. He denied that he had written the tehrir at the police station on the dictation of S.I.

16. ***P.W.3, Jai Hind Singh***, is the independent eye witness who has deposed that he knows the accused persons and the informant. The incident occurred on 10.4.2000 at 8:30 a.m., he had talked to the informant, Shiv Prakash Tiwari, in the evening for going to Vindhyachal together. On the date of incident this witness had come at about 8:30 a.m. to the house of the informant. The informant told him that his brother would also go with them and at the moment he had gone for worshiping at Ma Endree Devi Temple. At around 8:30 a.m. Jai Prakash Tiwari, returned and reached in front of Meenu Malviya's shop, there was a drain so Jai Prakash Tiwari slowed down. At that moment, Shyam Bihari exhorted to kill Jai Prakash Tiwari, Bimal caught the handle of the scooter from the front and then Kamal Mishra putting country-made fire arm on the chest of Jai Prakash fired. When people ran, Shiv Prakash Tiwari was ahead of them. He was also shot by Katta by Bimal but it did'nt hit him due to wall of the added bricks. Apart from him, Pawan Kumar Tiwari, Shiv Prakash Tiwari and others had reached the place of occurrence and witnessed the incident.

In cross-examination this witness deposed that after one month of the incident, I.O. had recorded his statement. During this period he remained at his house. After the incident, first of all he came to the police station with the injured and thereafter had gone to the hospital. He had reached police station at about 9:00 a.m. and stayed there for 2-3 minutes and thereafter went to the hospital. When at about 9:15 a.m., he reached the hospital where the doctor informed that the injured has died. Thereafter, Shiv Prakash Tiwari went to the police station for giving information. The dead body remained in the hospital. Then I.O. and Shiv Prakash Tiwari reached at the hospital at about 10:30 a.m., the I.O. had sealed the dead body at about 11-12 a.m. He cannot say the exact time. After that the I.O. returned to the police station, he and other persons remained in the hospital the whole night because of friendship. Nobody got any money. Dead body was handed over at 3:00-3:30 hours. About firing, first of all he had informed the I.O. and in the Court, none else. The discussion continued in the village. He had told the I.O. that in the evening he had spoken to the informant for going to Vindhyachal together. Therefore, he had come to the house of the informant at 8:00 a.m. Deceased had gone to worship in Maa Endree Devi Temple. The informant told him that his brother/deceased would also accompany

them to Vindhyachal. This witness further deposed that if the above fact has not been written in his statement, he can not tell the reason. The I.O. had recorded his statement at his house. He did not remember the time. Later he deposed that I.O. had recorded his statement at about 12:00 to 1:00 p.m. He is not literate, he had signed the statement given to the I.O. The I.O. had said that same statement would be given in the Court. He further deposed that where the bullet was fired, is the house of Chandra Kant Shukla. There is khadanja/brick road in front of the house of Chandra Kant Shukla. On the east of the road, Meenu Malviya's grocery shop is situated, which was open at the time of incident. He had seen the occurrence from the north corner of the house of Chandra Kant Shukla, standing two steps west Kamal had fired at Jai Prakash Tiwari. When bullet hit Jai Prakash, Jai Prakash had fallen down. There was only one fire on Jai Prakash. The place of occurrence is not visible from his house. He denied that he had not witnessed the incident and out of friendship he was falsely testifying.

17. P.W.-4, Pawan Tiwari, is the son of the deceased who deposed that his father was murdered about two years ago. He was present on the spot at the time of his murder which took place at around 8:30 in the morning. His father was returning from Maa Endree Devi temple. His father slowed down his scooter due to the drain in front of Malviya's shop. There is a street next to the same shop in which accused Shyam Bihari Mishra, Kamal Mishra and Bimal Mishra were standing. Shyam Bihari Mishra exhorted to kill his father on which Bimal Mishra stopped the scooter forcefully and Kamal Mishra, taking out the fire arm shot at the chest of his father. He along with others was standing at the door of his house. His uncle, Shiv Prakash Tiwari was ahead of them. Bimal Mishra, opened fire at Shiv Prakash Tiwari. There was a brick wall where his uncle hid himself and did not get hurt by the bullet. Thereafter, they ran through the street in which accused were standing. They lifted his father and took him to the house where his uncle got written Tehrir. Thereafter, they carried the injured in a commander jeep to the police station where after 15-20 minutes a constable was provided with whom they went to Swaroop Rani Hospital where doctor informed that the injured has died.

This witness further deposed that there was some enmity regarding land between them and the accused persons due to which they had killed his father. The I.O. had recorded his statement at his house. Kuldeep Mishra was also sitting on the scooter of his father.

In cross-examination this witness deposed that after one and a half month the I.O. had recorded his statement, during this period he remained in his village. Before recording the statement he had not met with the I.O. He had informed the I.O. that nearby the street of Meenu Malviya's shop accused were standing. If this fact is not written by the I.O., he cannot say the reason. He had informed in his statement to the I.O. that they were standing at the door and when they ran towards the place of incident, they were led by uncle Shiv Prakash Tiwari. If this fact is not written in his statement, he cannot say the reason. He had also stated to the I.O. that his uncle saved himself behind the brick pile. If this fact is not written by the I.O., he cannot say the reason. He had stated to the I.O. that the street in which accused had hidden, they ran through the same street to their house. If this fact is not written by the I.O., he

cannot say the reason. He had stated to the I.O. that his uncle had dictated the tehrir sitting at the house. If this fact is not written by the I.O., he cannot say the reason. He had also stated to the I.O. that at the police station they were provided constable after 15-20 minutes for going to hospital, if this fact is not written by the I.O. in his statement, he can not say the reason. According to this Court such questions are not closely related to the facts in issue. If such minute description are neither asked by the I.O. nor stated by this witness under Section 161 Cr.P.C. will not impeach the credit of the witness.

Further, this witness deposed that at some distance there is the house of Chandra Kant Shukla. At the time of shooting, shooter was 10 steps towards north west corner of the house of Chandra Kant Shukla, who hit his father. There is a Khadanja road towards west in front of the house and a shop towards west. On the west of this road there is the house of Chandra Kant Shukla. When bullet hit his father, his father was to the north of the house of Chandra Kant Shukla at Khadanja road. This place is to the east of the house of Umakant, Pancham Kant and Chandra Kant Shukla. When first firing took place, he, Shiv Prakash Tiwari and Jai Hind were together. When bullet hit his father, his father was on the scooter and fell down on Khadanja road with the scooter. Thereafter, he was taken to the door, blood was oozing out of his body. He was taken to the house from the place of occurrence on a cot. He remained on the door for 15 to 20 minutes in injured state. The Jeep then came at the door, he along with his uncle had kept his father in jeep with the help of several other persons of the village. He was taken to the police station. Whether blood fall on the jeep or not, he cannot say. His father was lying straight. During placing and carrying the injured on the jeep, there was no blood on his clothes and whether there was any blood on the clothes of his uncle, he can not say. On being asked, this witness deposed that the primary health center was on the way but they did not stop there because there was no doctor and they directly reached the police station as the condition of his father was deteriorating. At around 10:00-10:30 a.m. they reached hospital and remained at the hospital for the entire. He did not remember as to whether his uncle Shiv Prakash or the I.O. were in the hospital or not. On the second day, after performing last rites, they reached their village in the night, he did not remember whether the scooter was lying on the spot or in the house. After 2-4 days from the incident, the scooter was seen standing at the home. He did not care as to whether there was blood on the scooter and on the cot. He also did not pay attention as to whether blood had fallen on the door or not. There was a crowd on the place of occurrence at the time of incident. He denied that his father had been injured at some other place and he had not seen the occurrence.

18. ***P.W.5, Dr. K.N.Joshi,*** T.B. department, Sapru Hospital, Allahabad, deposed that he had conducted post-mortem of the body of the deceased on 11.4.2000. He found the following injuries:

External injuries:

a. Fire-arm wound of entry present on the right side of the chest, 4 cm below right nipple, size 3 cm x 1 cm, margin inverted, charring, blackening and tattooing present.

Internal injuries:

a. Pleura lacerated

b. Both lungs lacerated.

c. Heart lacerated.

d. Blood vessels lacerated

e. Thorax cavity filled with blood

f. Abdominal cavity filled with fluid.

g. Liver lacerated.

Cause of death- shock and hemorrhage as a result of Ante-mortem injury.

In the opinion of this witness, injury could have been occurred at 8:00 am on 10.4.2000. This witness has proved the post mortem report (Ex. Ka-2).

In cross-examination this witness has deposed that it is not possible to tell as to when the injuries were caused. It might have occurred 8-9 hours before the recorded time of death.

19. **P.W.6, Kripa Shankar Dixit,** I.O., deposed that on 10.4.2000, he was posted as S.O. Sarai Inayat; when informant Shiv Prakash Tiwari, moved a written complaint, an F.I.R. bearing no. 158 of 2000 under Section 307/ 504 I.P.C. was registered. The injured, Jai Prakash Tiwari, was sent to government hospital, Allahabad. After receiving copy of chick and report, he started investigation, recorded statements of F.I.R. scribe and copied it in CD, reached on the place of the occurrence with Chauki In-charge, Hanumanganj, Shri Ram Murti Pandey, where he came to know that after committing the crime the accused have gone towards Jamunipur by their Marshal Jeep No. UP 70 R 9145. Leaving the Chauki Incharge on the spot, he went in search of the accused persons but they could not be traced. Thereafter, he returned to the place of occurrence at about 11:00 a.m. Prem Narain Awasthi, H.C.P., informed about the death of the injured which he copied in CD and recrorded statement of the informant Shiv Prakash Tiwari and witness Kuldeep Mishra. He inspected the place of occurrence at the instance of the informant and prepared site map (Ex. Ka-3) in his handwriting and signature which he also proved.

Thereafter, he took blood stained and plain soil from the place of occurrence and got the recovery memo (Ex. Ka-4) prepared in the handwriting of S.I. Ram Murti Pandey and signed it. He also recorded statements of the witnesses present on the spot. Thereafter, he visited the house of the accused persons and searched it and recovered a country-made fire arm/gun of 303 bore and 7 cartridges. Besides, 5 live cartridges of 32 bore and 5 empty cartridges of 303 bore, 12 bombs were also recovered. Recovery memo (Ex. Ka5) was prepared. The proceeding was also entered in CD paper no.1. On 15.4.2000, knowing that the accused persons are disposing of their articles, moved an application for issuance of process under Section 82/83 of Cr.P.C. which was issued on 18.4.2000, pasted copy of process under Section 82 Cr.P.C. at the door of the accused persons. On 20.4.2000, he received information regarding fire arms inside the jeep of the accused persons on telephone. Thereafter, Marshal Jeep was taken to the premises of the police station where it was searched and 7 AK-47 cartridges were recovered under

the rubber of driving seat about which recovery memo was prepared and an FIR under Section 25 Arms Act was lodged. On 21.4.2000, when accused persons surrendered, it was recorded in Parcha No. 8. He attached inquest and post mortem report with the CD and after taking permission of CJM Allahabad, visited Naini Jail and recorded the statement of accused persons. They denied the commission of crime but accused Kamal Mishra and Bimal Mishra agreed to get the crime weapon recovered. After that their house was searched but no weapon, used in the crime, was recovered. On 27.4.2000, CJM, Allahabad, permitted police custody remand on 28.4.2000 up to 3:00 pm. On the pointing out of the accused Kamal Mishra a country-made fire arm of 12 bore and on the pointing out of the accused Bimal Mishra a country-made fire arm of 315 bore with empty cartridges of 315 bore were recovered from an alluvial area near Government Tubewell Chhavaiya Road. Recovery memo was prepared and site map (Ex. Ka-6) was prepared. After coming to the police station the case property was deposited in Malkhana and a case under Section 25 Arms Act was also lodged. After that the accused were sent to Naini Jail. On different dates this witness has recorded the statements of several witnesses. On 25.5.2000, he prepared parcha no. 16 wherein criminal history of accused Shyam Bihari Mishra of two cases, accused Kamal Mishra of five cases and accused Bimal Mishra of 3 cases have been mentioned. Being satisfied that accused persons had committed the crime he submitted charge-sheet (Ex. Ka-7) under Section 302, 307, 504, and 34 I.P.C.

In cross-examination this witness deposed that, on 12.4.2000 he recovered Marshal Jeep from a village under the territorial limits of police station Kheeri and had admitted it in accordance with law at the police station. No article was recovered from the jeep. It was at police station till 20.4.2000. He does not know as to what happened when he remained within the premises of police station. He could not say when chick report Ex. Ka-8 was prepared by the police. He further deposed that no ticuli of empty cartridge was recovered from the spot. He admitted that the house of accused persons is at a distance of 150 meter from the place of the incident. He deposed that the informant Shiv Prakash Tiwari was working in RTO. He did not try to find out the time on 10.4.2000, when the informant Shiv Prakash Tiwari departed from the office. He replied that neither blood stained soil was found on the spot nor blood stained cot was there. He admits that on 10.4.2000 and 15.5.2000, it is not recorded in G.D. that statements of which witnesses were recorded by him. He did not remember that before 15.5.2000 Pawan Tiwari and Jai Hind Singh met him or not. He denied that on 10.4.2000 after lodging FIR, he had visited S.R.N. Hospital. This witness further deposed that Shiv Prakash Tiwari had not stated in his statement that the accused were standing in the street next to the shop of Meenu Malviya rather it was told that they were standing next to the shop. The same witness in his statement had not told about standing at the door but had told to watch the incident while being present on the spot. He had not even told about the moving ahead at the time of the incident. This witness has told that accused Kamal Mishra drove the Marshall Jeep.

Witness Jai Hind Singh, did not say in his statement that he had spoken to the informant about going to Vindhyachal together but has said that when he came to

the house of informant Shiv Prakash Tiwari at around 8:00 am, the informant told him that his elder brother will also go with them, he has gone to worship Endree Devi.

Witness Pawan Tiwari did not depose that the accused were standing in the street next to the shop but had told that the accused were standing there. It was not even deposed that they were standing at their door. The witness has replied that he sat behind the wall. It was not deposed by him that he had hid behind the brick pile. He had deposed about running and escaping towards his house and had not replied that he had run towards the house through the same street in which he was hiding himself.

This witness further deposed that the FIR was lodged in his presence. He could tell whether Pawan Tiwari had come with the informant. There is no GD entry about the presence of Pawan Tiwari. On the date of the occurrence he had not met Pawan Tiwari and had not seen blood on him. This witness had not recorded the statement of Meenu Malviya. There is the house of Chandra Kant Shukla near the place of occurrence to the north of his house there is the house of Padam. If a person is standing 10 steps towards north-west corner or west of the houses of Chandra Kant Shukla and Padam Kant Shukla, he would not be able to see the place of occurrence. Houses of both the persons are pakka. During the investigation he knew that Shyam Bihari Mishra does service in Nagar Mahapalika. He did not know as to which post Shyam Bihari Mishra was posted nor he go there to inquire about his presence. According to this witness the information regarding the incident was given to the higher officials through R.T. Set. This witness denied suggestions given by the defence counsel. This witness could not recognize the signature on several papers of CD. He deposed that he did not remember as to who was the circle officer.

20. ***P.W.-7, Head Constable***, Badri Prasad Mishra, deposed that on 10.4.2000, he was posed as constable moharrir in police station Sarai Inayat where informant Shiv Prakash Tiwari along with injured Jai Prakash Tiwari, Kuldeep Mishra, Jai Hind and Samod Singh came in a commander jeep no. UP 70 M 1317 driven by Chandra Dev Tiwari and submitted a written complaint on the basis of which chick FIR No. 127/2000 case crime no. 158 /2000 under Section 307 and 504 IPC against accused persons Shyam Bihari Mishra, Bimal Mishra, and Kamal Mishra was registered. He observed the injuries on the person of Jai Prakash Tiwari and prepared Chitti Majrubi/ injury letter and provided it to the constable Jeet Bahadur Singh and sent him with injured to Swaroop Rani Hospital for treatment. This witness has proved the chick FIR (Ex. Ka-8) to be in his handwriting and signature. He also proved the carbon copy of GD (Ex. Ka-9). copy of chick FIR and written complaint were given to the I.O. Kripa Shankar Dixit who departed for investigation. Constable Jeet Bahadur returned from the hospital and informed that injured Jai Prakash Tiwari has died and his dead body was in mortuary. This information was recorded and at about 11:00 a.m. Section 302 IPC was added and copy of it was sent to the I.O. Information was also sent to the senior officer through DCR (Ex.Ka-10). This witness has also proved G.D. regarding addition of Section 302 IPC.

In cross-examination this witness has deposed that there was order and

signature of C.O. to send the chick to the Court on 13.4.2000. Injury letter is not on record because it was not returned by the constable Jeet Bahadur Singh. This witness denied the suggestions that as per rules GD should be sent to the C.O. Office by next date. He deposed that signature dated 13.4.2000 of P.O. has been made on G.D. dated 10.4.2000.

21. ***P.W.-8, Sant Kumar Chaturvedi***, H.C.P., deposed that on 10.4.2000, he was posted at police station Kotwali, Allahabad. That day he received copy of memo of tehrir and memo of S.R.N. Hospital after death of Jai Prakash Tiwari for preparation of inquest report. He prepared inquest report, challan nash and photo nash, letter to C.M.O., R.I. and specimen seal and proved it as Ex. Ka 12 to Ex. Ka-18.

In cross-examination he has admitted that at the time of inquest he did not know about the lodging of the F.I.R.

22. After completion of oral evidence, the statement of the accused persons have been recorded under Section 313 Cr.P.C.

(i). Accused Shyam Bihari Mishra denied all the questions and stated that witnesses have deposed on account of enmity and the case has been lodged due to enmity. He works in Nagar Mahapalika and on the date of occurrence, he was on duty in Naini, Allahabad with officials, 28 km away from the village.

(ii). Accused Kamal Mishra, also denied all the questions and in addition to it, has stated that the deceased was a criminal, there were several other enemies of him, he has been killed at a different place and time.

(iii). Accused Bimal Mishra also denied the questions and charges and has stated that the deceased was a criminal, having several other enemies. He was killed at some other place and time. Forged papers were prepared much later. After death of Jai Prakash false report was lodged after consultation.

23. In defence four witnesses have been examined. The evidence of these witnesses shall be described and discussed later on at the appropriate place.

24. The appeal is being decided as under.

25. Learned counsel for the appellants has submitted the argument that the prosecution has failed to establish any motive against the accused persons.

26. ***Motive:*** In F.I.R. it is mentioned that there was old enmity regarding land between the parties before the commission of crime which was the reason behind the murder of the deceased.

P.W.-1, Shiv Prakash Tiwari, in his examination in chief has deposed that there was old enmity from the accused due to purchase of the land of Khasra no. 1005 from Sudarshan son of Sundar. In cross-examination, he replied that there was 18 biswa land between the Government hospital and the road. Three partners got executed registered agreement in 1998. He, Senior Vajpayee and another had purchased three biswa land each. He and Vinay Vajpayee sold the land from their share to his sister. He expressed ignorance about the fact of selling of 4 biswa land of Sudarshan Dubey to Purshottam Dubey whether the mutation has been done in the name of Purshottam Dubey. He also expressed

ignorance that Purushottam Dubey has executed any power of attorney in favour of the accused Kamal Mishra on 31.1.2000 or not. This witness admits that Kuldeep Mishra is the son of his sister who has purchased 5 biswa land from the aforesaid plot. This witness denied that he and Kuldeep Mishra wanted to occupy the land illegally and in the past they were stopped by Purshottam Dubey. Asking such question also establishes previous land enmity between the parties.

Thus, from the above cross-examination also it is established that there was existing land enmity between the parties which formed motive to commit the offence.

P.W.4, Pawan Tiwari, son of the deceased has also deposed in examination-in-chief that due to land enmity accused persons have killed his father. No cross-examination has been made in this regard from this witness. Hence, evidence regarding previous land enmity and cause of killing the deceased remains intact and unrebutted.

It is a case of direct evidence wherein motive has no significance and moreover, motive put by the prosecution has been proved by the prosecution witnesses and by the way of cross-examination defence has also admitted that there was previous enmity between the parties and Sudarshan Dubey had executed sale-deed regarding his land in favour of Kuldeep Mishra and some part of his land was purchased by the victim's family and their relative. Therefore, there was a boon of contention between the parties due to which this offence had been committed.

In ***Lekhraj @ Hari Singh Vs. State of Gujrat 1998 SCC(Cri) 704,*** Supreme Court has held that-

"an accused can be convicted even in absence of proof of motive."

In ***Harphool and Ramjeevan Vs. State of Rajasthan, 2002 SCC Online, Raj 988,*** Division Bench of High Court of Rajasthan has held that-

"in a case of direct evidence, absence of motive is not fatal."

In the case of ***Saddik @ Lalo Gulam Hussein Shaikh and others vs. State of Gujrat, (2016) 10 SCC 663,*** the Apex Court in paragraph 21 has observed as under:

"21. It is settled legal position that even if the absence of motive, as alleged, is accepted, that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part losses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance."

Yet the Hon'ble Apex Court in the case of ***Raj Gopal Vs. Muthupandi @ Thavakkalai and others, (2017) 11 SCC 120***, in paragraph 14 has observed as under:

"14. Equally, it is well established that motive does not have to be established where there is direct evidence. Given the

brutal assault made on P.W.1 by criminals, the fact that witnesses have turned hostile can also cut both ways, as is well known in criminal jurisprudence."

On the basis of above discussion appellants argument regarding motive is dismissed.

27. ***F.I.R***.- About F.I.R. it has been argued that it was lodged anti-timed and it had been written on the dictation of the Police.

In this case as per prosecution, the occurrence took place at about 8:30 a.m. on 10.4.2000. The distance of the police station from the place of occurrence is 12 km and the F.I.R. has been lodged on same day at 9:30 a.m., It is also noteworthy that the name of the accused persons, manner of assault and name of witnesses, motive, pre and post conduct and behaviour of the accused persons have also been mentioned in the F.I.R. which was sufficient to proceed with the Tehrir. It is also established law that F.I.R. is not a substantive piece of evidence, it is an instrument to accelerate the police machinery to investigate the case. However, sufficient facts have been mentioned in the F.I.R.

In this case the F.I.R. was lodged one hour and five minutes after the incident and after some time the deceased was sent for treatment to S.R.N. hospital. The I.O. has visited the spot same day and prepared the map, inquest has been prepared same day and the dead body was also transported to mortuary same day. After the death of the deceased the case was converted from Section 307 to 302 IPC same day on 10.4.2000 vide report no. 19 on 11:00 am and G.D., Ex. Ka-10, was also prepared. All the papers regarding inquest and post-mortem were prepared by P.W.8 S.K. Chaturvedi same day except form no. 13. Tehrir and Chick F.I.R. was transcripted in case-diary same day. Statements of the informant Shiv Prakash Tiwari was also recorded same day and same day blood stained and simple clay was also taken from the place of occurrence. On 10.4.2000 the house of the accused persons was also raided and a country-made pistol of 303 bore, 7 cartridges and 12 bombs were recovered and its recovery memo was prepared.

In ***Girish Yadav and others Vs. State of M.P. (1996) 8 SCC 186,*** Supreme Court held that -

"except Maharaj Singh Vs. State of U.P. 1994 SCC (Cri) 139 there are some other external checks also to check as to whether F.I.R. was ante-timed or ante-dated. The list is exhaustive as in the cited case site plan was prepared in the presence of first informant giving case crime number and sanha entry maintained at the police station giving all the relevant contents of the the F.I.R. are also external checks."

In ***Prem Nath Yadav Vs. State of U.P. 2022 (2) ACR 1065 (L.B.****) it has been held that "when incident took place at 7:00 'O' clock in the morning, F.I.R. was lodged at 8:10 a.m. Inquest report was in support of the prosecution version. The Division Bench of this Court held that in these circumstances it can not be said that F.I.R. was ante-timed."*

In this regard paragraph 12 of Maharaj Singh Vs. State of U.P. (1994) 5 SCC 188, Ram Sajeevan Singh and others Vs. State of Bihar (1996) 8 SCC 552 are

relevant in which the Hon'ble Apex Court held that

"in order to prove the F.I.R. to be ante-timed, it is to be proved beyond doubt and merely on asking, the same cannot be held to be ante-timed, particularly when the chain/sequence of the events itself link so as to suggest that there is no possibility of the F.I.R. to be ante-timed. "

Thus it can not be said that the F.I.R. is ante-dated or ante-timed or it was reduced in writing at the behest of police personnel.

28. Learned counsel for the appellants argued that the copy of the chick F.I.R. not sent just after lodging the F.I.R. to the concerned Magistrate, under Section 157 Cr.P.C. is fatal for the prosecution. On this basis it is argued that since the F.I.R. was not lodged at the time mentioned in chick F.I.R. therefore, chick, F.I.R. was not sent to the concerned Magistrate immediately. In this regard facts evidence and relevant law are being discussed below.

Chick F.I.R. Ex. Ka-8 is on record in which it is written that it has been sent through post but there is no signature of the concerned Magistrate. As per Section 157 Cr.P.C., it should be sent immediately but generally this is never sent forthwith to the concerned Magistrate. There is provision to send it to the concerned Magistrate to take cognizance of such offence upon the police report. Though it is proved that just after lodging the F.I.R., the I.O. started investigation and visited the place of occurrence. The object of this provision is obvious and it involves mere technical compliance with law.

In S***tate of U.P. Vs. Gokaran and Others, AIR 1985 SC 131 and in Pala Singh Vs. State of Punjab, AIR 1972 SC 2679,*** it has been held that-

" it is not as if every delay in sending such special report to the District Magistrate under Section 157 Cr.P.C. necessarily leads to the inference that the F.I.R. has not been lodged at the time stated or has been ante-timed or ante-dated or that the investigation is not fair and forthright."

In ***Anil Rai Vs. State of Bihar, 2001 7 SCC 318 and State of Punjab Vs. Hakam Singh (2005) 7 SCC 408***, it has been held that-

"delay in sending copy of F.I.R. to the Area Magistrate is not material where the F.I.R. is shown to have been lodged promptly and investigation had started on that basis. Delay is not material when the prosecution has given reasonable explanation."

In ***State of Karnataka Vs. Moin Patel, (1996) 8 SCC 167 and in Betal Singh Vs. State of M.P., AIR 1996 SC 2770***, it is held that -

"when the F.I.R. Was recorded without delay and investigation was started on the basis thereof, mere delay in dispatch of the F.I.R. To the Magistrate would not make the prosecution case suspicious."

In this case defence could not create any doubt about the F.I.R. being lodged ante-dated and ante-timed. The investigation started just after the F.I.R. was lodged. After few hours the deceased had been declared brought dead and the proceeding of inquest and post-mortem had been started. The I.O. had visited the spot

and prepared map and had also recorded statement of informant, therefore, only delay in sending the report/copy of the F.I.R. to the Magistrate under Section 157 Cr.P.C. is not fatal for the prosecution and in no way affects the merit of the case.

29. ***Inquest-*** Learned counsel for the appellant argued that neither crime number, Section nor copy of chick F.I.R. was indexed with the inquest. In this regard, it is clarified by the prosecution that the matter relates to the police station Sarai Inayat and after lodging the F.I.R. the injured was sent to SRN Hospital for treatment and before reaching the hospital the deceased died on the way. Hence, doctors in the hospital found him 'brought dead'. Therefore, they did not pay attention to the injury letter (Majroobi Chitti) and it was returned to the concerned constable. It was not even taken and considered by the I.O. The inquest was conducted after information from SRN hospital by HCP S.K. Chaturvedi of Kotwali Allahabad, who was not posted in police station Sarai Inayat, therefore, absence of copy of chick F.I.R. and non mentioning of crime number and sections are not material. Moreover, inquest is not substantive piece of evidence. It is a process only to ascertain prima facie cause of death as to whether death was a natural or unnatural. During inquest, it was found that there was gun shot injury on the right chest of the deceased.

In R***adha Mohan Singh alias Lal Saheb Vs. State of U.P., 2006 (54) ACC 862,*** it has been held that-

"Argument advanced regarding omissions, discrepancies, overwriting, contradiction in inquest report should not be entertained unless attention of author thereof is drawn to the aid fact and opportunity is given to him to explain when he is examined as a witness. Necessary contents of an inquest report prepared u/s 174 CrPC and the investigation for that purpose is limited in scope and is confined to ascertained of apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal, and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. Details of overt acts need not be recorded in inquest report. Question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who were the witnesses of the assault is foreign to the ambit and scope of proceedings u/s 174 CrPC. There is no requirement in law to mention details of FIR, names of accused or the names of eyewitnesses or the gist of their statements in inquest report, nor is the said report required to be signed by any eye witness."

In ***Podda Narain Vs. State of A.P., AIR 1975 SC 1252,*** it is held that-

"the object of the inquest report is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. According to the Apex Court, the question regarding the details how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foregin to the ambit and scope of such proceedings."

This Court is of the opinion that for inquest there is no need of previously lodged F.I.R. Suppose an unidentified dead body is found and no FIR is being lodged, in that case, the police shall visit the place and shall take the dead body in its

possession and shall conduct inquest and post-mortem and shall publish news in media and newspaper, if after few days any person comes and claims the dead body and moves written complaint to lodge the F.I.R., it cannot be said that there was no occasion to conduct the inquest proceeding. In this case F.I.R. had already been lodged though copy of the chick F.I.R. was not with the Kotwali police while conducting the inquest. Hence, according to this court there is no scope of argument at this point.

It is also argued that form 13 was not prepared. The preparation of papers such as photo nash, challan nash, letter to R.I. and C.M.O. and preparation of form 13 are formal in nature. Omission of any of them does not adversely affect the merit of the case. Hence, the argument in respect of non preparation of form 13 being of no value, is rejected.

Thus, there is no irregularity or illegality in conducting and preparing the inquest report.

30. ***Autopsy***: - It is also argued that the autopsy report is not in support of the prosecution version and it has been conducted after inordinate and unexplained delay.

In this case the offence took place in the morning of 10.4.2000 and in afternoon the injured was declared dead. The inquest proceeding was finished at 4:25 p.m. and after that the dead body was sent to the mortuary through R.I., it was almost night by then, therefore, without the order of District Magistrate, post mortem of the dead body was not possible. There might have been some other reason such as non availability of doctor etc. This court is of the view that it does not appear that any inordinate delay has been caused in autopsy but if it is so, it is in no way relevant and fatal for the prosecution.

On 11.4.2000 at 2:00 pm autopsy was conducted by P.W.5 Dr. K.N. Joshi wherein he found fire arm wound of entry on the right side of chest 4 cm below right nipple size 3 cm X 1 cm, margins inverted, charring, blackening and tattooing present, 63 small pellets with one wad recovered from the thorax cavity. According to the doctor, the cause of death was shock and hammerahage as a result of anti morterm injury. Thus the contents of F.I.R., inquest and oral evidence and post-mortm report and evidence of the doctor are in conformity with each other. It is also established that deceased was shot at a very close range.

In ***Budh Singh Vs. State of MP, AIR 2007 SC (Suppl) 267 and Swaran Singh Vs. State of Punjab, AIR 2000 SC 2017***, it has been held that-

"where the wound was caused from a gun fire, blackening could be found only when the shot was fired from a distance of about 3 to 4 feet and not beyond the same."

In ***Bharat Singh Vs. State of UP, AIR 1999 SC 717,*** it has been held that-

"the absence of scorching, blackening and tattooing injuries will not discredit eye witness account in the absence of positive opinions from doctor and testimony on distance of firing."

In this case it is deposed by the witnesses that the accused Kamal Mishra shot the deceased from a close range. If a person observes an incident from behind or

from afar, then it appears to be shot from a close range while in reality it is not so. In this case blackening and tattooing were present in and above the gun shot injury and pellets and wad had also entered into the body of the deceased. Hence, there is no contradiction between the ocular and the medical evidence.

In S***arvesh Narain Shukla Vs. Daroga Singh, AIR 2008 SC 320,*** it has been held that-

" Where the witnesses had testified the use of assortment of modern fire arms from a distance of 1 to 2 feet and the defence had argued that only shot guns were used and the medical evidence was to the effect that all the entry wounds showed signs of charring and tattooing and had different dimensions, it has been held that the medical evidence was not inconsistent with the ocular evidence as to the use of different fire arms."

In ***Ram Swaroop Vs. State of U.P. 2000, (40) ACC 432 (SC)***, it has been held that -

" it is well settled that doctor can never be absolutely certain on point of time of duration of injuries."

In ***Ramjee Rai Vs. State of Bihar, 2007, (57) ACC 385 (SC),*** it has been held that-

" Medical science has not achieved such perfection so as to enable a medical practitioner to categorically state in regard to the exact time of death"

Supreme Court clarified that the doctor can never be absolutely certain about the time of death.

Thus, it is concluded that the autopsy report is in complete support of the prosecution version.

31. ***About Witnesses:-***

(i). It is argued by the learned counsel for the appellants that the witnesses are the family members and they are not deposing the truth.

It is true that all the witnesses are family members or from the vicinity. P.W.-1 is the real brother and P.W.4 is the son of the deceased. P.W.-2, scribe, is the neighbor and P.W.3 Jai Hind Singh, is also the resident of the same village. All the witnesses are natural witnesses. They are not chance witness. P.W.3 Jai Hindh Singh, was scheduled to go to Vindhyachal for darshan with the deceased. It is often seen that some people of the neighborhood and relatives go together for darshan/poojan, if space is available in the vehicle. There is no enmity between the independent witness P.W.3 Jai Hind Singh and the accused persons. There is no suggestion or evidence from the side of the defence that they were not there. There is no law which suggests that related and family members can not be relied upon. Only proper scrutiny and cautious appreciation of their evidence is necessary.

In ***Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537, Shyam Babu Vs. State of U.P., AIR 2012 SC 3311, Sonelal Vs. State of M.P., AIR 2009 SC 760, Sucha Singh Vs. State of Punjab, (2003) 7 SCC 270***, the Apex Court has held that-

"The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family

member of the victim of the offence. In such a case, court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible accused can be convicted on the basis of testimony of such related witness."

In ***Dharamveer Vs. State of U.P., AIR, 2010, SC 1378, Dilawar Singh Vs. State of Haryana, (2015) 1 SCC 737, Ramesh Harijan Vs. State of U.P., (2012) 5 SCC 777,*** it has been held that -

"Enmity of the witnesses with the accused is not a ground to reject their testimony and if on proper scrutiny, the testimony of such witnesses is found reliable, the accused can be convicted. However, the possibility of falsely involving some persons in the crime or exaggerating the role of the accused by such witnesses should be kept in mind and ascertained on the facts of each case."

Thus, it cannot be said that since the witnesses P.W.1 and P.W.4 are the family members of the deceased, therefore, they are falsely testifying themselves in support of the prosecution.

Prosecution has relied on ***Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra, 2022 0 Supreme (SC) 569,*** in para 22 & 23, it is held that -

"22. In Nain Singh v. State of U.P., (1991) 2 SCC 432 : (1991) SCC (Cri) 421, in which all the aforesaid decisions as referred to hereinabove were considered and after considering the aforesaid decisions on the question of exercise of power under Article 136 of the Constitution and after agreeing with the views expressed in the aforesaid decisions, the Court finally laid down the principle that the evidence adduced by the prosecution in that decision fell short of the test of reliability and acceptability and, therefore, was highly unsafe to act upon it. In State of U.P. v. Babul Nath, (1994) 6 SCC 29 : 1994 SCC (Cri) 1585, this Court, while considering the scope of Article 136 as to when this Court is entitled to upset the findings of fact, observed as follows: (SCC p. 33, para 5)

"5. At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and mis- reading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."

23. From the aforesaid decisions of this Court on the exercise of power of the Supreme Court under Article 136 of the Constitution, the following principles emerge:

(i) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of fact save in exceptional circumstances.

(ii) It is open to this Court to interfere with the findings of fact recorded

by the High Court if the High Court has acted perversely or otherwise improperly.

(iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.

(iv) When the evidence adduced by the prosecution falls short of the test of re-

liability and acceptability and as such it is highly unsafe to act upon it.

(v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, er- rors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evi- dence on record. "

Para 27 & 28 are as follows:

"27. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an

incident. It is not as if a video tape is replayed on the mental screen.

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

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another. IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

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

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.

[See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096 : AIR 1983 SC 753, Leela Ram v. State of Haryana, AIR 1999 SC 3717, and Tahsildar Singh v. State of UP, AIR 1959 SC 1012]

28. To put it simply, in assessing the value of the evidence of the eye-witnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the

accused raise a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence. "

It is also held that few contradictions in form of omissions here or there are not sufficient to discard the entire evidence of an eyewitness. Medical evidence on record further corroborates ocular version of eyewitnesses. Hence, it was held that Courts below rightly believed both the eyewitnesses. The circumstances are similar here and the principles laid down in the above precedents are relevant for the present case.

(ii). **Non examination of the following witnesses :-**

Learned counsel for the appellants argued that non examination of constable 1740 Jeet Bahadur Singh, Raghudutt Mishra, death informer and constable 1670 Bharat Lal is fatal for the prosecution.

According to this Court it has never been held that in every case constable who carried and accompanied an injured to hospital or a deceased to the mortuary would have been examined. Constable Jeet Bahadur had already informed the police station about death of the injured. It is not a case of circumstantial evidence where the examination of all the concerned is necessary to prove all the links. Hence, this argument has no force and is accordingly rejected.

32. **Non submission of F.S.L. Repor**t in respect of blood stained and plain soil or blood stained clothes:

(I) It is argued by the learned counsel for the appellants that the F.S.L. report has not been produced in support of the prosecution story therefore the case of the prosecution can not be said to be proved beyond reasonable doubt.

(II) In this case though the plain and blood stained clay were taken but the report of the same has not been produced. The I.O. has also not taken blood stained clothes of the deceased or the witnesses and has not sent the same for F.S.L. report. From the evidence of witnesses it is clearly established that the place of occurrence is the same place as alleged by the informant and the prosecution since beginning of the case. Contrary to it, though suggestions have been given that the deceased was killed at different place but no doubt could be created about the place of occurrence. From the oral and the documentary evidence the place of occurrence alleged in the written complaint is fully established.

(III) In ***Maqbool Vs. State of A.P., AIR 2011 SC 184, Sheo Shankar Singh Vs. State of Jharkhand, 2011, CrLJ 2139 (SC) and Dhanaj Singh Vs. State of Punjab, (2004) 3 SCC 654,*** it has been held that -

"non sending of blood stained earth and clothes of the deceased or injured to chemical examiner for chemical examination is not fatal to the case of the prosecution if the ocular testimony is found credible and cogent.

(IV) In ***Keshav Lal Vs. State of M.P., (2002) 3 SCC 254,*** it is held that-

"if the evidence of eyewitnesses is otherwise trustworthy, non availability or non ascertainment of blood group/blood

marks/blood stains report can not be made a basis to discard the witnesses who otherwise inspire confidence of the Court and are believed by it."

(V) Thus, the lack of report regarding blood stained soil and clothes and plain soil is not fatal for prosecution and the defence argument in this regard is not tenable.

33. It is argued that the F.S.L. Report regarding the fire-arm and the cartridges is not in support of the prosecution story.

F.S.L. report dated 9.11.2000, is on record. The laboratory received two bundles ' A & B' and envelop 'C'.

In bundle A, a country-made pistol of 12 bore and an executed cartridge of same bore were found. The country made pistol was marked as 1/2000 and cartridge was marked as E.C.-1 whose cap was torn.

In bundle B, case property of crime number 202 of 2000 were keptin which a country-made pistol of .315 bore marked as 2/2000 and a cartridge marked as E.C.-2 was kept.

After testing it was found that three cartridges of 12 bore marked as T.C.-1 to T.C.3 were executed from the country-made pistol marked as 1/2000. It is already said that the cap of disputed cartridge marked E.C.-1 (12 bore) was torn, centre mark was present and feeble mark of extractor was also present. It is already said that for examination cartridges T.C.1 to T.C.-3 were executed from country-made pistol of 12 bore marked as 1/2000 and it was noticed that the caps from T.C. -1 to T.C.-3 were torn in a similar way. Though there is a lack of individual characteristic to compare the center mark present on it with the marks present on the test cartridges marked as T.C.-1 to T.C.-3 and concluded that sufficient marks were not found when the controversial cartridge marked E.C.-1 was compared with the country-made pistol marked 1/2000.

Country-made pistol of .315 bore was marked as 2/2000 and used cartridge was marked as E.C.-2 for comparison. Two cartridges marked as T.C.-4 and T.C.-5 were executed during the examination. The E.C.-2 (.315 bore) had two firing pin marks on the cap and a chamber cap on the middle shell. On T.C.-4 and T.C.-5 firing pin marks were present and they had centre mark and also feeble mark. It was opined that out of the two firing mark of the pin present on the disputed cartridges marked E.C.-2, one mark and the middle mark present on it were similar in individual characteristic to the firing pin and the middle mark present on the test cartridges T.C.-4 and T.C.-5 though the second dent lacks individual characteristic.

The laboratory concluded that- (i) sufficient marks were not found to compare the disputed cartridge marked E.C.-1 with the country-made pistol marked 1/2000; (ii) the disputed cartridge marked E.C.2 was fired by country-made pistol marked 2/2000; (iii) received 63 pieces of pellets and wad may have been fired from country-made pistols marked 1/2000 but it is not possible to give a definite opinion in this matter.

In ***M.K. Upadhyaya Vs. State of A.P., (2012) 3 SCC (Cri.) 42,*** it has been held that-

"A bullet was recovered from the scene of crime. Later on a pistol was recovered at the instance of accused. Ballistic expert opinion disclosed that bullet recovered from the scene of crime was fired from the pistol recovered at the instance of accused. Ballistic expert opinion/evidence is a strong incriminating circumstance against the accused."

In ***Leela Ram Vs. State, (1999) 9 SCC 525***, it has been held that-

"whether the ballistic expert had given opinion that if the empty cartridges recovered from the spot of occurrence matched with the injury. It has been held that it was a piece of evidence and could not be brushed aside."

In ***Anand Mohan Vs. State of Bihar, (2012) 3 SCC (Cri.) 328***, submission of defence was that witnesses had deposed that deceased was shot by B when he was laying injured on ground but medical evidence established that bullets were fired when deceased was in a standing position and then evidence of witnesses should be discarded. Dr. as P.W.-16 had stated that fire arm injuries could have been caused to the deceased even in standing or sleeping position. Therefore, it cannot be said that there was any contradiction between oral and medical evidence. So the submission of defence was rejected.

In ***Mohd. Mian Vs. State of U.P., (2011) 2 SCC (Cri.) 694,*** Apex Court referring page 724-725, 23rd Edition of Modi Medical Jurisprudence and Toxicology, held that-

"if country-made pistol had been used, the performance of these weapons being unpredictable and uncertain the trajectory of the bullet alone would not be a safe guide for assessing the entire evidence more particularly as the projectiles could have been deflected from their true path by the bones or tissues that came along the way."

In this case country-made firearms have been used in commission of crime, therefore, the defence can not expect that the F.S.L. report should be in accordance of the standard prescribed for the factory made firearms.

In Modi's Medical Jurisprudence and Toxicology, 23rd Edition page 716, it is mentioned "that when there is a close shot that is in the range of powder blast and the flame is within 1-3 inches, for small arms there is a collar of soot and grease (if present on the bullet) around the circular wound of entry. Singed hairs may be seen if the body is not covered with clothing. Partially burnt and unburnt grains of powder are blasted into the skin causing a tattooing which can not be easily wiped off. Wadding, pieces of clothing or other debris may be found lodged in the wound. The entry wound of a revolver fired very near or in contact with the skin is generally stellate or cruciform in shape instead of being circular. When it is fired beyond a distance of 12 inches, there are no powder marks of soot or heat effects around the wound. If the revolver is fired close to the skin but held at an angle, the smudging and tattooing is limited only to one side of the bullet hole."

Further at page 721 in the above noted book Modi has mentioned that "If a fire arm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches around the wound of entrance or lacerated

and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gun powder or smokeless propellant powder. The adjacent hairs are singed and the clothes covering the part are burnt by the flame. If the powder is smokeless, there may be a grayish or white deposit on the skin around the wound.----- blackening is found, if a firearm like a shotgun is discharged from a distance of not more than three feet and a revolver or a pistol discharged within about two feet. In the absence of powder residue, no distinction can be made between one distant shot and another, as far as distance is concerned. Scorching in the case of the latter firearm is observed within a few inches, while some evidence of scorching in the case of shotguns may be found even at one to three feet. Moreover, these signs may be absent when the weapon is pressed tightly against the skin of the body as the gases of the explosion and the flame smoke and particles of the gun powder will all follow the track of the bullet in the body. Wetting of the skin or clothes by rain reduces the scorching range. Blackening is not affected by wet surface although it can easily be removed by a wet cloth. Blackening with a high power rifle can occur up to about one feet. Usually, if there are unburnt powder grains, the indication is that the shot was fired from a revolver or a pistol and shorter the barrel of the weapon used the greater will be the tendency to the presence of the unburnt of slightly burnt powder grains."

Thus, it is proved that it was a very close range shot by the accused and not the contact range shot and in the fact and circumstances it can not be said that the witnesses have not seen the occurrence and their evidence is not trustworthy.

In ***Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology***, 7th edition page 246, it is mentioned that a close discharge i.e. between actual contact and about 6 inches, is likely to show the following features;

a- where clothing is present, it will trap most of the soot and powder grains, and may reduce the flame effect.

b- Scorching of skin, singeing of hair, and blackening and tattooing (far less with smokeless powder) of skin are generally seen.

c- depending on the angle of firing, the wound is circular or elliptical, and the age may be smooth or crenated depending on the size of the pellets. There are no separate pellets holes.

In this case it has been concluded that witnesses observed the commission of crime from behind and due a little distance between the accused and the deceased they thought that the deceased had been shot from a contact range but virtually it was a close range shot by the accused. Therefore, the charring, blackening and tattooing were found on the wound of entry.

In this case empty cartridges of 12 bore and the country-made pistol of 12 bore and .315 bore were not recovered from the place of occurrence but were recovered on the pointing out of accused persons. Used pellets of 12 bore, 63 in number were also recovered from the body of the deceased during the autopsy thus, the F.S.L. report supports the prosecution version and admissible in evidence in favour of the prosecution. In this case, there is no variation or discrepancy between the

ocular evidence, post mortem report or the F.S.L. Report.

34. No question has been put under Section 313 Cr.P.C. at this point. In this regard argument of the prosecution is accepted that report of F.S.L. is admissible in evidence under Section 293 Cr.P.C. and no application has been moved by the accused persons to summon the scientist who prepared the report. Hence, non putting of questions under Section 313 Cr.P.C. to the accused persons is not fatal for the prosecution and even in absence of that F.S.L. Report shall be read and would be admissible in evidence.

35. ***Place of occurrence***: Learned counsel for the appellants argued that the prosecution has not been able to prove the place of occurrence.

36. As per F.I.R., site plan and evidence of the witnesses, the place of occurrence is the place 'C' shown in map (Ex. Ka-3) which is in front of the house of Padamkant Malviya and Mithai Prajapati. It is established from the evidence that before the commission of crime deceased had gone for the worship with his nephew Kuldeep and in the return journey, when he slowed down scooter due to drain, accused Shyam Bihari Mishra exhorted from the place 'B' which is a lane between the house of Krishna Kant Malviya and shop of Meenu Malviya. Being induced by the exhortation his two sons namely Kamal Mishra and Vimal Mishra went ahead and when the deceased proceeded further, he was stopped from the front side by the accused Vimal Mishra at place 'J' and third accused Kamal Mishra, shot him from a close range from 12 bore country-made pistol at place 'C', just before the place 'J'. The I.O. had found blood there, where from blood stained and plain clay were taken. As per the evidence and the map, witnesses were at place 'E' where from they saw the incident and started chasing the accused. Way of the witnesses has been shown by the mark of two arrows in the map and when witnesses started chasing, accused Vimal Mishra, fired at the informant with the intention to kill him. In order to save himself, the informant, hid behind the bricks plates at place 'H' in front of the house of Jagdeo Prajapati, therefore, he was escaped. Witness Kuldeep Mishra hid at place 'G' at the south east corner of the house of Padam Kant Malviya. Way to escape of the accused persons has been shown by single arrow which is just towards their house. The I.O. has also mentioned distance in steps between the relevant places in the index of the map.

37. Learned counsel for the appellants argued that the manner of the assault and stopping of the scooter is not proved but a close scrutiny shows and establishes that there is no material difference in the evidence of the witnesses. If some facts relating to commission of crime are not narrated in the written complaint, it is not fatal for the prosecution. Every second's act done by the accused persons and the witnesses cannot be narrated in the FIR.

38. The defense counsel has cross-examined the witnesses from different angles as to whether the place of occurrence could be seen from this place or that place or angle is not material because their presence at the place of occurrence is fully established and they were in position to watch the entire incident which happened on the open pathway. Whether the scooter was stopped from the front side or from the left or right side is not material and if some contradictions occur in this

regard, the same can not be a ground to discard the testimony of the eye witnesses. In this regard if some statements have not been recorded by the I.O., is not material. Hence, argument regarding place of occurrence is rejected.

39. Learned counsel further argued that the injury letter (Chitti Majrubi), is not on record. Since the injured had died before reaching the S.R.N. Hospital and no occasion arose to his treatment. Hence, it was not taken by the doctor and it was also not returned to the I.O. (Non submission of injury letter is neither material nor fatal for the prosecution). P.W.7, Badree Prasad Mishra, has proved that after preparing injury letter, it was given to the constable Jeet Bahadur Singh with whom the injured was sent for the treatment at S.R.N. Hospital.

40. Learned counsel for the appellant argued that ***non examination of Kuldeep Mishra*** alleged pillion rider is fatal for the prosecution. From the perusal of record, it is revealed that the statement of Kuldeep Mishra was recorded by the I.O. same day i.e. 10.4.2000 but he could not be examined in Court due to his mental illness. During the course of trial an application 59 B was produced with the averment that the mental condition of Kuldeep Mishra was not good and he was not in position to be testified. The trial Court accepted the prayer and discharged him. Thus, the argument has no force and is rejected accordingly.

41. Further, it is argued that if the alleged occurrence had happened and the life of the deceased was in danger, why the deceased was not firstly taken to the hospital and why the time was wasted in writing the complaint ***at the house.*** The informant, P.W.-1, in his cross-examination has deposed that he dictated the written complaint to P.W.3 and after being satisfied, he signed it. It would have taken only 15-20 minutes (In between the jeep was also arranged). Thereafter, he loaded his brother in commander jeep and reached the police station at around 9:00 A.M. wherefrom the injured was sent to the hospital through constable at 9:30 A.M. It must have taken about half an hour at the police station. When he was at the police station, his brother's condition had become critical. He thought information at the police station was necessary than taking his brother to the hospital immediately. At the police station he kept telling that his brother's condition was critical and let him take to the hospital but they let him go only after writing the tehrir. It would have taken about an hour in reaching the hospital from the police station. He reached the hospital at around 10:30 A.M. through Shashtri Bridge, it would have taken around 10-15 minutes.

P.W.4, Pawan Tiwari, son of the deceased has also deposed that after the incident they brought his father home, their uncle got the tehrir written and brought him to the police station from another jeep where after 15-20 minutes they alongwith constable went to S.R.N. Hospital where doctor told that the deceased had died.

P.W.2, Satya Prakash Tiwari, scribe has deposed that on 10.4.2000 he had written the tehrir and has proved it as Ex. Ka-1. According to this Court, it depends upon the outlook or advice of people as to whether they think it is proper to write the complaint first or to attempt to provide medical help to the injured. It has come in evidence that the village government hospital was not properly working and there was no proper facility to

treat such injured. The suitable hospital were far away and the police station was on the way to S.R.N. Hospital. It might be possible that the informant and his family members would have thought that there was little hope of survival so first of all F.I.R. should be lodged. Thus, this Court believes that after the incident if written complaint was prepared on the spot and the F.I.R. was lodged first, the same would not affect the merit of the case otherwise.

42. Learned counsel for the appellants also argued that in this case the ***I.O. has not recorded the statement of the witnesses in time*** but has recorded the statement after unreasonable delay which is fatal for the prosecution and it creates doubt about their presence.

43. P.W.6 , S.H.O., Kripa Shankar Mishra, I.O. started the investigation the same day on 10.4.2000, he copied the chick F.I.R., G.D., recorded the statement of the informant, reached on the spot, search the accused persons and after receiving the information of the death of the injured, entered it into the case diary and changed the section, recorded the statement of informant Shiv Prakash Tiwari and witness Kuldeep Mishra, inspected the place of occurrence and prepared the map, took blood stained and plaint soil and recorded the statement of two witnesses, searched the house of the accused persons and recovered bombs, the country made pistol and cartridges and took it into possession and prepared recovery memo same day.

44. Thus, there is no delay in recording the statement of the informant and three witnesses. On 13.4.2000, the I.O. recorded the statement of Virendra Bahadur Singh and Babbu Singh and took the marshal jeep of the accused persons into custody. After knowing that the accused persons have surrendered in the Court and they were sent to Naini Jail, after obtaining permission recorded their statement and moved application for police custody remand. It is true that the statements of witnesses Pawan Tiwari and Jai Hind Singh, were not recorded forthwith just after receiving the investigation by the I.O. But it is pertinent to mention that they were named in the F.I.R. as eye witnesses and the I.O. was also S.H.O. of the concerned police station, having several other burden and work. It is also proved that these two witnesses had visited the police station and S.R.N. Hospital and had also participated in last rites of the deceased, hence, only non-recording of their statement immediately does not created doubt that they were not present on the spot and they had not seen the commission of crime. It is fault of the I.O. not of these witnesses. Such omission or irregularity is covered under the category of faulty investigation which cannot be basis to discard their testimony.
In Krishna Pal Vs. State of U.P. AIR 1996 SC 733 and Ramdev and Another Vs. State of Rajasthan 2003 CrLJ (1680) it is held that-

" mere delay in recording the statement of eyewitnesses under Section 161 Cr.P.C. is not always fatal in a murder case."

In ***Suradhani Darbar Vs. State of West Bengal 2004 (3) Crimes 196 Culcutta High Court DB,*** it is held that -

"where the delay in recording the statement of witnesses under Section 161 Cr.P.C. is due to casual approach of the I.O., it would not affect the value of the statement of the witnesses."

Thus this Court is of the opinion that in these facts and circumstances, the delay in recording the statement of the witnesses Pawan Tiwari and Jai Hind Singh is not fatal for the prosecution.

45. Further it is argued by the learned counsel for the appellants that if the deceased was killed at the place of occurrence, **why no empty cartridges, wad or bullets or pellets were found on the spot.**

In this regard, it is argued by the counsel for the respondent that there was no occasion about finding of empty cartridges, bullets, pellets or wad on the spot because both the accused persons had used firearms only once, they had not made indiscriminate firing. It is noteworthy that firing was made by the accused from a very close range and 63 pellets along with the wad were found inside the body of the deceased. Therefore, non finding of the alleged articles on the spot is quite natural.

46. It is also argued by the learned counsel for the appellants that the scooter was not taken into possession by the police.

In this context, it is noteworthy that there was neither any damage or erosion to the scooter nor it was broken by the accused persons. Hence, there was no need to take scooter into possession for its technical examination. According to P.W.1, they left the scooter on the spot. When he returned back, it was parked at the door by the I.O. P.W.3 has deposed that when the deceased was shot, he had got off the scooter. P.W.-4, has deposed that when his father was shot, he (deceased) was sitting on the scooter along with Kuldeep Mishra, scooter had fallen on the brick road. This witness has deposed in cross-examination that he did not pay attention to the scooter, after 2-4 day from the incident the scooter was seen standing at home. Thus, this Court is of the conclusion that any argument about the scooter, is neither material nor relevant for the decision of the trial or the appeal.

47. So far as the recovery of the weapon and its trial under Section 25 Arms Act is concerned, it has been tried separately, therefore, it would not be proper to give a finding about the recovery of the Arms Act, in this appeal.

48. It is argued that ***charges framed*** on 8.8.2001 ***are not in accordance with*** the prosecution version and chapter ***XVII*** of the Cr.P.C.

49. Learned counsel for the appellants compared the charge from the map (Ex. Ka-3) and argued that the charges are not correctly framed. It is the case of the prosecution that in return journey from the temple of Maa Endree Devi when the deceased reached in front of Meenu Malviya's shop and due to drain, slowed down his scooter accused Shyam Bihari exhorted the rest of the accused persons upon which when scooter reached point 'C' the deceased was stopped by the accused Vimal Mishra and after that accused Kamal Mishra shot at his chest.

The charge framed under Section 302 read with Section 34 I.P.C. reads as follows:

"on 10.4. 2000 at around 8:30 a.m. in the morning you accused persons killed Jai Prakash Tiwari, real brother of the informant, in front of Meenu Malviya's shop situated in village Kotwa Sarai Inayat, pursuant to common object, from a

country-made pistol. Thus, in this way you have committed an offence punishable under Section 302 read with Section 34 I.P.C. which is under my cognizance.

The second charge is as under:

" that on the aforementioned date, time and place you people in fullfillment of your common intention opened fire with the intention to kill the informant, thus in this way you have committed an offence punishable under Section 307 read with Section 34 I.P.C. which is under my cognizance. "

The charges were read over and understood by the accused persons who denied the charges and sought trial.

Certainly, the actual place of occurrence is not exactly in front of Meenu Malviya's shop but it is not far away from there and the incident started from there. It is just 20 steps away from the shop. It is no where stated that any objection was raised from the side of the accused persons that they were not made to understand the charges. They had not moved any objection that they could not understand the charge. The Court has the power to alter charge any time before the pronouncement of the judgment under Section 216 of the Code. All the papers relating to the case were provided to the accused persons, therefore, they were knowing that according to the prosecution's version, the exact place is not exactly in front of the shop but is somehow to the north of the shop. Thus the manner in which the alleged offence was committed has been mentioned and is sufficient to understand the charge and proper words have been used in the sense attached to them. As per requirement of Section 212 Cr.P.C. Regarding time, place and persons connected with the offence have also been mentioned and almost contents of charge are enough to understand the case.

The relevant part of Chapter XVII of Cr.P.C. is quoted herein below:

211. Contents of charge.

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific- name, the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) The charge shall be written in the language of the Court.

(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which

the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed. Illustrations

(a) A is charged with the murder of B. This is equivalent to a statement that A' s act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code (45 of 1860); that it did not fall within any of the general exceptions of the said Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within Exception 1, one or other of the three provisos to that exception applied to it.

(b) A is charged under section 326 of the Indian Penal Code (45 of 1860), with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the said Code-, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property- mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property- mark, without reference to the definitions of those crimes contained in the Indian Penal Code (45 of 1860); but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(d) A is charged under section 184 of the Indian Penal Code (45 of 1860) with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

212. Particulars as to time, place and person.

(1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money or other movable property, It shall be sufficient to specify the gross sum or, as the case may be, describe the movable property in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 219; Provided that the time included between the first and last of such dates shall not exceed one year.

Section 213 in The Code Of Criminal Procedure, 1973

213. When manner of committing offence must be stated. When the nature of the case is such that the particulars mentioned in sections 211 and 212 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence

was committed as will be sufficient for that purpose. Illustrations

(a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

Section 214 in The Code Of Criminal Procedure, 1973

214. Words in charge taken in sense of law under which offence is punishable. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

Section 216 in The Code Of Criminal Procedure, 1973

216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

In this case Section 215 Cr.P.C. is important and quoted herein below:

Section 215 in The Code Of Criminal Procedure, 1973

215. Effect of errors. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Illustrations

(a) A is charged under section 242 of the Indian Penal Code (45 of 1860), with" having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word" fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may inter from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) A is charged with the murder of Khoda Baksh on the 21st January, 1882 . In fact, the murdered person' s name was Haidar Baksh and the date of the murder was the 20th January, 1882 . A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh: The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e) A was charged with murdering Haidar Baksh on the 20th January, 1882 , and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882 . When charged for the murder of Haider Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

According to Section 215 Cr.P.C., defective framing of charge would be of no consequence unless it has resulted in failure of justice as held in State **(NCT of Delhi) Vs. Navjot Sandhu, AIR 2005 SC 3820-**

"It is not uncommon that the offence alleged might seemingly fall under more than one provision and sometimes it may not be easy to form a definite opinion as to the Section in which the offence appropriately falls. Hence, charges are often framed by way of abundant caution. Assuming that an inapplicable provision has been mentioned, it is no ground to set aside the charges and invalidate the trial."

50. In this case commission of the crime was started when the deceased reached in front of Meenu Malviya's shop

and just after reaching about 20 steps ahead, he was killed. The place of murder of the deceased is not far away from the shop of Meenu Malviya so it cannot be said that the accused persons could not understand the place of occurrence.

51. In view of the aforesaid Section 215 and on the basis of judicial precedent, it is concluded that there is no failure of justice. Hence, neither charges framed are liable to be quashed nor trial would be said to be vitiated.

52. In alternative accused Shyam Bihari has taken the ***plea of alibi*** that at the time of the alleged occurrence he was not present on the spot and he has not exhorted the rest of the accused persons to commit the alleged crime. According to him at the date and time of the alleged occurrence, he was on duty at Naini, Allahabad, about 28 km away from the village. To prove the plea of alibi, this accused has cross-examined four defence witnesses, whose testimony is discussed herein below.

53. D.W.-1, Surendra Prasad Mishra, was not present with the accused person at the time of inspection in Naini Zone, Allahabad, but he had deposed that he had directed Shyam Bihari Mishra and Assistant Tax Office Revenue Grade II to inspect house No. 92E/8 Chak Lal Mohammad. A report, prepared by the accused and other inspectors Shitla Prasad Saroj and Radhey Shaym, was produced before him and Rs. 500/- house tax was also deposited by the accused on that day. In cross-examinations this witness has admitted that when employees come, they sign on the attendance register. He could not tell as to what time accused Shyam Bihari Mishra went to his area and at what time he came back. He could not tell the distance of his house from Chakdodi. He admits that when Shyam Bihari used to come to the office, he did not put time while signing the attendance register; there was no tradition to mention time of coming and leaving. He further admits that report Ex. Ka-2 had not been given in front of him by the above three employees by keeping it in any register but had presented it directly in front of him. They had not even given time for presentation of the report. There is no register to enter the report. This witness further admits that in Ex. Kha-3, no time is entered while submitting the challan with revenue inspector as there is no register for it.

Thus from the evidence of this defence witness, it is not proved that the accused had actually made inspection of Chak Lal Mohammd at the time of occurrence and was not present on the place of occurrence.

55. D.W.-2, Radhey Shyam Sharma, Assistant Tax Superintendent, has deposed that on 10.4.2000, he along with S.P. Saroj and accused Shyam Bihari had gone to Chak Lal Mohammad and Chak Dodi for legal inspection. According to him they had conducted local inspection from 8 A.M. to 10 A.M. and he had also directed Shyam Bihari to recover the house tax thereafter he returned to Office, Allahabad. According to this witness, accused Shyam Bihari was with him from 8 A.M. to 10 A.M. and he had also deposited the recovered tax amount in the office. This witness admits that there was no attendance register for the inspectors while according to D.W.1 there is attendance register upon which accused Shyam Bihari used to sign to prove his attendance. This witness admits that no such attendance register for the purpose is maintained in his office to know that at

what time any employee came to the office and at what time left the office. Contrary to the above deposition there is an attendance register for the inspectors. This witness has further deposed that presence of Shyam Bihari is in the office register. In cross-examination, this witness has admitted that no such attendance register is before him seeing him he could tell at what time accused Shyam Bihari came to the office on 10.4.2000 and at what time he left the office. This witness was deposing seeing the photocopies, which are not admissible in evidence. This witness admits that there is no specified time for depositing the recovered tax amount.

56. Thus, it is concluded that from the evidence of this witness, presence of accused Shyam Bihari Mishra, in Naini Zone, at 8:00 A.M. is not established beyond reasonable doubt. Just after the incident the accused persons left the village, ample opportunity was available to the accused to join the colleagues and to show that he was not present on the spot but was busy in his duty at the time and date of the occurrence. It is also a matter of surprise that first of all when an employee comes to the office, he signs the attendance register thereafter proceeds for the field work/inspection. Generally no Municipal Corporation official would start official work from 8:00 A.M. No other example could be shown by this accused (except on the date of occurrence) that he also did the official duty in the same manner before or after the incident.

57. D.W.-3, Mahesh Chandra Mishra, clerk at Municipal Corporation Allahabad, came to the Court with original records and presented the attendance register and deposed that on 10.4.2000 accused Shyam Bihari had made signature about his presence. This witness has admitted that in file no. 42 papers are neither sequentially arranged nor serially numbered. The file cover was also changed. According to this witness second changed file cover has been put. This witness has admitted that there was no signature or mention of Shyam Bihari Mishra in file no. 77 at page no. 1 on 10.4.2000. Signature of Shyam Bihari Mishra is on page 2 but the date has not been mentioned. This witness further admits that from seeing receipt book number 81, 83, 17 and 18, it is not known as to when Shyam Bihari deposited the amount. The time is not mentioned in the receipt book. Thus only on the ground that tax amount was deposited in the name of accused Shyam Bihari, it can not be said that it was deposited by him on the alleged time and date. There are also some cutting in the year on the main page of the attendance register. Seeing the attendance register this witness deposed that from 11.4.2000, accused Shyam Bihari was absent and before his name cross 'X' has been made. Considering the evidence of this witness, this Court concludes that this witness was not present with the accused Shyam Bihari at the time of occurrence, he has deposed before the Court only on the basis of documents available in the office. It can not be concluded that at the time of occurrence accused Shyam Bihari was not present on the spot as he was on duty.

58. D.W.-4, Shitla Prasad, has deposed that on 10.4.2000, he had inspected the house in Chak Lal Mohammad; that day he had inspected the house of Jeet Lal Vist and two other houses in Chak Raghunath and Chak Dodi. According to him he started inspection at 8:00 A.M. along with Radhey Shyam Sharma and Shyam Bihari Mishra; they remained with him till 10 :00 a.m. In the

cross-examination this witness answered that Shyam Bihari had come by cycle. According to him prior to this inspection he also used to go for inspection with accused Shyam Bihari Mishra. This witness admits that though there is attendance register but since they were field staff, hence their attendance was taken till 4 :00 P.M. without mentioning the time of coming and leaving the office.

This witness is also a colleague of the accused. Generally, no inspection are made before 10:00 a.m. No such previous or past example could be shown by the accused that except on the fateful day any other day also he had done such inspection and had collected the house tax. Thus, this Court is of the opinion that all the four witness from the side of defence have not been able to prove that the accused was in Chak Lal Mohammad or Chak Dodi from 8:00 a.m. onwards on 10.4.2000.

59. In this regard section 11 of the Evidence Act is relevant which is as follows:

Section 11. *When facts not otherwise relevant become relevant- facts not otherwise relevant are relevant.*

1. if they are inconsistent with any fact in issue or relevant fact;

2. if by themselves or in connection with other facts they make the existence or not-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is, whether A committed a crime at Calcutta on a certain day. The fact that, on that day, A was at Lahore is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime. The circumstances are such that the crime must have been committed either by A, B, C or D, every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D, is relevant.

A. In ***Commissioner of I.T. Vs. Kamla Town Trust, (1196) 7 SCC 349****, it has been held that "Section 11 deals with facts which ordinarily have nothing to do with the facts of a case and are not in themselves relevant, but they become relevant only by virtue of the fact that they are either inconsistent with any fact in issue or relevant fact or they make the existence of a fact in issue or a relevant fact either highly probable or improbable."*

Evidence can be given of facts which have no other connection with the main facts of a case except this that they are inconsistent with a fact in issue or a relevant fact. Their inconsistency with the main facts of the case is sufficient to warrant their relevancy. This section enables a person charged with a crime to take what is commonly called the plea of alibi which means his presence elsewhere at the time of the crime. His presence elsewhere is inconsistent with the fact that he should be present at the place of the crime.

*B. In **Binay Kumar Singh Vs. State of Bihar, AIR 1997 SC 322, i**n para 22 and 23 has observed as under:*

"22. We must bear in mind that alibi not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (A) given under the provision is worth reproducing in this context:

" The question is whether A committed a crime at Calcutta on a certain date : the fact that on that date, A was at Lahore is relevant."

23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and had participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.

*C. It is well-settled that the burden of substantiating the plea of alibi and making it reasonably probable lies on the person who sets it up (State of U.P. Vs. Sughar Singh AIR 1978 Sc 191). The Supreme Court has stated : "The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of the offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed." Applying this to the facts of the case the court held that the plea of alibi was not established as the gap between the factory where the accused worked and where he was present at 8.30 a.m. and the place of murder which took place at 9 a.m. was so short that the accused could have easily reached there **(Dudh Nath Pandey Vs. State of U.P., (1981) 2 SCC 166).***

*D. In **Sandeep Vs. State of U.P, (2012) 6 SCC 107.** Burden of proving the*

plea of alibi lies upon the accused. If the accused has not adequately discharged that burden, the prosecution version which was otherwise plausible has, therefore, to be believed.

E. In ***Shaik Sattar Vs. State of Maharashtra, (2010) 8 SCC 430****, it has been held that Plea of alibi has to be established by accused by leading positive evidence. Failure of said plea would not necessarily lead to success of prosecution case which has to be independently proved by prosecution beyond reasonable doubts. Plea of alibi has to be proved with absolute certainty so as to completely exclude possibility presence of accused at place of occurrence at the relevant time.*

F. In ***Om Prakash Vs. State of Rajasthan & Another, (2012) 5 SCC 201*** *it has been held that plea of alibi has to be raised at first instance and subjected to strict proof of evidence and cannot be allowed lightly, in spite of lack of evidence merely with the aid of salutary principal that an innocent man may not suffer injustice by recording conviction in spite of his plea of alibi.*

G. In ***Adalat Pandit Vs. State of Bihar, (2010) 6 SCC 469*** *it has been held that where in a murder trial, the place of alibi not being far, witnesses being colleagues & there being no proper documentary evidence regarding alleged levy work during time of commission of crime, it has been held that the plea of alibi was rightly rejected.*

60. In this case all the defence witnesses are the colleagues of the accused. If actually the accused Shyam Bihari Mishra had inspected the house at Chak Dodi and Chak Mohammad, some of the house owners could have been examined to prove the presence of the accused from 8:00 a.m. onwards on 10.4.2000, it would have become a ground to consider that the accused was not present on the spot and was in Naini Zone for the purpose of his inspection. Thus, the ***plea of alibi is rejected.***

61. Learned counsel for the appellants also argued that informant, P.W.1, Shiv Prakash Tiwari, brother of the deceased, returned home from the hospital after death of Jai Prakash Tiwari and did not participate in the inquest proceeding and did not reach at the time of post-mortem which is very uncommon and unnatural behaviour and the truth has not been put by the prosecution in this regard.

According to this Court even if this fact is true, even then it does not affect the merit of the case. It is proved from the evidence that after death of Jai Prakash Tiwari, his son - P.W.4- Pawan Tiwari, P.W.3- Jai Hind Sigh and other persons remained present with the dead body till the post-mortem was over. No person was present in the house and the I.O. had visited the spot and had started the investigation and had also recorded the statements of informant and other witnesses. Therefore, if the informant, P.W.-1, did not return to the hospital or the mortuary, it cannot be said that his behavior was uncommon or unnatural and contrary to the prosecution version or in any way it affects the merit of the prosecution case otherwise.

62. Learned counsel for the appellants has also argued that in this case for the sake of arguments, the version of prosecution is accepted, even then the role of accused Shyam Bihari Mishra is distinguishable from the role of other co-accused persons.

According to him as per the prosecution version Shyam Bihari had only exhorted the rest of the accused persons. Hence, it can not be said that he was involved in the crime and he cannot be held guilty for murder with the help of Section 34 I.P.C.

Here the charges are under Section 302 and 307 I.P.C with the help of Section 34 I.P.C., only an incorrect word i.e. "Samanya Uddehsya' has been used, which does not affect the merit of the case or the conclusion. The main offence has been committed by the rest of the two accused persons only on the exhortation of the accused Shyam Bihari. All three accused persons had left the village together by Marshall Jeep. Shyam Bihari was knowing that the rest accused persons are armed with a firearms. Hence, a prior meeting of mind and common intention to kill the deceased of all the accused persons is established.

There are two subsidiary sections to enable the Court to cover all the accused persons. In case the offence has been committed by more than one person but not more than four persons then Section 34 I.P.C. comes into play. In this case there are three accused persons hence charge under Section 302 read with Section 34 I.P.C. and Section 307 read with 34 I.P.C. has been framed. If charges are framed under Section 34 I.P.C. then 'common intention' or 'Samanya Aashay' word is used. If there are five accused persons then an unlawful assembly is automatically formed under Section 141 I.P.C. and if any member of such assembly commits an offense then it is said that such member has committed the offence in pursuance to common object or *'Samanya Uddeshya'*, then charges with the help of Section 149 I.P.C. are framed. In this case, at the time of framing charge instead of using word *'Samanya Aashay'* word *'Samanya Uddeshya'* has been used. But it does not affect merit of the case, it is mere a typographical error. Prosecution and accused both sides were understanding that it was a case of common intention in which only three persons were charged for the commission of said offence.

It has been dealt with in framing of charge that all the accused persons being three in number, the charges under Section 302 read with Section 34 I.P.C. and Section 307 read with Section 34 I.P.C. have been framed against them. Section 34 I.P.C. deals with common intention. It is as under:

"Section 34: Acts done by several persons in furtherance of common intention. --When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

The main ingredients of Section 34 i.e., 'common intention' are :-

1. A criminal act must be involving several persons,

2. The criminal act must be in furtherance of common intention of all; and

3. There must be participation of all persons in furthering the common intention.

The expression 'common intention' as used in Section 34, I.P.C. has been given various meanings as follows:-

(i) It implies a pre-aranged plan, prior meeting of minds, prior consultation among all the persons constituting a group.

(ii) Common intention means a desire to commit a criminal offence without any contemplation of consequences.

(iii) It implies mens rea necessary to constitute an offence that has been committed.

(iv) It also means evil intention to comity some criminal act, but not necessarily the same offence which is committed. "

In ***Saidu Khan Vs. State, AIR 1951 All. 21 (FB), and Pyare Lal Vs. State of U.P., 1987 SC 852***, it has been held that-

"Even in regard to offence involving physical violence it is not necessary that every accused must have taken active part in the attack on the victim."

63. In this case the occurrence started on the exhortation of the accused Shyam Bihari Mishra, a government employee, after that rest of the two accused persons committed the crime. It is established that the accused persons were together and were waiting for the deceased to return and when he reached the shop of Meenu Malviya and slowed down his scooter due to drainage, accused Shyam Bihari Mishra, exhorted his sons that 'he should not be escaped' thereafter accused Vimal Mishra stopped the scooter by standing ahead and accused Kamal Mishra shot in the chest of the deceased and when witnesses ran towards the place of occurrence, then Vimal Mishra also fired at the informant. Thus, this incident occurred only on the exhortation of the accused Shyam Bihari. The such an incident was not possible without a prior meeting and consult between the accused persons. Hence, this Court is of the considered view that the act of the accused Shyam Bihari Mishra is covered under Section 34 of the I.P.C. and his role cannot be said to be lesser than those of rest accused. Therefore, the trial Court has rightly convicted and sentenced the accused Shyam Bihari with the help of Section 34 I.P.C.

Supreme Court in ***Nand Kishore Vs. State of Madhya Pradesh (2011) 4 Cri LJ 4243 (SC)***, held that

"Section 34 deals with constructive criminal liability. Where a criminal act is done by several persons in furtherance of common intention of all, each of such persons would be liable for that act in the same manner as if it was done by him alone. If the common intention leads to Commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them."

The essence of common intention under Section 34, IPC is simultaneous meeting of the minds of persons participating in the criminal act to bring about a particular desired result. ***Lallan Rai Vs. State of Bihar, (2003) 1 SCC 268.*** It is not necessary that the act of participating persons should be identical or same. For instance, if in furtherance of a common intention to kill Z, A stands outside the door as a watchman, B overpowers Z and C inflicts dagger blows on Z, all the three (i.e., A, B and C) will be held liable for acting in furtherance of a common intention of murdering Z though their acts

were different. Here, 'A' cannot escape joint criminal liability on the plea that he was merely standing at the door and did not participate in the actual act of killing Z. This has been referred to by Lord Summer who in ***Barendra Kumar Ghosh Vs. King Emperor, AIR 1925 PC 1,*** quoting words of Milton said, "they also serve who only stand and wait."

Elaborating on the scope of Section 34, the Privy Council in this case observed that a person standing only as a guard outside the room would be also jointly liable with the culprits committing the crime and it will be no defence for him to say that he did not have any intention to kill the person murdered and that he was compelled by the other accused to stand outside as a guard and alter them of any possible danger. The Privy Council in this case observed, "Criminal act means that unity of criminal behaviour which results in something for which an individual would be liable, if it were all done by himself alone, that is, in a criminal offence."

Even in regard to an offence involving physical violence it is not necessary that every accused must have taken an active part in the attack on the victim. ***Pyarelal Vs. State of U.P, AIR 1987 SC 852.***

64. About manner of assault, several questions have been put by the defence counsel but there is no substance in it. It is immaterial that whether the scooter was stopped from the side or the front or whether the deceased was shot by putting the barrel on his chest or from some distance. It has already been discussed that if any person sees the occurrence from behind or from some distance, he would think that deceased is being shot from very close range.

65. Learned counsel for the appellants have relied on following rulings:

(a) ***Jagdish Murav Vs. State of U.P. 2006 Law Suit (SC) 686***. It was a case under Section 307 I.P.C. In which site plan was not brought on record. Original G.D. was not produced, evidence of the prosecution witnesses was found full of contradiction. Due to variation in facts, principles laid down in this case does not apply to the case in hand.

(b) ***Maruti Rama Naik Vs. State of Maharashtra, 2003 0 Supreme (SC) 863.*** In this case P.W.-3, injured, had not named the appellants as assailants in his statement to the police despite opportunity to record his evidence after one day's delay his statement was recorded. It was held that without corroboration the evidence of this witness was not liable to be relied on. P.W.-4 was the close friend of the deceased but he did not inform the police or anybody else and he went to his workplace. There was unexplained delay in recording his statement.

In this case P.W.-1 is the informant and was shot by the accused Kamal Mishra. His statement along with some other persons statements were recorded same day. The mater was immediately reported to the concerned police station, eye-witnesses had been mentioned in the written complaint and accused persons had absconded. Hence this judicial precedent does not apply in favour of the appellants.

(c) ***Sampath Kumar Vs. Inspector of Police Krishnagiri, AIR 2011 SC 1249.*** It is a case based on circumstantial evidence. In this judgment principles regarding cases relating to

circumstantial evidence has been propounded. There are major difference between the facts of both the cases. Hence, it does not apply.

(d) ***State of U.P. Vs. Parshuram Yadav, 2005 0 Supreme (All.) 1309 DB.*** It was a case of lathi blow under Section 307 I.P.C. There was also a cross case of the said incident. No blood was found at the scene of the occurrence. It was also observed that in the first half of May, crop of mango is of no use even not ready for preparing pickle. Therefore, the prosecution version was not found worthy of credence. Facts of both the cases are quite different, therefore, this citation cannot be applied in favor of the appellants.

(e) ***Daud Khan Vs. State of Rajasthan, 2015 0 Supreme (SC) 1041***. The principles laid down in this case are in favor of the prosecution, not in favor of the appellants. In this case the Apex Court did not accept that by overwriting on the F.I.R. it was made ante-timed. The offence had been caused at 9:30 p.m. and the F.I.R. was lodged at about 10:30 p.m. The Apex Court held that there is hardly any delay in lodging of the F.I.R. Similarly in this case the occurrence took place at 8:30 A.M. and the F.I.R. was lodged at 9:35 a.m. in P.S. Sarai Inayat, Allahabad which is 12 km away from the place of occurrence. About Section 157 CrPC the Apex Court held that when there is no delay in lodging an F.I.R. then any delay in communicating the special report to the Magistrate would really be of little consequence, since manipulation of the F.I.R. would then get ruled out. The Apex Court also held that the interpretation of Section 157 Cr.P.C. is no longer res integra and has also referred the citation Brahm Swaroop Vs. State of U.P., (2011) 6 SCC 288 ; Shiv Shankar Singh Vs. State of U.P., (2013) 12 SCC 539, wherein it was held that before such a contention is a countenanced, the accused must show prejudice having been caused by delayed dispatch of the F.I.R. to the Magistrate.

In para 34 of this the citation it is also held that there is no doubt both from the medical and the ocular evidence that Doud Khan had shot with a gun. The forensic evidence shows that the bullet extracted from the body of Nand Singh was capable was being fired from the recovered gun. Whether Nand Singh was shot by use of the recovered gun or some other gun was not questioned and none of the witnesses was asked any substantive question about the gun recovered from Javed at the instance of Daud Khan or whether it was the same gun (or a different one) used by Daud Khan.

Similarly in this it has been established from the F.S.L. Report that the cartridge of 12 bore could be executed from the country-made pistol recovered on the pointing of the accused Kamal Mishra.

(f) ***Samsul Haque Vs. State of Assam AIR 2019 SC 4163.*** In this case owner of the hotel or except P.W.1 no other independent witness present at the place of occurrence was examined. Like statement in F.I.R. of the cited case there is no vague statement in F.I.R. of the case in hand. Regarding interested and inimical witnesses, a detailed discussion has been made earlier. When the occurrence took place near the house of the deceased and informant, the family members and the persons of neighborhood would be natural witness. In this case argument for accused no. 9 has also been discussed and answered. In the present case except the

omission regarding asking about the F.S.L. report in Section 313 Cr.P.C. nothing has been left. In this context it has been concluded that under Section 293 Cr.P.C. such reports are automatically admissible in evidence and the accused persons had no objections thereon, therefore, they did not seek examination of the concerned scientist. In the present case all the three accused persons had been convicted and sentenced. Hence, any discussion and principle laid down about the acquittal of accused no. 9 of the cited case has no relevancy. In the cited case Section 34 and 107 I.P.C. have also been discussed. In this regard a detailed finding has been given earlier. In this case no plea of Section 109 I.P.C. has been taken and from the discussion it has been concluded that the role of all the accused persons including the accused Shyam Bihari Mishra is covered under the Chapter of Common Intention. Thus, the principles laid down in this case does not apply in favour of the appellants.

Ganesh Bhavan Patel and Another Vs. State of Maharashtra, 1978 0 Supreme (SC) 323. In the above noted case there were several infirmities in the statements of the alleged eyewitnesses and the statements of alleged eyewitnesses were recorded with an undue delay by the I.O. The F.I.R. was not lodged within the appropriate time. In the case in hand the F.I.R. has been lodged without delay and the statement of informant P.W.-1 had been recorded same day with some other persons. In the cited case, the trial Judge found the conduct of Pramila a girl of tender age unnatural and inconsistent with her being an eyewitness. The Apex Court accepted the conclusion of trial Court that Pramila was highly interested witness and the amenability to tutoring of a girl of such tender age, cannot be ruled out. In this case the fact and evidence are not so. Hence, the principles laid down in the cited the case cannot be applied in the present case.

66. In the present case the trial Court has not imposed fine either under Section 307 I.P.C. or 302 I.P.C.

Section 307 is as under:

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

***Section 302. Punishment for murder.** Whoever commits murder shall be punished with death or 1 [imprisonment for life], and shall also be liable to fine.*

This aspect has been discussed by the Full Bench of this Court in ***Sukh Dev Vs. Sate of U.P., 2017 SCC Online All 2992,*** wherein discussing judgments of this Court, other High Courts and also of the Apex Court, the Full Bench held in para 27 as under:

"27. Courts are armed with the power to impose sentence of fine also in addition to imprisonment, but it does not mean that the Court should impose fine

every case as a rule, though it may be desirable, having regard to the facts and circumstances of the case, to impose fine and to consider issuing directions to pay compensation to the victim as contemplated by section 357 of Cr.P.C. Section 302 or other similar sections do not fix any upper limit in respect of fine for a particular offence and the Court has the freedom to fix any amount. Section 63 of I.P.C. says that where no sum is expressed, the amount of fine, to which the offender is liable to pay, would be unlimited but not excessive or ridiculously low. Financial capacity of the accused, enormity of the offence, extent of damage caused to the victim of the offence are also relevant considerations-in fixing the amount. Having regard to these and overall facts and circumstances of each case, it needs to be taken into consideration whether to impose a fine or not, and it should not be a mechanical process of either imposing fine or not to impose fine. It is for the Court to decide whether any person involved in a criminal offence (victim) deserves payment of compensation. In all such cases, sentence of fine in conjunction with the sentence of imprisonment would be necessary and appropriate. Thus, we answer the question framed by us in the negative. In other words, we hold that it is not mandatory to impose a fine in addition to a substantive sentence of imprisonment for an offence punishable under section 302, I.P.C., though it is desirable to impose a fine having regard to the facts and circumstances of the case and the power conferred under section 357 of Cr.P.C. 291. The Registry is directed to place the instant criminal appeal along with this judgment before the appropriate Bench."

Therefore, imposition of fine in addition to a substantive sentence of imprisonment for an offence punishable under Section 302, I.P.C., though it is desirable to impose fine but is not mandatory in nature. The trial Court has neither imposed fine nor ordered to pay any amount as compensation to the aggrieved persons.

67. On the basis of the overall discussion this Court is of the considered view that there is no infirmity in the judgment and order of conviction passed by the learned trial Court. The prosecution has proved its case beyond all reasonable doubts. The order of sentencing is also proper. It is neither harsh nor punitive and has been awarded the minimum sentence which meets the ends of justice. The appeals lack merit and are liable to be dismissed.

Order

Both appeals are accordingly **dismissed**. The Registry to return the lower court record along with the copy of this judgment. Let a copy be sent to C.J.M. Allahabad, to ensure its compliance. If the convicts are not in custody, they shall be taken into custody forthwith and shall be sent to jail for serving out their remaining sentences.

As regards Kamal Mishra, appellant in Criminal Appeal No. 1884 of 2005 is concerned, the Court has been informed that he has been granted remission by the State Government and has been released. The order granting remission is under challenge in Writ Petition No. 17743 of 2022 (Satya Prakash Tewari Vs. State of U.P. & 7 Others) which has been heard by a co-ordinate Bench and judgment is reserved. Therefore, compliance of this judgment by the C.J.M., Allahabad as

directed above, shall be in accordance with the judgment and outcome of Writ Petition No. 17743 of 2022.

(2023) 4 ILRA 1430
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.04.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE VINOD DIWAKAR, J.

Capital Case No. 05 of 2020
With
Reference No. 4 of 2020
And
Capital Case No. 6 of 2020

Rakesh Pandey ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rajrshi Gupta, Sri Dileep Kumar (Senior Adv.), Sri Rizwan Ahamad, Ms. Shambhavi Shukla, Sri Gaurav Yadav, Sri Sunil Singh, Sri Ankush Yadav, Sri Rajesh Babu

Counsel for the Opposite Party:
G.A., Sri Ashok Kumar Dwivedi, Sri Ganesh Datt Mishra, Sri Kamal Krishna (Senior Adv.), Sri A.K. Dwivedi, Sri Shailendra Sharma

Criminal Law – Criminal Appeal- Capital Case and capital reference- arising out of Sessions Trial- conviction under Sections 147, 148, 201 and 302/34/149 IPC- allegations against the convicted appellants that they committed the heinous crime- severed the head and thumb of the deceased- relationship between the parties of immense significance- star witness PW-1-interested witness- will and gift deed executed by the deceased in his favour- contradiction in his testimony- testimony is not sterling in nature- oral and documentary evidence mismatch-his deposition found to be unnatural-identity of the headless body not established- numerous missing links in prosecution version- PW-1 not wholly reliable witness- separation of chaff from grain necessary- further corroboration from available evidence necessary-trial overlooked inherent contradictions in testimony of PW-1 vis-à-vis medical evidence- prosecution has failed to establish guilt of the accused beyond reasonable doubt- appellant acquitted- appeal allowed.

HELD:
The background facts have been noticed by us in order to appreciate the issues that arise for determination in the present appeals. It is the criminality part of the incident which alone requires adjudication by us. We have to determine whether the incident, as is alleged by the prosecution, has occurred in the manner suggested by the prosecution and; secondly, whether the prosecution has succeeded in establishing the guilt of the accused appellants beyond doubt on the basis of oral and documentary evidence produced by it. Dispute relating to rights of the parties over immovable property or contentious issues relating to legality and validity of the will and the gift deeds do not form part of the lis before us, and therefore we refrain ourselves from making any observations on the merits of such contentions raised by the parties. We also hasten to clarify that any observation made by us while noticing the respective stand of the parties is for the limited purpose of proper appreciation of the background facts and does not amount to expression of our opinion on the merits of the claim of either party. (Para 59)

The star witness of the prosecution in this case is the informant Akhilesh Kumar Pandey who has been produced as PW-1. This witness claims to have seen the incident, wherein the accused persons in an ambush brought down the deceased and chopped of his head and thumbs. As per PW-1 the deceased had executed a registered will and gift deed in favour of his brother and himself. A subsequent gift deed of 24.4.1995 was also relied upon by PW-1. PW-1 has clearly stated that deceased Dubari Pandey

was living with his family and he had no issue. (Para 66)

PW-1 is not only a related witness but is a highly interested witness in this case. We have already taken note of the background facts as per which the deceased had executed a will and gift deed in favour of informant Akhilesh Kumar Pandey and his brother to the detriment of other branch consisting of the accused persons. The relations between accused and the informant were thus highly inimical for the aforesaid reason. (Para 68)

In light of the principles laid down by the Supreme Court as noticed above, the testimony of PW-1 will have to be carefully examined in order to determine its credibility and reliability. (Para 70)

We also find that PW-1 has clearly stated in his testimony that the deceased Dubari Pandey was never married. This fact in the testimony of PW-1 is contradicted by his own document i.e. will and gift deed dated 30.3.1995 and 24.4.1995 which records that the wife of deceased has already died. It is difficult to believe that being a grandson and inheriting the entire estate of the deceased, PW-1 would be unaware of the marital status of the deceased. His deposition is therefore unnatural. (Para 74)

We otherwise find certain missing links in the prosecution case.. The Police Station– Dullahpur had received information about the recovery of head at 9.45 pm. In the statement of PW-8 Rajendra Prasad Singh, who was posted at Police Station Dullahpur, it transpires that this witness was sent alongwith Constable Raj Kumar for investigation and preparing the inquest by the Sub-Inspector Uma Nath Shukla. He claims that as it was dark the inquest could not be conducted in night and the inquest was conducted the next morning. He has stated that after receipt of such information at the police station, he reached the pond at about 11.00 in the night. He has specifically stated that the police personnel had not seen the head in the night and had seen it only in the morning at around 7.00 am. This witness has also stated that no information was received on wireless set from adjoining district Mau about the missing head of a dead person. Although this witness has supported the prosecution case, as per which, the inquest was conducted at about 7.00-8.00 am, but he later stated that the inquest concluded by 8.00-9.00 am. (Para 91)

In addition to above, there are some other loop-holes in the prosecution story. The postmortem of the beheaded body shows that the first ante-mortem injury was a clean cut. Incised wound 14x13cm x bone deep thru and thru (A.P. diameter), 3 cm above supra sternal notch and 1 cm above base of cervical seven vertebra underlying bone. The chopping of head is at the level of cervical six vertebra whereas the postmortem report of head shows clean cuts to be at the level of C2. The situation of cuts in the body and the head does not entirely match as they are at a different levels. This creates a doubt in the prosecution itself that the recovered head was part of the body of deceased Dubari Pandey. (Para 94)

The testimony of PW-1 does not fall in the category of wholly reliable witness since PW-1 is a highly interested witness. In this circumstance the Court is required to be circumspect and separate the chaff from the grain and seek further corroboration from reliable evidence, direct or circumstantial. (Para 98)

Though the trial court has convicted the accused appellants, but we find from the judgment of the court below that inherent contradictions in the testimony of PW-1 vis-a-vis medical evidence, as noticed above, have entirely been overlooked. The other circumstance with regard to identity of the dead body on the basis of prosecution evidence has also not been subjected to careful scrutiny. The trial court has completely omitted to consider that there existed an order of the consolidation court as per which the estate of the deceased was to devolve in equal proportion upon the informant and his brother as well as other branch of accused persons. We also find that PW-1 has clearly stated in his testimony that the deceased Dubari Pandey was never married. This fact in the testimony of PW-1 is contradicted by his own document i.e. will and gift deed dated 30.3.1995 and 24.4.1995 which records that the wife of deceased has already died. It is difficult to believe that being a grandson and inheriting the entire estate of the

deceased, PW-1 would be unaware of the marital status of the deceased. This aspect has also been clearly overlooked by the court below. (Para 100)

Appeal allowed. (E-14)

List of Cases cited:

1. Md. Jabbar Ali & ors. Vs St. of Assam, reported in 2022 SCC OnLine SC 1440

2. Nand Lal & ors. Vs St. of Chhat., (2023) SCC Online SC 262

3.Vadivelu Thevar Vs St. of Mad., 1957 SCR 981

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Aggrieved by the capital sentence awarded to them, the two appellants, namely Rakesh Pandey and Yashwant Chaubey have filed the present appeals challenging the judgment and order of conviction and sentence dated 10.2.2020/11.02.2020, passed by the Additional Sessions Judge, Court No. 1, Mau in Sessions Trial No. 75 of 1996 (State vs. Indrasan Pandey and others), arising out of Case Crime No. 83 of 1996, under Sections 147, 148, 201 and 302/34/149 IPC, Police Station - Sarai Lakhansi, District - Mau; whereby they have been convicted under section 147 IPC and sentenced to 2 years rigorous imprisonment alongwith fine of Rs. 2000/- and in case of default in payment of fine to undergo two months additional rigorous imprisonment; under Section 148 IPC sentenced to 2 years rigorous imprisonment alongwith fine of Rs. 3000/- and in case of default in payment of fine to undergo three months additional rigorous imprisonment; under Section 201 IPC sentenced to 5 years rigorous imprisonment alongwith fine of Rs. 5000/- and in case of default in payment of fine to undergo five months additional rigorous imprisonment and under Sections 302/34/149 IPC awarded death penalty alongwith fine of Rs. 1,00,000/- and in default of payment of fine, the same shall be recovered as arrears of land revenue. All the sentences were directed to run concurrently.

2. Apart from the two appellants, three other persons were also implicated in the aforesaid case crime no.83 of 1996. Two of these three accused, namely Indrasan and Ghanshyam have died during the course of trial. The third accused Mithilesh was declared juvenile vide order dated 7.12.2019, and his trial was segregated and transferred to the Juvenile Justice Board.

3. As death sentence was awarded to the two accused appellants, a reference i.e. Reference No.4 of 2020 has also been made to this Court under Section 366 Cr.P.C. by the court of sessions for confirmation of death penalty.

INCIDENT

4. On 12th March, 1996 at about 12.00 noon near the agricultural field of one Jiyutbandhan Singh the deceased Dubari Pandey S/o Dhanraj Pandey was allegedly done to death by chopping his head from neck, by a Dao (a heavy sharp edged weapon used for cutting wood) by accused Rakesh Pandey. The accused also cut both the thumbs of the deceased. The other accused namely Indrasan Pandey, Yashwant Chaubey, Mithilesh and Ghanshyam Pandey had pulled down Dubari Pandey on the ground and held him during the course of assault. Specific role of chopping the head and thumbs of deceased has been assigned to the accused

Rakesh Pandey. Accused Rakesh Pandey left with the head of the deceased as also his two thumbs.

5. A written report in respect of the incident was given by the informant Akhilesh Kumar Pandey, which is Exhibit Ka-1. On the basis of said written report a first information report came to be lodged at the Police Station Sarai Lakhansi, District Mau as Case Crime No. 83 of 1996, under Sections 147, 148, 201 and 302/34/149 IPC at 3.10 pm i.e. on the very date of incident i.e. 12.3.1996.

INVESTIGATION

6. The investigation proceeded in the matter pursuant to the aforesaid report and the inquest (panhayatnama) of the body (without head) was conducted on 12.3.1996 at 17.40 pm. The inquest report is on record and is marked as Exhibit Ka-2. As per the inquest report the information with regard to the incident was furnished to the police by the informant Akhilesh Kumar Pandey. The witnesses of inquest were Sitaram, Lalji Pandey, Islam, Chandradev and Vishun Ram (PW-2). The inquest report also records that the dead body (without head and thumbs) of Dubari Pandey is lying in the wheat field of Jiyutbandhan Singh. The deceased was wearing a white colour old "Dhoti' and a white vest i.e. "Bandi'. He also had a checked "Gamchha' (indian towel) on his body. The inquest witnesses suggested holding of postmortem in order to ascertain the exact cause of death. The detailed police scroll was prepared and thereafter the body was sealed and handed over to constable Rajpati Patel for getting the postmortem conducted.

7. The postmortem of the headless body was conducted at 2.15 pm on 13.3.1996. The autopsy surgeon has specified the age of the deceased as about 70 years and the expected time of death was reported to be about one day. The external examination of the dead body in the postmortem is as under:-

"Headless body, Rigor mortis present in lower extremity, Abdomen distended fecal matter coming out, Right and Left thumbs in part are missing.

Clotted blood present over neck, chest and back of neck."

8. Autopsy Surgeon determined the cause of death as shock and hemorrhage due to following ante-mortem injuries:-

"1. Incised wound 14x13cm x bone deep thru and thru (A.P. diameter), 3 cm above supra sternal notch and 1 cm above base of cervical seven vertebra underlying bone, muscles, vessels and soft tissue and cervical six vertebra is cut thru and thru apportion of cervical six is attached with trunk margin clear cut.

Note: Incised wound is having A.P. diameter 14 cm with Transverse diameter is 13 cm.

2. Incised wound 7 x 3 cm x muscle deep at the back of Rt. Shoulder joint.

3. Incised wound 3 x 2 cm x muscle deep on top of Rt. Shoulder joint.

4. Incised wound 4 x 2 cm x skin deep on the lateral side of right shoulder joint."

9. In addition to above, the autopsy surgeon has found following postmortem injuries on the deceased:-

"(1) incised wound 2 cm x 1½ cm x thru and thru on the proximal phalynx of right thumb underlying bone parts missing.

(2) incised wound 4 cm x 3 cm x bone deep obliquely placed on the middle phalynx of right index finger.

(3) incised wound 2 cm x 1½ cm x bone deep thru and thru on the middle phalynx of left thumb."

10. The autopsy surgeon also found the rectum of deceased to be loaded and fecal matter was coming out.

11. The record shows that a separate report was lodged with the Station House Officer of Police Station - Dullahpur, District - Ghazipur (an adjoining district of Mau, where the incident occurred) on 13.3.1996, by one Dhanpati Yadav S/o Jagroop Yadav stating that he has a tube-well situated on the east of the village near a pond. In the evening hours of 13.3.1996, a plastic polythene containing head of a male was found stuck in the khur (cracking) of a buffalo, when it came out of the pond. The polythene was of a shop selling school uniform and ladies bag, etc., situated below the Union Bank of India at Sahadatpura in District Mau. Both the eyes of recovered human head were missing and there were cuts on the cheek and face of the deceased.

12. On the basis of such information given by Dhanpati Yadav police personnel from Police Station Dullahpur reached village Sultanpur late in the evening and commenced investigation. Inquest of the recovered head was got conducted by Sub-Inspector Uma Nath Shukla of Police Station - Dullahpur, District - Ghazipur on the next morning vide Paper No. Ka.15, as per which the information with regard to recovery of the head has been received in the police station concerned at 21.45 pm on 13.3.1996 and has been recorded as Entry No. 37 in the General Diary. The inquest began at 6.00 am on 14.03.1996 and concluded at 7.15 am. The identity of the recovered human head was not ascertained and has been described as unknown. The inquest witnesses were Dhanpati Yadav, Ram Lal, Geeta Yadav, Jagroop Yadav and Ambika Yadav. The inquest witnesses found multiple injuries on the face and both the eyes were found missing. The recovered head was sealed and sent for postmortem. It is worth noticing that till the conclusion of inquest the identity of deceased was not established. Postmortem has been conducted in respect of the recovered human head from the pond on 14.3.1996 at 4.00 pm, which is Exhibit Ka-14. However, in the postmortem of the recovered head conducted by Dr. Bhupendra Nath Srivastava has been identified as that of the deceased Dubari Pandey. In the opinion of the autopsy surgeon the age of the deceased was about 60 years and the cause of death is reported to be shock and hemorrhage as a result of following ante-mortem injuries:-

"An incised wound size 10 cm x 10 cm at level of C2 margins clear cut.

An incised would size 4.0 cm x 1.0 cm x bone deep on right side of skull 15 cm above right eyebrow. Right frontal bone is sharply cut."

13. The Investigating Officer proceeded to collect evidence in respect of the offence. Statements of witnesses were recorded under Section 161 Cr.P.C. Upon completion of statutory investigation in accordance with Chapter XII of the Code of Criminal Procedure, the Investigating Officer submitted a charge-sheet against five accused on 15.6.1996 vide Paper No. 4K/1 (Exhibit Ka-12). The concerned magistrate took cognizance and committed the case to the court of Sessions where it got registered as Sessions Trial No. 75 of

1996 (State Vs. Indrasan Pandey and others).

THE TRIAL

14. Separate framing of charge orders were passed against the accused. Vide order dated 20.5.1999, the accused Rakesh Pandey was charged of committing offence under Section 148 IPC; whereas by a separate order of the same date the accused Rakesh Pandey, Mithilesh, Ghanshyam Pandey and Yashwant Chaubey were charged of committing offence under Section 302 r/w 149 IPC as also under Section 201 IPC. By yet another order of the same date, the accused Mithilesh alias Tipu, Ghanshyam Pandey, Yashwant Chaubey were charged of an offence under Section 147 IPC. The charges were read out to the accused who denied the same and demanded trial. Resultantly the trial procedure commenced.

PROSECUTION EVIDENCE

15. The prosecution in order to prove its case produced the following documentary evidence:-

"1. FIR dated 12.03.1996 as Ex.Ka.22
2. Written Report dated 12.03.1996 as Ex.Ka.1
3. Application dated 18.03.1996 as Ex.Ka. 3
4. Postmortem Report dated 13.03.1996 as Ex.Ka.13
5. Postmortem report (Head) dated 14.03.1996 as Ex.Ka.14
6. Affidavit by Sitaram dated 09.04.1999"

16. In addition to above documentary evidence, the prosecution produced Akhilesh Kumar Pandey (PW-1); Vishnu Ram (PW-2); Dhanpati Yadav (PW-3); Kusum Pandey (PW-4); Vansh Bahadur Yadav (PW-5); Anil Kumar Arya (PW-6); Bhupendra Nath Srivastava (PW-7); Rajendra Prasad Singh (PW-8); and Jamvant Jaiswal (PW-9).

17. Though in the charge sheet submitted by the Investigating Officer 28 prosecution witnesses were nominated but during trial the prosecution adduced only 9 witnesses, referred to above.

18. It is relevant to note that as per the FIR the incident is alleged to have been witnessed by the residents of village namely Sitaram and Chandradev, in addition to the informant. Sitaram, however, has filed an affidavit dated 9.4.1999 during trial stating that he has not seen the incident and that he had gone out of the village due to some urgent personal work. The other eye-witness Chandradev was got discharged by means of an application filed by the informant Akhilesh Kumar Pandey, through the Government Counsel. It is, therefore, apparent that out of the witnesses who have witnessed the incident only the first informant has been produced during trial by the prosecution.

19. PW-1 (Akhilesh Kumar Pandey) in his testimony has disclosed the name of his father as Ram Singhasan Pandey, who in turn was the son of Amardev alias Khedan Pandey. The father of Amardev was Dhanraj Pandey. Dhanraj Pandey had two sons namely Amardev alias Khedan Pandey and Dubari Pandey. As per the statement of PW-1, in his examination-in-chief, the deceased Dubari Pandey was unmarried and consequently issueless. Amardev, the elder brother of deceased Dubari Pandey had two sons namely Ram

Singhasan Pandey and Indrasan Pandey. Ram Singhasan has two sons namely Kamlesh Pandey and Akhilesh Kumar Pandey (first informant). Indrasan Pandey (accused) has four sons namely Rakesh Pandey (accused), Mithilesh Pandey alias Tipu (accused), Amit alias Bhoja and Kavis alias Mandhata. Indrasan also has two daughters namely Kanaklata alias Urmila and Ruchi. Indrasan Pandey alongwith his two sons namely Rakesh Pandey and Mithilesh Pandey are the accused in this matter apart from Yashwant Chaubey, who happens to be the son-in-law of Indrasan Pandey and husband of Kanaklata alias Urmila. During the course of trial Indrasan Pandey and Ghanshyam Pandey have died. Accused Mithilesh Pandey son of Indrasan Pandey has been declared a juvenile and therefore his trial was segregated and sent to the competent forum i.e. Juvenile Justice Board.

20. PW-1 has further stated that younger brother of his grandfather namely Dubari Pandey was residing with his family and had no progeny. He was satisfied with the services rendered to him by the witness and consequently Dubari Pandey had bequeathed his movable and immovable property to PW-1 Akhilesh Kumar Pandey and his brother Kamlesh Pandey by way of a registered will and gift deed dated 30.3.1995. Indrasan Pandey and his heirs were not given any share in the estate of deceased Dubari Pandey. Accused Indrasan Pandey and his family members were thus annoyed. Even during lifetime of Dubari Pandey the accused Indrasan Pandey had misrepresented his daughter Kanaklata as Urmila, daughter of Dubari Pandey, and prepared a fraudulent unregistered will in her favour, showing her to be the daughter of Dubari Pandey in the family register. However, no date was mentioned in the family register regarding this entry. A civil litigation had already started in the matter. For such reasons the accused wanted to eliminate Dubari Pandey. On 12.3.1996, at about 12.00 noon PW-1 was returning with the deceased Dubari Pandey after inspecting the wheat crop. Dubari Pandey was a little ahead of PW-1. When they reached the field of Jiyutbandan Singh the accused Indrasan Pandey, Rakesh Pandey, Mithilesh, Ghanshyam Pandey and Yashwant Chaubey pulled down the deceased on the ground in an ambush. While Indrasan, Mithilesh, Ghanshyam and Yashwant held the deceased the accused Rakesh Pandey beheaded him with Dao (a heavy sharp edged weapon used for cutting wood) and also chopped both his thumbs. The head and thumbs of deceased were then taken away by the accused Rakesh Pandey threatened that no one standing should come in his way and proceeded towards south on the chak road. The accused also abused PW-1 and chased him. On raising alarm by PW-1, Sitaram Singh and Chandradev alongwith other villagers came on the spot and an atmosphere of terror prevailed in the village so that none may testify regarding the incident.

21. PW-1 was cross examined by the accused in which he feigned ignorance about the sister of deceased Dubari Pandey. He stated that Smt. Anjora was the wife of Amardev and he does not know the name of the wife of Dubari Pandey. He had not seen her and was not aware as to when the wife of Dubari Pandey died. He claims to know nothing about the wife of Dubari Pandey. PW-1 has further stated that the deceased Dubari Pandey had executed a will and gift in his favour on 30.03.1995. The original gift and will, however, was not available as it was allegedly filed in the mutation proceedings at the Tehsil from

where the proceedings came to the Additional Magistrate. He then stated that original will has been submitted before the High Court in the case of Akhilesh vs. Gulabi. He then stated that will was taken from the court of Tehsil and submitted before the High Court. An application under section 156(3) Cr.P.C. was filed by the accused, against PW-1, which is challenged in High Court where the will is submitted. The original gift dated 24.04.1995 is also filed in the said case. The witness, however, did not remember the case number. He claimed to be unaware of the direction issued by the trial court to produce original will and gift deed. He claims that original will and gift deed is on record. The witness has further stated that on 24.04.1995 a registered gift deed was executed in his favour and also in favour of his brother but its photocopy has not been produced. Original deed has been given to the advocate at High Court as per PW-1. The witness asserted that the will dated 30.03.1995 as also the two gift deeds dated 30.3.1995 and 24.04.1995 are both registered documents.

PW-1 has further stated that the deceased Dubari Pandey was with him in the night of 11.03.1996. On 12.3.1996, they left at around 09.30 - 10.00 in the morning for the agricultural field. By then, they had eased themselves (attended nature's call) but had not taken bath or eaten anything. The agricultural field which he had gone to see with the deceased was at a distance of about 300 meters. The agricultural plot had already been partitioned in which share of Dubari Pandey was half while ¼th - ¼th shares were of Ram Singhasan and Indrasan. Cultivation in the agricultural field by deceased and PW-1 was done jointly. At the time when he had gone to inspect the wheat crop it was almost the harvesting time. There were agricultural fields of other villagers between his house and the agricultural fields. The names of other tenure holders whose agricultural fields are situated in between has been specified. He has explained that towards the east of the field of Jiyutbandhan Singh is the field of one Kuber and Khichadi and nearby it are the fields of Markandey Pandey. At the time of incident these persons were not in their fields. Khichadi, Kuber, Jhullan, Vinod Pandey, Jamuna had arrived much after the incident. The village Abadi is at a distance of about 300 meters on the eastern side. On the way to the fields PW-1 claims to have met Ganga Yadav and others working in the brick-kiln. The brick-kiln belongs to Rakesh Pal and is at a distance of 110-115 yard from the place of occurrence. He has stated that on the way to his field he had crossed the fields of about 20-25 persons. The witness has specified that he reached his agricultural field at about quarter to 11 and stayed there for about half an hour. They also talked to Shankar Yadav whose field was about 100 yards towards west. While they remained at their agricultural field none of the adjoining tenure holders were available. He has stated that while returning from their field the accused ambushed the deceased in the fields of Jiyutbandhan Singh. The place where the accused had hidden themselves was not visible from the chak road and thus he cannot specify it. The accused ambushed the deceased from behind and pulled him down. It was only when the accused came near them that the witness could see them. He saw the accused coming from a distance of 5-7 paces. Rakesh Pandey was carrying "Dao' whereas other accused had sticks in their hand. PW-1 halted at a distance from them on the chak road. The accused hurled abuses and asked him to leave or else he too would be done to death. The witness was not chased by the accused. The

deceased could not protect himself. The deceased fell on his back. PW-1 claims that he was at a distance of 70-80 paces from the place of occurrence when the incident occurred.

The cross examination of PW-1 continued and on 22.07.2003 he stated that the deceased was held by Yashwant, Mithilesh and Ghanshyam. Rakesh and Indrasan followed. PW-1 claims to have left when Indrasan started abusing him. He was chased by Indrasan Pandey for few steps whereafter Indrasan returned. However, PW-1 rushed 70-80 paces and halted thereafter. He raised an alarm from there. On raising alarm by PW-1 the workers engaged in the brick-kiln rushed to the place of occurrence. Various other villagers also came thereafter. On arrival of such persons from brick-kiln the accused left with the head and thumbs of deceased. About 20-25 persons had come from brick-kiln. Those 20-25 persons who came from brick-kiln did not chase or followed the accused. PW-1 has asserted that about 10 to 15 minutes was consumed between the deceased being pulled down and beheaded. He did not remember the name of those 20-25 persons but remembers the names of only Sitaram Singh, Chandra Dev Ram, Shree Ram Singh, Ganga Yadav, Lal Mohammad, Lalji Pandey, Shankar Yadav etc.

In his further cross-examination on 23.07.2003, PW-1 has stated that the place where accused had hidden themselves was at a distance of 20-30 paces from chak road. He had seen the accused in the village a day before. He further stated that the Investigating Officer had seen the place of occurrence when he arrived first. He had also seen the place where the accused were hiding. The place of occurrence was inspected by the Investigating Officer and his statement was recorded. He also stated that there was a solitary will executed by the deceased alongwith two gift deeds in his favour and that of his brother. The witnesses to the deeds executed by deceased were Jitendra Pandey and Girish Chandra. Jitendra Pandey is father-in-law of his sister whereas Girish Chandra is his maternal uncle. He stated that age of the deceased was about 70-80 years when he executed the will.

A Photograph was shown to PW-1 (Paper no.108) about which he stated that the persons standing near the dead body shown in the photograph is Indrasan Pandey. PW-1 was standing behind Indrasan in the photograph. The photograph included other persons namely Ghanshyam Pandey, Jai Prakash Singh @ Jaya Singh and accused Rakesh Pandey. Next to Rakesh Pandey is Radhey Shyam Chaubey who is father of accused Yashwant Chaubey. He has denied the suggestion that photograph (paper no.108) was of cremation of Dubari Pandey and stated that in fact Dubari Pandey was then alive. As per him this photograph was taken during the last rites of Anjora wife of Amar Dev @ Khedan. He also denied the suggestion that during the first consolidation proceedings a compromise was arrived at between Dubari Pandey, Indrasan Pandey and father of PW-1 Ram Singhasan Pandey whereby Dubari Pandey was prevented from transferring his agricultural land. He has denied the fact that Dubari Pandey was married or that name of his wife was Sharda. He has also denied having any knowledge of the fact that a daughter was born to deceased Dubari Pandey from Sharda Devi. He also stated that original suit no.456/95 (Indrasan vs. Dubari Pandey) filed in the court of civil judge (junior division) was dismissed in default. This witness has denied the suggestion that he had got the suit filed

through an imposter claiming to be Indrasan Pandey. He also denied that some imposter had signed on the vakalatnama of such suit. He also denied the suggestion that distance of Abadi from the village is about 1 kilometer or that the brick-kiln was at a distance of 400 meter. He also denied the suggestion that gift deed executed in his favour is not by Dubari Pandey but was by some imposter. He has admitted that in his statement made to the Investigating Officer he had stated that various persons working in the nearby fields at the time of incident came to the place of incident and saw it. In his statement under section 161 Cr.P.C. he had also not disclosed that other accused were carrying sticks in their hands.

22. Prosecution then produced PW-2, Vishun Ram, who is the witness of inquest of the alleged beheaded body of Dubari Pandey. He has identified the headless body as that of Dubari Pandey. The dead body was sealed in his presence and the witness has identified his signatures on the inquest. In his cross-examination this witness has clearly stated that he had not identified the headless body as that of Dubari Pandey on the saying of PW-1. He had rather identified the body of deceased Dubari Pandey from the boil on the back of the deceased. He had seen the boil earlier also on the back of the deceased. The testimony of PW-2, in that regard, is extracted hereinafter:-

"मैंने खुद लाश को पहचाना वह दुबरी पाण्डे की थी। यह कहना गलत होगा कि अखिलेश के बताने पर मै माना कि लाश दुबरी पाण्डे की थी। दुबरी पाण्डे के धड व पीठ के फोडे को देखकर मैंने पहचाना की वह दुबरी पाण्डे की लाश है। मैं लाश का फोड़ा देखा था पहले से भी मैंने फोड़ा देखा था। पंचनामा के समय मैंने दुबरी पाण्डे की पीठ पर फोडा़ देखा था मैं मौके पर करीब रात्रि तीन बजे पहुँचा था। मैं पहुंचा तो लाश पीठ के बल पड़ी थी।"

23. PW-3 Dhanpati Yadav, who has proved the written report given by him to the in-charge of police station Dullahpur with regard to unidentified human head recovered from pond near his tubewell. He has stated that on his information the Sub-Inspector came on the spot and deputed two constables in the night. The Sub-Inspector again came in the morning and conducted inquest. It is at this juncture that the police of other police station alongwith family members of deceased came on spot and identified the recovered human head. The human head had no eyes and had signs of cut on cheek and face. The family members had recognized the human head as that of the deceased Dubari Pandey. This witness identified his signatures on the inquest. In the cross-examination PW-3 has explained the manner in which human head surfaced from the pond and he had informed the police about it. He has stated that he came to the place of occurrence alongwith Investigating Officer and it was dark by then. He again came in the morning at the place where human head was recovered and various paper formalities were carried out by Investigating Officer in his presence. He denied that he was an accused in a dacoity case. He also denied that he has given false testimony on the persuasion of Ram Lal, who was a client of Rakesh Pandey.

24. PW-4 Kusum Pandey, who is the wife of PW-1 and has stated that she had left alongwith Sitaram Singh, Chandra Dev Ram and Sub Inspector early in the morning to identify the recovered human head at village Sultanpur on 14.03.1996. When she arrived various persons were already present and the human head was kept in a polythene. The human head was taken out and on seeing it she identified it as that of the deceased. It is after such

identification that the head was sealed by Investigating officer and she returned. In her cross-examination PW4 has stated that the Investigating officer came to her house at about 05.00 in the morning alongwith other police personnel and nobody else joined her. The Investigating Officer informed her that human head has been found which was to be identified by her and therefore she immediately left with the Investigating Officer. It was already day time when she arrived near the pond. She has stated that about 1-1½ hour was taken in reaching the pond from her house. The polythene was opened when she arrived there but she does not remember the colour of polythene. No proceedings were undertaken by the Investigating Officer in her presence. The polythene was kept there from before and police took out human head and showed it to her. When human head was taken out from polythene it had no blood marks and face was disfigured. However, she could recognize it. She returned alongwith police personnel. She denied the suggestion that she had not visited the pond and that the identification proceedings were never undertaken in her presence.

25. PW-5 Sub-Inspector Vans Bahadur Yadav, who was posted as Station House Officer of Police Station Sarai Lakhansi. He verified the receipt of written report by PW-1 and lodging of FIR thereafter. He has also explained the steps undertaken during investigation and that the thumbs of deceased could not be traced. Blood was found in the field but despite best efforts the head of deceased and his two thumbs could not be traced. He further stated that he received information on 14.03.1996 from the informer while he was conducting investigation of this case in the village itself that a human head of old man was recovered from a pond within the police station Dullahpur, Ghazipur. On receiving such information he left with PW-4 and others and found that Sub-Inspector Umanath Shukla alongwith his companion was present and had already filled various columns of inquest report. Before the recovered head could be sealed he had arrived at the place of inquest and the Investigating Officer had shown the recovered head to the family members which was recognized by the family members, who started weeping. It was thereafter that the human head was sealed and sent for postmortem. He has also proved the site plan and other police papers. He has stated that an application was moved by him before the concerned C.J.M. for custody of accused Rakesh Pandey, which was denied by the court and that is why the weapon used in the offence could not be recovered.

26. In the cross-examination PW-5 has admitted that he had recorded statement of Chandra Dev Ram on 20.03.1996. He had inquired about the incident from Jullan Pandey, Vinod Pandey and Jiyutbandhan Singh but their statements were not recorded. The informant had not disclosed to him about the persons whose lands are situate near the place of occurrence. He also stated that statement of brick-kiln owner Rakesh Pal was not recorded by him. Statements of the workers engaged at the brick-kiln were also not recorded. He also admitted that house of Shankar was about 200 yards from the place of occurrence but he had not recorded the statement of Shankar. He also denied that the fields of nearby villagers were not shown in the site plan deliberately. He also denied the suggestion that statement of Rakesh Pal and workers at brick-kiln was not recorded as they were not supporting

the prosecution case. The informant had also not disclosed him about other accused having sticks in their hands. He also did not disclose that he was chased by Indrasan Pandey. He also had not disclosed that Dubari Pandey was grabbed from behind by the accused and was pulled down. With regard to identification of human head PW-5 has stated as under:-

"सिर के बरामदगी के सम्बन्ध में दुल्हपुर थाना से सूचना मिली थी। यह सूचना 14-3-96 को मिली थी। समय याद नहीं है। केस डायरी के पर्चा नं०-3 में अंकित किया है। स्वयं कहा कि मुझे मुखविर से ऐकवारे डीह में सूचना मिली थी।

मैने मृतक के सिर की बरामदगी नहीं की थी। केवल बरामदगी स्थल का निरीक्षण किया था।

दुबहा ताल पर वादी मुकदमा की औरत कुसुम थी। तथा विपिन कुमार दुबे, चन्द्रदेव राय, सीताराम सिंह को भी लेकर पहुँचा था। मैंने उक्त व्यक्तियों का सिर बरामदगी के संबंध में बयान नहीं लिखा था। वे बरामदगी के गवाह नहीं थे। शिनाख्त के गवाह थे।

यह कहना गलत है कि सिर को पोस्ट मार्टम होते समय मै गाजीपुर पहुंचा था।"

27. From the above it transpires that the information about recovery of human head was received by PW-5 on 14.03.1996. He, however, does not remember the time when such information was received. He stated that such information was received from informer at Raikwar Deeh where incident had occurred, however, the name of informer is not known. He had not recovered the human head but had only inspected it. He also admitted that statement of witnesses was not recorded by him at the spot. At the pond PW-4 was present alongwith Vipin Kumar Dubey, Chandra Dev Ram, Sitaram Singh etc. PW-5 admitted that he has not recorded the statement of above persons with regard to recovery of human head. He denied the suggestion that he arrived only at the postmortem house at Ghazipur. Human head was sent for postmortem by the police at Dullahpur. He has also stated that on identification he had mentioned the name of Dubari Pandey in place of unknown. He also gave an application for incorporating the name of deceased in the postmortem and this fact was mentioned in parcha no.3 of case diary. He recorded the statement of Dhanpati Yadav on 19.03.1996. PW-5 has also stated that when he arrived at the place where inquest was being undertaken of the human head and the head was sealed about half an hour, thereafter. The inquest proceedings continued for 15 minutes after his arrival. He has stated that informant had not disclosed that the head and thumbs of deceased were taken by accused Rakesh Pandey in a polythene. Informant had also not disclosed him that Dubari Pandey was unmarried or had no children. Informant had also not disclosed him that murder of deceased had been committed on account of a land dispute. The weapon used in the commission of offence could not be recovered by him. PW-5 has also denied that the information about recovery of a dead body in the field of Jiyutbandhan Singh was not given by the informant but by someone else. He has also denied that such information was given by Jai Prakash.

28. PW-6 Dr. Anil Kumar Arya, who conducted the postmortem of the headless body. As per him, age of the deceased was about 70 years and the period of death has been specified as one day. He found that rectum was loaded and the fecal matter was oozing out from the body. In the cross-examination the Autopsy Surgeon has stated that the abdomen was empty but large and small intestines had gas and fecal matter. Rectum was loaded. A Dhoti was wrapped around the dead body. The deceased was also wearing a vest (Bandi) alongwith a Gamchha and a Janeu when the body was handed over to him by the constable. He has stated that the deceased

could have died after 5.00 in the morning on 12.3.1996. He had written the age of the deceased on the basis of police papers. He has further stated that there is a marked difference between the ante-mortem and the postmortem injuries. Ante-mortem injury show signs of bleeding and clotting and gaping, which is not there in the postmortem injuries. No pus etc. is found in the postmortem injuries. The injuries relating to chopping of thumbs of deceased were postmortem injuries. He has stated that injury no.1 is an ante-mortem injury. As per him, the abdomen gets empty after 7-8 hours of the meal and that fecal matter would remain in the small intestine for 2-3 days. Rectum load is a condition prior to defecation.

29. PW-7 Dr. Bhupendra Nath Srivastava, who conducted the postmortem of the human head. In his cross-examination this witness has stated that the police papers had shown the name of deceased as unknown and he cannot give a definite answer as to on what basis he has mentioned the name of Dubari Pandey in the postmortem report. He has mentioned the age of deceased as 60 years on the basis of hairs and teeth of the deceased. He has denied the suggestion that on the asking of the police personnel he has mentioned the name of deceased as Dubari Pandey.

30. PW-8 Constable Rajendra Prasad Sharma, who has proved the inquest of the human head. He had also seen the human head and had taken it to mortuary alongwith Constable Raj Kumar Yadav. In the cross-examination he has stated that in the evening of 13.3.1996 he had received information about the recovery of a human head from one Dhanpati at the police station. He had come to the police station after about 10.00 in the night alone. He has stated that the police persons had not seen the human head in the night and had seen it in the morning hours of 14.3.1996 at around 7.00, after the sunrise. In his cross-examination PW-8 has stated that inquest concluded at around 7.00-8.00 am. He later stated that it was concluded by 8.00-9.00 am. He has denied the suggestion that inquest report was not prepared in his presence.

31. PW-9 S.I. Jamwant Jaiswal, who was posted as Head Moharrir at Police Station Sarai Lakhansi. He has proved the check FIR of Case Crime No.83 of 1996. He has denied the suggestion that FIR was ante-timed or that the FIR was registered under pressure of Station House Officer after receipt of postmortem report.

32. It appears that during the course of trial an issue was raised with regard to the juvenility of accused Mithilesh. In order to ascertain facts in that regard court below summoned Rajnath Singh, who was the Principal of Balika Inter College Ramvan Kuti Kajha, Mau as CW-1. The court also summoned CW-2 Ram Lakhan Pandey, CW-3 Rakesh Kumar Pandey and CW-4 Raj Narayan Mishra on the question relating to juvenility of accused Mithilesh Pandey. On the basis of their testimonies court below came to the conclusion that Mithilesh Pandey was a juvenile on the date of occurrence. Accordingly, his trial was referred to the competent forum.

33. The incriminating material produced by the prosecution during trial was then confronted to the accused for recording their statements under Section 313 Cr.P.C. The accused have stated that they have been falsely implicated in the matter and that Kanaklata is not called as Urmila. Accused Yashwant Chaubey has

stated that brother of his grandfather late Dukhari Chaubey was married to the sister of Dubari Pandey and that he has been falsely implicated in the matter.

DEFENCE EVIDENCE

34. The defence has produced Jai Prakash Singh, aged 60 years as DW-1, who has stated that Dubari Pandey had a daughter named Urmila, who pre-deceased Dubari Pandey. She was got married in Madhya Pradesh. He has stated that Dubari Pandey died in 1995 and he had participated in his last rites conducted at Ghazipur. This witness was confronted with paper no. 108 Kha. He has stated that Indrasan Pandey had performed the last rites of deceased Dubari Pandey. He has also stated that informant's father Ram Singhasan Pandey was employed in Madhya Pradesh and had got a servant about 30 years back. This servant was not seen after 11.3.1996. He had seen the headless body in the fields of Jiyutbandhan Singh. He has also stated that at about 6.00-7.00 in the morning he had gone to the field for grazing his cattle, where he found the headless body and had informed about it to the police. The police then arrived at about 10.00-11.00 in the morning. He has stated that in consolidation proceedings Dubari Pandey had given half of his land each to the branches of Indrasan Pandey and Ram Singhasan Pandey and they were in possession of their respective shares over such land. This witness has been cross-examined by the prosecution. He has denied that headless body was that of Dubari Pandey. He has further stated that Dubari Pandey had died a year back and he has no knowledge about any case having been filed by Dubari Pandey against him. He has further stated that under the influence of accused he is making a false statement. He has also stated that there was no dispute in respect of land of Dubari Pandey between the branches of Indrasan Pandey and Singhasan Pandey.

35. DW-2 is Santosh Kumar Singh, who has also supported the defence version that Dubari Pandey had a daughter, who was got married in Madhya Pradesh by the father of the informant Ram Singhasan Pandey. He has also stated that mother of Indrasan and Ram Singhasan Pandey had died six months after the death of Dubari Pandey. This witness has also stated that headless body was seen at about 9.00-10.00 in the morning and it was not of Dubari Pandey, as he had already died in the year 1995. He has also stated that this information was given to police by Jai Prakash Singh. He has also stated that there were rumours that headless body is that of an unknown person. He has also stated that after the death of Dubari Pandey a feast was organized in which Akhilesh and Singhasan Pandey had also participated. Last rights of Dubari Pandey were performed by Indrasan. This witness has denied the suggestion that on account of dispute of passage between him and the informant he is making false deposition.

36. DW-3 is Kedar, aged 55 years, who was running/managing the Cremation Ghat at Ghazipur. He has proved the death certificate, as per which Dubari Pandey died on 11.3.1995. He has stated that certificate of death has been issued by his Munim Mukhtar Khan.

37. DW-4 is Jagdish Pandey, who claims to be the brother-in-law of Dubari Pandey and has claimed that his sister Sharda Devi was married to the deceased and from their wedlock a daughter named Urmila was born. He has stated that on

11.3.1995 Dubari Pandey died. His cousin Ajoriya was married to Amardev Pandey and that he had participated in the last rites of Dubari Pandey. He was around 60 years of age. He had two sisters namely Sharda @ Saraswati and Rajpati. Sharda was married to Dubari Pandey, whereas Rajpati was married to Ramchandra Pandey. This witness was a clerk in the Indian Army. He has also stated that there was no enmity between the deceased with Indrasan Pandey. He has denied that he has been discharged from Army or that he is not receiving pension. He has denied that Dubari Pandey has been done to death on 12.3.1996.

38. DW-5 is one Premchandra Dubey, who allegedly had filed the application under Section 156(3) Cr.P.C. purportedly on behalf of Indrasan Pandey. This witness has stated that the person on whose instructions the application was filed under section 156(3) Cr.P.C. was brought by informant Akhilesh Kumar Pandey. He neither recognized the applicant Indrasan Pandey nor had he identified him.

JUDGMENT OF CONVICTION AND SENTENCE

39. Court below upon evaluation of the evidence brought on record and has come to the conclusion that prosecution has succeeded in proving the guilt of the accused appellants beyond reasonable doubt. For arriving at such conclusion the trial court has relied upon following material:-

(i) The FIR was promptly lodged in this case i.e. the incident occurred at 12.00 noon whereas FIR was lodged at 15.10 hours. Considering that place of occurrence was 18 kms from the police station, there was no delay in lodging of FIR.

(ii) There was a definite motive for the accused to commit the offence as the deceased had executed a will and gift deed in favour of the informant to the detriment of accused.

(iii) The dead body as also the human head was recognized/identified as that of the deceased Dubari Pandey by the family members of deceased i.e. PW-2 and PW-4.

(iv) Intense dispute was going on between the two factions i.e. the informant and the accused to inherit the property of Dubari Pandey and proceedings were pending before the civil court and revenue authorities.

(v) The testimony of PW-1 is trustworthy as he has seen the incident and his ocular testimony matches the inquest and postmortem.

(vi) The defence has not been able to establish that Dubari Pandey had already died on 11.03.1995.

(vii) The accused party had prepared an unregistered will and showing Dubari Pandey as dead, got the name of Urmila mutated by showing her to be the daughter of Dubari Pandey although she is actually the daughter of Indrasan Pandey. Dubari Pandey having came to know of it filed an application under section 156(3) Cr.P.C. for initiating criminal proceedings.

(viii) Even if the defence case about lack of motive is accepted, yet, it would not carry much weight since the direct evidence of PW-1 is truthful and reliable.

(ix) Minor contradictions in the testimonies of prosecution witnesses would not be material as there was huge time gap in the recording of statements and some variation is bound to arise.

(x) Prosecution has thus proved that incident has occurred in the manner stated by the prosecution witnesses and it being a case falling in the category of rarest of rare cases, merits awarding of capital punishment to the two accused.

APPELLANTS' ARGUMENTS

40. Aggrieved by the judgment and order of conviction and sentence, the two appellants herein have preferred the aforesaid appeals inter alia on following amongst other grounds:-

(a) Accused appellants have been falsely implicated by the informant in order to deprive them of the property to be inherited by them from the deceased, who was a common ancestor.

(b) Dubari Pandey had died on 11.03.1995 and such fact is clearly established by the defence by leading cogent and reliable evidence which has been erroneously discarded by the court below.

(c) The headless body alleged to be that of Dubari Pandey was actually of a servant of informant's father who had come from Madhya Pradesh and was not seen after 11.03.1996.

(d) The body alleged to be of Dubari Pandey was of someone else and the prosecution has failed to prove the identity of the beheaded body as that of Dubari Pandey.

(e) The alleged registered will and gift deed in favour of informant and his brother are fabricated documents executed through some imposter and the informant had himself got the thumbs of the dead body chopped of so that the identity of the deceased may not be established.

(f) Testimony of PW-1 is contrary to the medical evidence on record inasmuch as the witness (PW-1) has alleged that the accused appellant Rakesh Pandey had chopped the head and thumbs of the deceased in one go, whereas the postmortem shows that while chopping of head was an ante-mortem injury the chopping of thumbs was a postmortem injury, both of which could not have occurred simultaneously, in one incident, and exposes the falsity in the testimony of PW-1, who is otherwise a highly interested witness. As such he is neither a credible nor a reliable witness. Hence, his testimony is not worthy of reliance.

(g) Identity of the human head is also not established as being that of Dubari Pandey.

(h) Trial court has erroneously ignored the testimony of defence witnesses as per which Dubari Pandey had already died leaving behind a daughter and the testimony of PW-1 that deceased was unmarried or had no issue is contrary to the weight of evidence on record but the contra opinion of court below is unsustainable.

PROSECUTION ARGUMENTS

41. On the contrary, the counsel for the informant and State submit that the judgment of conviction and sentence is based upon proper appreciation of law and fact. It is urged that motive for the offence is established. Deceased Dubari Pandey was a common ancestor and had executed a registered will as well as registered gift deed in favour of the informant and his brother to the detriment of the accused. This act of the deceased had enraged the accused, who avenged the enmity by chopping the head of deceased. The incident has been seen by the informant and his testimony is trustworthy and reliable. It is further submitted that the manner in which the deceased was beheaded and his

head was carried by the accused Rakesh Pandey created an atmosphere of terror in the village. It is urged that the offence on part of accused would fall in the category of rarest of rare case, and therefore the death sentence awarded by the court below is justified. Submission is that appeal lacks merit and is liable to be dismissed.

42. We have heard Sri Dileep Kumar, the learned Senior Counsel assisted by Sri Rajrshi Gupta and Sri Rizwan Ahmad for the appellants, Kumari Meena the learned AGA for State and Sri Kamal Krishna, the learned Senior Counsel assisted by Sri Ganesh Dutt Mishra for the informant and have carefully perused the records of the capital appeals and the reference as also the original records of the court below.

RELATIONSHIP BETWEEN THE PARTIES AND GENESIS

43. Before adverting to the incident or examining the respective pleas of the parties, we deem it appropriate to refer to the relationship between the parties, as also the issues of inheritance of the estate left behind by the deceased in order to understand the background of the case and also the genesis of the incident.

44. One Dhanraj Pandey was the common ancestor, who had two sons namely Amardev alias Khedan Pandey and Dubari Pandey (deceased). Amardev alias Khedan Pandey had two sons namely Ram Singhasan Pandey and Indrasan Pandey. Ram Singhasan Pandey had two sons namely Kamlesh Pandey and Akhilesh Kumar Pandey (first informant). Indrasan Pandey has four sons namely Rakesh Pandey, Mithilesh Pandey @ Tipu, Amit alias Bhoja and Kavis alias Mandhata. Indrasan also had two daughters namely Kanaklata alias Urmila and Ruchi. Kanaklata is married to accused Yashwant Chaubey.

45. The agricultural holding of Dhanraj Pandey devolved upon his two sons Amardev @ Khedan Pandey and Dubari Pandey in equal proportions. Half of the property accordingly devolved upon Dubari Pandey and the remaining half came to the share of Amardev @ Khedan Pandey. Upon death of Amardev @ Khedan Pandey his share devolved upon his two sons namely Ram Singhasan Pandey and Indrasan Pandey. The accused party in this case is Indrasan Pandey and his family, who inherited 1/4th share of the agricultural property from the common ancestor and 1/4th share of Ram Singhasan Pandey devolved upon his two sons Kamlesh Pandey and Akhilesh Kumar Pandey (first informant).

46. Going by the law of inheritance (Section 171 of the U.P. Zamindari Abolition and Land Reforms Act, 1950), the agricultural land owned by Dubari Pandey would have devolved upon his two nephews namely Ram Singhasan Pandey and Indrasan Pandey. If Dubari Pandey died intestate or had no heir (as is the prosecution case), the estate of Dubari Pandey in normal circumstance was thus to be equally divided between the two branches of Ram Singhasan Pandey and Indrasan Pandey, such that their share in the original property would work out to 1/2 each (1/4th + 1/4th).

47. The defence has produced an order passed by the Consolidation Officer in proceedings under Section 9(A)(2) of the U.P. Consolidation of Holdings Act, 1953 incorporated in Aakar Patra 23(1) of village Raikwar Deeh, Pargana Mohammadabad,

Tehsil Sadar, District Mau, which contains a compromise between Dubari Pandey, Ram Singhasan Pandey and Singhasan Pandey to the following effect:-

"श्रीमान चकबन्दी अधिकारी मुकदमा 442/25.8.1966 धारा 9क(2) जोथ. चकबन्दी अ० सिंहासन बनाम दुबरी आदेश हुआ कि खाता सं० ..... मे डुबरी पुत्र धनराज का नाम सिंहासन व इन्द्रासन पुत्रगण अमर देव के साथ खातिरन दर्ज रहेगा उक्त आराजियात को डुबरी पुत्र धनराज को किसी को विक्रय करने व हिबानामा व आराजियात की नवाईयत को तबदील करने का कोई अधिकार आज से नही है और न कभी भविष्य मे रहेगा। डुबरी पाण्डे की नबालिग लड़की उर्मिला का देख रेख शादी विवाह सिंहासन व इन्द्रासन करेगें, यदि इस आदेश के खिलाफ सिंहासन व सिंहासन किसी प्रकार का विक्रय पत्र व हिबानामा व किसी प्रकार का कागजात पेश करेंगें तो वह गलत व नाजायाज माना जायेगा। हम दुबरी पुत्र धनराज के मृत्यु के बाद ½ सिंहासन व ½ इन्द्रासन पुत्र गण अमरदेव रहेंगे।

हस्ताक्षर
(अस्पष्ट)
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48. The effect of aforesaid compromise is that the share between the two branches of Ram Singhasan Pandey and Indrasan Pandey would remain equal upon death of deceased Dubari Pandey. The aforesaid order also contains recital to the effect that minor daughter of Dubari Pandey namely Urmila would be looked after and her marriage etc. would be performed by the two brothers Ram Singhasan Pandey and Indrasan Pandey and any sale deed or gift deed at variance with the above arrangement would be treated illegal. It is alleged by the defence that Dubari Pandey died a natural death on 11.3.1995. Thereafter the name of his daughter Urmila was recorded in the revenue records. Upon death of Dubari Pandey his share would thus devolve upon Ram Singhasan Pandey and Indrasan Pandey in the ratio of 1/2 each by virtue of the compromise.

49. Our attention has not been invited to any challenge made to the order of the Consolidation Officer nor is it shown to the Court that this order was reversed in any higher forum. It appears that subsequent consolidation proceedings have intervened and therefore no opinion on the claim of parties is required to be expressed by us, particularly as it not the lis to be adjudicated by us in these proceedings.

50. It appears that name of Urmila was recorded in place of Dubari Pandey in the revenue records by an undated order. A subsequent order was passed on 18.7.1996 in proceedings under Section 34 of the U.P. Land Revenue Act, 1901, expunging the name of Urmila daughter of Dubari Pandey and incorporating the name of Akhilesh Kumar Pandey and Kamlesh Pandey as Bhumidhar, on the basis of will dated 30.3.1995. An application for restoration was filed by Urmila on 31.8.1996 seeking recall of the order dated 18.7.1996. This restoration application has been allowed and the proceedings have been restored to its original number. The mutation proceedings have apparently not attained finality, since second consolidation proceedings have intervened in the village. The proceedings for determination the inter-se rights of the parties are thus sub--judice before the appropriate forum and thus we refrain ourselves from expressing any opinion in the matter.

51. Contrary to the above position, the case of informant Akhilesh Kumar Pandey is that Dubari Pandey was unmarried and died issueless. Urmila Pandey is actually Kanaklata daughter of Indrasan Pandey, who has misrepresented herself as the daughter of Dubari Pandey. According to informant a registered will and gift deed has been executed by Dubari Pandey on

30.3.1995, whereby his immovable property is bequeath in favour of Akhilesh Kumar Pandey and his brother Kamlesh Pandey to the exclusion of the branch of Indrasan Pandey.

52. The informant has also brought on record a subsequent gift deed of Dubari Pandey dated 24.4.1995, which records that the wife of Dubari Pandey has died earlier.

53. The informant further alleges that an Original Suit No.456 of 1995 was filed by Indrasan Pandey Vs. Dubari Pandey (first set) and Kamlesh Pandey as well as Akhilesh Pandey (second set) seeking relief of injunction against the defendant. In the said suit an application came to be filed by Dubari Pandey (Application No.17Ga-2 for recording his statement as defendant due to his old age of 85 years. In this suit the trial court noticed that plaintiffs were not appearing and consequently issued notices to the plaintiff Indrasan and his counsel for securing their presence before the court on 14.3.1996. However, two days before the date fixed in the matter for appearance of parties, the deceased Dubari Pandey was brutally murdered.

54. Contrary to the above case set up by the informant, the defence case is that they never filed Suit No.456 of 1995 and that the suit was got instituted through an imposter by the informant Akhilesh Pandey, who is an Advocate by profession. As per the defence, they came to know about filing of the suit much later and filed application for comparing the signature of Indrasan Pandey on the plaint and Vakalatnama with his admitted signatures recorded at the time of framing of charge in this case.

55. On getting knowledge about the filing of the papers/documents on 26.06.2006 by complainant/first informant, two applications were filed on 05.10.2015 (Paper No. 448 Kha) and on 24.12.2015 (Paper Nos. 459/460Kha), highlighting the fraudulent act of Akhilesh Pandey and made a specific prayer that the signature/thumb impression purported to be of Dubari Pandey in different documents namely, Registered WILL, gift deed dated 30.03.1995 and gift deed dated 24.04.1995 and other documents, having the signature/thumb impression of Dubari Pandey, through Handwriting Expert, may be compared. The signature of Indrasan Pandey, appearing on Plaint No. 456/1995 may also be compared from his admitted signature, put on the ordersheet of the Court of Magistrate, at the time of committal of the case to the Court of Sessions. The said prayer was refused by the Learned Sessions Judge, vide order dated 17.12.2019. The said order dated 17.12.2019 was challenged through 482 Cr.P.C. Petition No. 2623 of 2020. On 20.01.2020, counter affidavit was called by fixing 11.02.2020. However, before disposal of the said 482 Cr.P.C. Petition, the present impugned judgment and order was passed on 11.02.2020.

56. Defence has also relied upon various documents to show that Dubari Pandey had already died on 11.3.1995. His daughter Urmila filed Original Suit No.1221 of 1995 before the court of Civil Judge (Junior Division), annexing copy of the order dated 7.9.1995, whereby the revenue authorities mutated the name of Urmila in place of Dubari Pandey. In the said suit the family register was directed to be put in sealed cover. Copy of the family register was also annexed with the said suit, which shows that name of Urmila was

deleted on account of her marriage. A photograph (Paper No. 108 Kha) has also been filed to show that Dubari Pandey had died on 11.3.1995. The photograph of cremation shows the presence of informant Akhilesh Pandey as also accused Rakesh Pandey and the father of co-accused Yashwant Chaubey namely Radhey Shyam Chaubey. A school leaving certificate (Paper No. 220Kha) has also been filed by the defence showing Kanaklata to be daughter of Indrasan without any alias like Urmila.

ANALYSIS OF EVIDENCE

57. It is in the above backdrop and relying upon the case setup by the informant that the prosecution alleges that Dubari Pandey was alive and has been brutally done to death by the accused appellants in the incident which occurred on 12.3.1996. To the contrary, the defence version is that Dubari Pandey had already died on 11.3.1995 and the alleged will and gift deed dated 30.3.1995 and 24.4.1995 are fraudulent documents and have been prepared through an imposter. It is also the case of the defence that the informant's father namely Ram Singhasan Pandey was employed in Madhya Pradesh and had brought a servant with him about 30 years back. This servant was not seen after 11.3.1996. The defence, therefore, alleges that the informant has actually chopped the head of his own servant, so as to falsely implicate the accused for murdering Dubari Pandey and in order to suppress/conceal his identity the two thumbs of the deceased have also been chopped off.

58. It is in the above background that this Court has to examine whether the prosecution has succeeded in establishing that the accused appellants have beheaded the deceased on 12.3.1996 and have chopped off his two thumbs in the incident alleged by the informant. This Court is also required to determine whether the prosecution has succeeded in establishing the guilt of the accused appellants beyond doubt.

59. The background facts have been noticed by us in order to appreciate the issues that arise for determination in the present appeals. It is the criminality part of the incident which alone requires adjudication by us. We have to determine whether the incident, as is alleged by the prosecution, has occurred in the manner suggested by the prosecution and; secondly, whether the prosecution has succeeded in establishing the guilt of the accused appellants beyond doubt on the basis of oral and documentary evidence produced by it. Dispute relating to rights of the parties over immovable property or contentious issues relating to legality and validity of the will and the gift deeds do not form part of the lis before us, and therefore we refrain ourselves from making any observations on the merits of such contentions raised by the parties. We also hasten to clarify that any observation made by us while noticing the respective stand of the parties is for the limited purpose of proper appreciation of the background facts and does not amount to expression of our opinion on the merits of the claim of either party.

60. As per the prosecution the incident has occurred on 12.3.1996 at about 12.00 noon near the agricultural field of Jiyutbandhan Singh, wherein the deceased Dubari Pandey was done to death by chopping his head from the neck by a Dao. The accused also cut both the thumbs of the deceased. It is alleged that accused Rakesh

Pandey took away the head and thumbs of the deceased. The head of the deceased has been recovered from a pond in an adjoining district. The thumbs, however, have not been recovered. The weapon of assault has also not been recovered.

61. So far as the medical evidence on record is concerned, the beheaded body of deceased has been subjected to postmortem at 2.15 pm on 13.3.1996. The external examination of dead body shows that a beheaded body of a 70 year old person was produced before the Autopsy Surgeon with rigor mortis present in lower extremity, abdomen was distended and fecal matter was coming out. Right and left thumbs in parts were missing. Clotted blood was present over neck, chest and back of neck. The cause of death has been determined as shock and hemorrhage due to ante-mortem injuries. There are four incised wounds. The first injury is an incised wound 14x13cm x bone deep thru and thru, 3 cm above supra sternal notch and 1 cm above base of cervical seven vertebra underlying bone, muscles, vessels and soft tissues and cervical six vertebra is cut thru and thru, apportion of cervical six is attached with trunk margin clear cut. The autopsy surgeon also found that the rectum of deceased to be loaded.

62. Apart from the above four ante-mortem injuries on the body, the postmortem report also shows three postmortem injuries, which are as under:-

"(1) incised wound 2 cm x 1½ cm x thru and thru on the proximal phalynx of right thumb underlying bone parts missing.

(2) incised wound 4 cm x 3 cm x bone deep obliquely placed on the middle phalynx of right index finger.

(3) incised wound 2 cm x 1½ cm x bone deep thru and thru on the middle phalynx of left thumb."

63. The second postmortem report is in respect of the recovered head. This postmortem was conducted on 14.3.1996 at 4.00 pm. The age of the deceased is mentioned as 60 years and the cause of death is shown as shock and hemorrhage, as a result of ante-mortem injuries. An incised wound of size 10 cm x 10 cm at level of C2 exists with margins clear cut. An incised wound of size 4.0 cm x 1.0 cm x bone deep on right side of skull 15 cm above right eyebrow also exists. Right frontal bone is sharply cut.

64. The medical evidence led by the prosecution has to be examined with an intent to determine whether the recovered head and the headless body are of same person. We are also to determine whether the prosecution has established that the recovered body is of the deceased Dubari Pandey.

65. The defence has seriously contradicted the prosecution case regarding the identity of the deceased as also whether the recovered head and the headless body are of one person. So far as the identity of headless body as being of Dubari Pandey is concerned, we find from the record that the beheaded body has been identified by PW-2 Vishun Ram and his statement shall be adverted to in the later part of this judgement when we examine the testimony of witnesses. There is also an issue with regard to identification of the head by PW-4 and her testimony shall be examined when we deal with the testimony of witnesses.

66. The star witness of the prosecution in this case is the informant Akhilesh Kumar Pandey who has been produced as PW-1. This witness claims to have seen the incident, wherein the accused persons in an ambush brought down the deceased and chopped of his head and thumbs. As per PW-1 the deceased had executed a registered will and gift deed in favour of his brother and himself. A subsequent gift deed of 24.4.1995 was also relied upon by PW-1. PW-1 has clearly stated that deceased Dubari Pandey was living with his family and he had no issue.

67. The incident as per PW-1 was seen by Sitaram Singh and Chandradev Ram as well as several other persons of the village who arrived at the place of occurrence. Sitaram Singh and Chandradev Ram are also the eye-witnesses of the incident in the first information report. These two persons, however, have not been produced in evidence by the prosecution. An affidavit has been filed by Sitaram Singh before the trial court saying that he has not seen the accused assaulting the deceased Dubari Pandey and that his statement has not been recorded by any police personnel. He has further stated that on account of his personal work he had gone out and was not even present in the village when the incident occurred. Similarly, on the date fixed for recording the statement of Chandradev Ram, an application was moved by informant Akhilesh Kumar Pandey through the govt. counsel stating that the witness Chandradev Ram though has appeared before the court but he has colluded with the accused and is not prepared to state correct facts. Prayer was accordingly made to discharge the witness Chandradev Ram. This application (Paper No. 109Kha) was allowed by the court on 12.9.2003 and consequently testimony of Chandradev Ram has also not been recorded during trial. Thus the only eye-witness of the incident is the informant Akhilesh Kumar Pandey (PW-1).

68. PW-1 is not only a related witness but is a highly interested witness in this case. We have already taken note of the background facts as per which the deceased had executed a will and gift deed in favour of informant Akhilesh Kumar Pandey and his brother to the detriment of other branch consisting of the accused persons. The relations between accused and the informant were thus highly inimical for the aforesaid reason.

69. Law with regard to the testimony of interested witnesses is by now well settled. In Md. Jabbar Ali and others Vs. State of Assam, reported in 2022 SCC OnLine SC 1440, the Court has observed as under in paras 55 to 58 of the report:-

"55. It is noted that great weight has been attached to the testimonies of the witnesses in the instant case. Having regard to the aforesaid fact that this Court has examined the credibility of the witnesses to rule out any tainted evidence given in the court of Law. It was contended by learned counsel for the appellant that the prosecution failed to examine any independent witnesses in the present case and that the witnesses were related to each other. This Court in a number of cases has had the opportunity to consider the said aspect of related/interested/partisan witnesses and the credibility of such witnesses. This Court is conscious of the well-settled principle that just because the witnesses are related/interested/partisan witnesses, their testimonies cannot be disregarded, however, it is also true that when the witnesses are related/interested,

their testimonies have to be scrutinized with greater care and circumspection. In the case of Gangadhar Behera and Ors. v. State of Orissa (2002) 8 SCC 381, this Court held that the testimony of such related witnesses should be analysed with caution for its credibility.

56. In Raju alias Balachandran and Ors. v. State of Tamil Nadu (2012) 12 SCC 701, this Court observed:

"29. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in Dalip Singh [AIR 1953 SC 364] and pithily reiterated in Sarwan Singh [(1976) 4 SCC 369] in the following words: (Sarwan Singh case [(1976) 4 SCC 369, p. 376, para 10)

"10. ... The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration."

57. Further delving on the same issue, it is noted that in the case of Ganapathi and Anr. v. State of Tamil Nadu (2018) 5 SCC 549, this Court held that in several cases when only family members are present at the time of the incident and the case of the prosecution is based only on their evidence, Courts have to be cautious and meticulously evaluate the evidence in the process of trial.

58. It is thus settled that the evidence of the related witnesses have to be considered by applying discerning scrutiny. ....."

70. In light of the principles laid down by the Supreme Court as noticed above, the testimony of PW-1 will have to be carefully examined in order to determine its credibility and reliability.

71. PW-1 has stated that when the accused persons had grabbed the deceased and held his hands and legs the witness raised an alarm and various persons came from the nearby brick-kiln to the place of occurrence. As per PW-1, by the time persons from the brick-kiln arrived at the place of occurrence, the accused had already chopped the head of the deceased and was leaving alongwith the head of the deceased. Relevant part of the testimony of PW-1 is reproduced hereunder:-

"मेरे शोर पर भट्ठे पर से दौड़ कर लोग आये। गांव से लोग घटना के बाद आये। भट्ठे से जो लोग आये वे घटना स्थल पर जब पहुँचे जब मुलजिमान दुबरी पाण्डे को मार कर सर लेकर चलने लगे थे। भट्ठे से लगभग 20-25 लोग आये थे। जब भट्ठे से लोग घटना स्थल पर पहुँचे थे मुलजिमान भट्ठे से सौ डेढ़ सौ गज दूर जा चुके थे। तथा मन्सड़ी जाने वाली सड़क के करीब पहुँच चुके थे। सड़क से 40-50 कदम उत्तर थे। मुलजिमान जो अपने हाथ में हथियार लिए हुए थे व सर लेकर भाग रहे थे। जो लोग 20-25 की संख्या में भट्ठे से आये थे वे मुलजिमान का पीछा नहीं किये। मुलजिमान को दुबरी पाण्डे को पटकने तथा सर काटने में 10-15 मिनट का समय लगा होगा। 20-25 लोगों में सबका नाम याद नहीं है कुछ का नाम बता सकता हूँ। उनमें सीताराम सिंह, चन्द्रदेव राम, श्रीराम सिंह, गंगा यादव लाल मोहम्मद, लालजी पाण्डे, शंकर यादव आदि थे। कुछ भट्ठे पर काम करने वाले थे सब भट्ठे पर काम करने वाले नहीं थे। उस समय ईंट की पथाई, पकाई झुकाई, ढुलाई चल रही थी। सब लोग करीब भट्ठे से ही आये कुछ लोग भट्ठे के करीब घांस कर रहे थे।"

72. However, none of these persons from the brick-kiln or others whose names are specified by PW-1 have been produced in evidence, nor their statements have been recorded by the Investigating Officer under

Section 161 Cr.P.C. There is no explanation put-forth by the prosecution as to why these persons were not examined under section 161 Cr.P.C. The Investigating Officer has also been examined as PW-5, who has stated that though he had examined Jiyutbandhan Singh as well as other nearby tenure holders Jhullan and Vinod Pandey but their statements were not recorded. These persons have, however, not disclosed anything about the incident to the Investigating Officer. With regard to the testimony of the workers engaged in the nearby brick-kiln, the Investigating Officer has stated as under:-

"वादी ने मुझे यह बयान नहीं दिया था कि घटना स्थल के पश्चिम तरफ स्थित शंकर यादव का मकान व ट्यूवेल स्थित है, पर वादी व मृतक दुबरी पाण्डेय शंकर यादव से बातचीत किए थे। भट्टा राकेश लाल का था। उनका कोई बयान मैंने नहीं लिया था वादी ने मुझे अपने बयान में यह नहीं बताया था कि राकेश लाल के उक्त भट्टे पर काम करने वाले मजदूर भी घटना स्थल पर पहुँचे थे मैंने भट्टा के मजदूरो से बयान नहीं लिया था।"

73. From the above statement of Investigating Officer it appears that PW-1 had not informed him that the brick-kiln belonged to Rakesh Pal or that workers from brick-kiln or others had came to the place of occurrence around the time of incidence. Their statements were also not recorded by the Investigating Officer. None of them has been produced in evidence. This is a material omission inasmuch as PW-1 has clearly stated that several workers from the brick-kiln and nearby had arrived at the place of occurrence and saw the accused taking/carrying the head of the deceased but none of them have been examined by the Investigating Officer. Their statements were also not recorded. As per the Investigating Officer, PW-1 in fact had not informed him about the workers from the brick-kiln coming to the place of occurrence at all. This anomaly in the prosecution evidence is crucial and remains unexplained.

74. We also find that PW-1 has clearly stated in his testimony that the deceased Dubari Pandey was never married. This fact in the testimony of PW-1 is contradicted by his own document i.e. will and gift deed dated 30.3.1995 and 24.4.1995 which records that the wife of deceased has already died. It is difficult to believe that being a grandson and inheriting the entire estate of the deceased, PW-1 would be unaware of the marital status of the deceased. His deposition is therefore unnatural.

75. Moreover, PW-1 in his testimony has stated that he left alongwith deceased to inspect the wheat field at around 9.30-10.00 in the morning. They (PW-1 and the deceased) had attended the nature's call but neither of them had taken bath or eaten anything. In specific terms PW-1 has stated that they had not taken tea or breakfast. This statement of PW-1 does not find corroboration from the postmortem report wherein the autopsy surgeon found the rectum of deceased to be loaded. Fecal matter was also coming out. The deceased had not passed the stool or eased himself as per opinion of the autopsy surgeon. The medial evidence thus does not support the ocular version.

76. It has thus been emphasized on behalf of the appellants that the statement of PW-1 about the deceased having eased himself before going to the field does not find corroboration from the medical evidence on record. If the testimony of PW-1 was correct about the deceased having eased himself, then that eventuality his rectum would not be loaded or that fecal matter would be coming out of the

rectum of deceased. Autopsy surgeon when confronted with this aspect of the matter has stated as under:-

"जिस समय मृतक की मृत्यु हुयी उस समय आमाशय खाली था। छोटी आंत में गैस व मल भरा था। आदमी के खाना खाने के 7-8 घन्टे बाद आमाशय खाली हो जाता है। यदि व्यक्ति रात में 9-10 बजे खाना खाकर सो जाय तो सुबह 4-5 बजे उसका आमाशय खाली रहेगा। छोटी आंत में 2-3 दिन तक मल पदार्थ रह सकता है। Rectum Loaded शौच के पहले की स्थित होती है। शौंच के बाद अगर कोई व्यक्ति खाना न खाये तो उसके 3-4 घन्टे बाद रेक्टम लोडेड नहीं होगा।"

The above aspect also creates a doubt upon the reliability of the testimony of PW-1.

77. PW-1 in his testimony has stated that the accused Rakesh Pandey chopped of the head of deceased and also his thumbs. This statement of PW-1 has been examined by us with reference to the postmortem report and the testimony of the doctor. The postmortem report shows existence of ante-mortem injury as well as postmortem injury on the body of the deceased. The ante-mortem injury consisted of incised wound including the injury in which the deceased was beheaded. The three postmortem injuries on the deceased were incised wound on his thumbs. Autopsy surgeon was cross-examined on this aspect of the matter. The autopsy surgeon has stated that the ante-mortem injuries were caused to the deceased before his death while postmortem injuries were caused after the death of the deceased. The difference between the ante-mortem and postmortem injuries have been elaborated by PW-6, according to which, bleeding and clotting occurs in ante-mortem injury whereas such features do not figure in postmortem injury. No pus, etc., is found in postmortem injury.

78. PW-1 in his statement has not asserted that there was any gap in chopping of head and the thumbs. As per this witness both the injuries were caused in the same transaction/incident. However, as per the Autopsy Surgeon the chopping of head was ante-mortem injury whereas cutting the thumbs was a post-mortem injury. Though, in the opinion of doctor, no specific time gap can be specified but, in our opinion, by the very nature of things some time gap is bound to intervene between the two kinds of injury i.e. ante-mortem injury and post-mortem injury. The statement of PW-1 that both the injuries i.e. ante-mortem and post-mortem were caused by accused Rakesh Pandey in the same transaction/incident, therefore, does not find corroboration from the medical evidence on record. The postmortem report does not support the assertion of PW-1 that both injuries were caused simultaneously in the same incident. This also raises a doubt on the reliability of PW-1.

79. On behalf of the defence it has been strenuously urged that identity of the headless body has not been established and the prosecution has not been able to prove that the headless body was that of Dubari Pandey.

80. Learned Senior Counsel for the appellant has invited our attention to the will and gift deed dated 30.3.1995, allegedly executed in favour of PW-1 and his brother, which contains the following recital:-

''हम मुकिर की आयु लगभग 85 वर्ष की हो चुकी है''

81. However, in the postmortem report the age of deceased is mentioned as about 70 years. In the postmortem report of head (Exhibit Ka-14), the age of deceased is shown to be 60 years. There is thus marked difference in the age of the

deceased specified at different places. In the will the deceased is shown to be 85 years old, whereas in the postmortem report of the beheaded body the age has been specified as 70 years. This aspect also remains unexplained by the prosecution.

82. We have examined the issues relating to identity of the dead body in light of the prosecution evidence brought on record. The inquest report shows that the witnesses of inquest of beheaded body were Sitaram, Lalji Pandey, Islam, Chandradev Ram and Vishun Ram. Out of these five witnesses of inquest only Vishun Ram has been produced in evidence as PW-2 by the prosecution. PW-2 in his testimony has proved the inquest which is exhibited as Paper No. Ex.Ka-2. He has identified the beheaded body as that of deceased Dubari Pandey. This witness has been cross examined wherein he denied the suggestion that he had identified the dead body as that of Dubari Pandey on the saying of PW-1. He claims to have identified the body from the boil on his back. Following part of the statement of PW-2 is relevant and is reproduced hereinafter:-

"मैंने खुद लाश को पहचाना वह दुबरी पाण्डे की थी। यह कहना गलत होगा कि अखिलेश के बताने पर मैं माना कि लाश दुबरी पाण्डे की थी। दुबरी पाण्डे के धड व पीठ के फोड़े को देखकर मैंने पहचाना की वह दुबरी पाण्डे की लाश है। मैं लाश का फोड़ा देखा था पहले से भी मैंने फोड़ा देखा था। पंचनामे के समय मैंने दुबरी पाण्डे की पीठ पर फोड़ा देखा था मैं मौके पर करीब रात्रि तीन बजे पहुँचा था। मैं पहुँचा तो लाश पीठ के बल पड़ी थी। लाश को वहां से पुलिस ने पंचनाम होने के बाद उठाया।"

83. PW-2 has denied that he made a false statement on account of his friendship with PW-1.

84. On behalf of the appellants our attention has been invited to the inquest in which the condition of body as well as appearance have been specified as under:-

''दशा शव - मृतक दुबरी पान्डेय उपरोक्त के शव को समझ बयान उपरोक्त निरीक्षण किया के श्री जिउत बन्धन सिह के गेहू के खेत के पच्छिमी उत्तरी छोर पर सर जानिब दक्षिण दोनो पैर जानिब उत्तर चित हालत में गर्दन कटा शव पड़ा है। सर नही है। दोनों हाथ का अगुठा कटा है।

हुलिया शव - सावला रंग औसत कद इकहरी मजबूत जिस्म। उम्र करीब 70 वर्ष।"

85. Clothes worn by the deceased have also been specified as under in the inquest report:-

"पहनावा - (1) सफेद रंग की पुरानी धोती पहना है।
(2) सफेद रंग की वन्डी पहना है।
(3) चेकदार गमछा धड पर है।"

86. On the strength of the above material it is sought to be urged on behalf of the appellants that PW-2 could not have identified the deceased only on the basis of boil on the back of the deceased when the deceased himself was lying on his back in the field of Jiyutbandhan Singh. The deceased was wearing a white colour vest (Bandi) and the body was clearly covered. In such a situation, it would be difficult for anyone to notice any boil on the back of the deceased particularly when the body itself was covered by clothes and is on his back. This argument of the appellant appears to have substance and raises a doubt with regard to identification of the body of the deceased. This aspect of the matter has not been explained by the prosecution during the course of hearing of the present appeals.

87. A doubt is also raised by the appellants with regard to the identification of the head as that of the deceased Dubari Pandey. From the evidence on record it transpires that PW-3 reported to the Station

In-charge of Police Station - Dullahpur, Ghazipur about recovery of the head from a pond near his tube-well. The head was kept in a polythene which got stuck in the Khur (cracking) of a buffalo and came out with the cattle. The information about such recovery of head got received vide Exhibit Ka-3 in the late evening hours of 13.3.1996. The inquest of the recovered head Ex.Ka.15 shows that the inquest proceedings concluded at 7.15 am on 14.3.1996.

88. The inquest shows that an unknown death was reported vide Entry No. 37 at 21.45 pm on 13.3.1996. At the time of inquest the head was not identified. The prosecution, however, alleges that Investigating Officer while conducting the investigation at the village Raikwar Deeh received information about the recovery of the head of an elderly person. Such information was received by the Investigating Officer on 14.3.1996. The Investigating Officer has been produced as PW-5 and has stated as under with regard to the receipt of information about the recovery of head from the informant:-

"सिर के बरामदगी के सम्बन्ध में दुल्हपुर थाना से सूचना मिली थी। यह सूचना 14.3.96 को मिली थी। समय याद नहीं है। केस डायरी के पर्चा नं०-3 में अंकित किया है। स्वयं कहा कि मुझे मुखविर से ऐकवारे डीह में सूचना मिली थी।

मैनें मृतक के सिर की बरामदगी नहीं की थी। केवल बरामदगी स्थल का निरीक्षण किया था।

दुबहा ताल पर वादी मुकदमा की औरत कुसुम थी। तथा विपिन कुमार दूबे, चन्द्रदेव राय, सीताराम सिंह को भी लेकर पहुँचा था। मैंने उक्त व्यक्तियों का सिर बरामदगी के सम्बन्ध में बयान नहीं लिखा था। वे बरामदगी के गवाह नहीं थे। शिनाख्त के गवाह थे।

यह कहना गलत है कि सिर को पोस्ट मार्टम होते समय मैं गाजीपुर पहुंचा था।"

89. As per the prosecution the recovered head has been identified by PW-4 Kusum Pandey, who happens to be the wife of the informant PW-1. This witness has stated in her cross examination that the Investigating Officer arrived at her house at around 5.00 am and she left with him in his Jeep. PW-4 has stated that the Investigating Officer informed her that the missing head of Dubari Pandey has been recovered and that she may come with him to identify it. She says that it took about 1-1½ hours in arriving at the location where the head of deceased was found. She was the only one from her house apart from Sitaram Singh, Vipin Dubey and some other residents of the village. She claims that the recovered head was kept in the polythene and had not been sealed by then. She claims that no legal formality was done by the police personnels in her presence. The statement of PW-4 is relevant and is reproduced hereinafter:-

"दिनांक 14.3.96 को दरोगा जी मेरे घर गये थे, दरोगा जी मेरे लग० पांच बजे भोर में गये थे। उनके साथ और पुलिस थे, पुलिस के अलावा उनके साथ और कोई नहीं था। मेरे घर दरोगा जी पुलिस के जीप से गये थे, दरोगा जी घर गये तो बताये कि सर मिल गया है चल कर पहचान कर लों तो तुरन्त मैं दरोगा जी के साथ चल दी। जब मैं पहुँची पोखरे तो दिन निकल गया था। मैं घड़ी नहीं पहनी थी इसलिये मैं ठीक समय नहीं बता सकती कि क्या बजा था। घर से पोखरे तक थाने में लग० एक डेढ़ घन्टा लगा होगा। वहां पहुचने पर लग० 6-7 बज रहा था। मैं अपने घर की एकेली थी, और सीताराम सिंह, विपिन दूबे तथा गांव के एक दो लोग और थे बाकी पुलिस थी। मुझे इस समय याद नहीं है कि उस पोखरी के आस पास घर थे या नही। उस पोखरी के अगल बगल कुछ पेड़ वगैरह थे। जब मैं वहां पहुँची तो पुलिस दरोगा लोग थे और जनता के दो चार लोग थे। वह सिर पोखरी के दाहिनी व पूर्वी कोने पर थी, फिर कही कि सिर दाहिनी पश्चिमी कोने पर थी। मैं पोखरी पर सिर बरामदगी वाले जगह पर लगभग आधे घन्टे रही। जब मैं गयी तो पोलीथीन में रखा हुआ सिर रस्सी से बंधा हुआ नहीं था, पोलीथीन खुला था, पोलीथीन का रंग इस समय याद नहीं है, पोखरी पर हमारे सामने दरोगा जी सराय लखन्सी के कोई लिखा पढ़ी नहीं किया। पोलीथीन से जो पहले से वहां पुलिस थी वही सिर निकाल कर मुझको दिखायी। पोलीथीन की लम्बाई चौड़ाई मुझे याद नहीं है मैं अन्दाज से भी लम्बाई चौड़ाई नहीं बता सकती। दुबरी पाण्डेय की मृत्यु के समय उम्र लग० 70 वर्ष थी। उनका सर निकाला गया तो उनका चेहरा खून से लतपथ नहीं था। चेहरा विकृत हुआ था। पहचान में आ रहा था। चेहरे पर भी चोटे थी, चेहरे पर कटे की घाव थी, सूजन नहीं थी। जबड़ा कटा हुआ था, गाल पर चोट नहीं थी, माथे पर चोट नहीं थी, दाहिनी आंख के ऊपर चोट थी।

दरोगा जी ने मेरा बयान लिया था। दरोगा जी ने जहां मैं सिर को पहचानी थी वहीं पर मुझसे पूछे थी कि सिर को पहचान रही हो मैं कहा कि हाँ। मैं घड़ी नहीं पहनी थी, फिर वहां से मैं पुलिस वाली जीप से ही घर आयी, याद नहीं है कि मैं कितने बजे घर पहुँची। यह कहना गलत है कि न मैं मौके पर गयी और न मेरे सामने सिर की बरामदगी हुई।"

90. From the evidence available on record it transpires that the unknown head recovered on the information of PW-3 was subjected to inquest proceedings which concluded at 7.15 am on 14.3.1996. As per the inquest proceedings the recovered head was of an unidentified person. The inquest also records that the recovered head was sealed and sent for postmortem. In the event PW-4 had arrived at the place of inquest and had identified the head as that of Dubari Pandey then such identity ought to have been mentioned in the inquest report but such is not the case here.

91. We otherwise find certain missing links in the prosecution case.. The Police Station- Dullahpur had received information about the recovery of head at 9.45 pm. In the statement of PW-8 Rajendra Prasad Singh, who was posted at Police Station Dullahpur, it transpires that this witness was sent alongwith Constable Raj Kumar for investigation and preparing the inquest by the Sub-Inspector Uma Nath Shukla. He claims that as it was dark the inquest could not be conducted in night and the inquest was conducted the next morning. He has stated that after receipt of such information at the police station, he reached the pond at about 11.00 in the night. He has specifically stated that the police personnel had not seen the head in the night and had seen it only in the morning at around 7.00 am. This witness has also stated that no information was received on wireless set from adjoining district Mau about the missing head of a dead person. Although this witness has supported the prosecution case, as per which, the inquest was conducted at about 7.00-8.00 am, but he later stated that the inquest concluded by 8.00-9.00 am.

92. From the prosecution evidence it is clear that the information with regard to recovery of head was received fairly late in the evening and the police personnel arrived at around 11.00 pm at the pond from where the unknown head had been recovered. PW-8 admits that he had not seen the recovered head in the night. If that be so, it would be difficult to visualize as to how the Investigating Officer could know that the recovered head was that of an old male person and could be of the deceased. There is no material on record to show that the information regarding recovery of head was circulated to the adjoining Police Station or the police personnel of Sarai Lakhansi, District Mau. There is also nothing on record to show as to when and how the Investigating Officer came to know about recovery of the head of an elderly person. The unknown head was recovered from a good distance from the place where beheaded body was recovered and PW-4 herself has admitted that it took her about an hour and half to reach the pond. The prosecution case that the Investigating Officer (PW-5) received information about the recovery of head from an informer on 14.3.1996 without specifying the time of receipt of such information or the manner or person from whom such information was received creates a doubt in the prosecution case.

93. The statement of PW-5 that he was at village Raikwar Deeh and came to the house of PW-4 at 5.00 in the morning and left with her for identifying the head also creates some doubt. Neither the timing of receipt of information has been

mentioned in the case diary by the Investigating Officer, nor prosecution has satisfactorily explained as to how recovered unknown head was identified as that of the deceased Dubari Pandey. No other person except the wife of first informant has come forward to identify the recovered head.

94. In addition to above, there are some other loop-holes in the prosecution story. The postmortem of the beheaded body shows that the first ante-mortem injury was a clean cut. Incised wound 14x13cm x bone deep thru and thru (A.P. diameter), 3 cm above supra sternal notch and 1 cm above base of cervical seven vertebra underlying bone. The chopping of head is at the level of cervical six vertebra whereas the postmortem report of head shows clean cuts to be at the level of C2. The situation of cuts in the body and the head does not entirely match as they are at a different levels. This creates a doubt in the prosecution itself that the recovered head was part of the body of deceased Dubari Pandey.

95. We have otherwise carefully examined the original records of the sessions trial and we find existence of an affidavit of the accused submitted before the S.S.P. Mau (Paper No. 392Kha/10) dated 13.3.1996 in which the accused Rakesh Kumar Pandey has made serious allegations against the Investigating Officer (PW-5) and has prayed for the investigation to be conducted by any other gazetted police officer. The accused Rakesh kumar Pandey has stated that his family was passing through a difficult phase due to lack of resources. Being elder son, he was selling newspapers to fund his studies. The supply of newspaper was also at the police station by him since long. The newspaper bills, however, were not cleared from 1st May, 1995 to 31st January 1996 amounting to Rs. 1458/-. The amount is not negligible. The accused has stated that he made a complaint against the Investigating Officer V.B. Singh Yadav to the S.P. Mau on 15.2.1996 and 21.2.1996, on account of which, he was extremely unhappy with him. It has, therefore, been alleged that for such reasons and also for other extraneous reasons the Investigating Officer was acting in collusion with the first informant to implicate him. The defence has otherwise stated that the beheaded body was seen in the morning and one Jai Prakash Singh and Ram Badai Singh had given information to police about recovery of an unknown dead body. This case has been specifically set up by DW-2.

96. The two other witnesses of incident as per the FIR namely Sitaram Singh and Chandradev Ram have not come forward to give their statements before court. Although various other workers from the adjoining brick-kiln are alleged to have seen the incident as per PW-1, but neither they have been produced in evidence, nor they have even been examined by the Investigating Officer. Their statements have also not been recorded under Section 161 Cr.P.C. The testimony of PW-1 is otherwise found inconsistent with other evidence on record for the following reasons:-

(i) PW-1 although has stated that the workers from brick-kiln have seen the incident but this statement is a clear improvement from his earlier statement made to the Investigating Officer under Section 161 Cr.P.C. The statements of workers have otherwise not been recorded. These workers could be independent and

reliable witnesses and their unexplained non production, in evidence, creates a doubt in the prosecution case.

(ii) Though PW-1 alleges that the accused has beheaded the deceased and also chopped of his thumbs in the same incident, almost simultaneously, but the postmortem report shows that the act of beheading was an ante-mortem injury while chopping of thumbs was a postmortem injury. The act of beheading and chopping of thumbs, therefore, does not appear to be simultaneous or in the same incident. This also raises a serious doubt regarding the testimony of PW-1.

(iii) PW-1 claims that the deceased had attended natures call and had eased himself whereas the postmortem report shows rectum of the deceased to be loaded and fecal matter was coming out of the rectum of the deceased.

(iv) The identity of the dead body as being that of deceased Dubari Pandey is not established.

(v) We also find that PW-1 has clearly stated in his testimony that the deceased Dubari Pandey was never married. This fact in the testimony of PW-1 is contradicted by his own document i.e. will and gift deed dated 30.3.1995 and 24.4.1995 which records that the wife of deceased has already died. It is difficult to believe that being a grandson and inheriting the entire estate of the deceased, PW-1 would be unaware of the marital status of his own grand parent.

CONCLUSION

97. Having carefully examined the records of the present case, we find that the prosecution case is primarily based upon the oral testimony of PW-1 who is a highly interested witness. His testimony has not been found to be of sterling nature. In a recent decision of Supreme Court in Nand Lal and others vs. State of Chhatisgarh, (2023) SCC Online SC 262, the Court relying upon Vadivelu Thevar vs. State of Madras, 1957 SCR 981, has classified the category of witnesses as under:-

"33. Undisputedly, the present case rests on the evidence of interested witnesses. No doubt that two of them are injured witnesses. This Court, in the case of Vadivelu Thevar v. The State of Madras7, has observed thus:

"11. .....Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way -- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial....." [1957] SCR 981

34. It could thus be seen that in the category of "wholly reliable" witness, there is no difficulty for the prosecution to press for conviction on the basis of the testimony of such a witness. In case of "wholly unreliable" witness, again, there is

no difficulty, inasmuch as no conviction could be made on the basis of oral testimony provided by a "wholly unreliable" witness. The real difficulty comes in case of the third category of evidence which is partly reliable and partly unreliable. In such cases, the court is required to be circumspect and separate the chaff from the grain, and seek further corroboration from reliable testimony, direct or circumstantial."

98. The testimony of PW-1 does not fall in the category of wholly reliable witness since PW-1 is a highly interested witness. In this circumstance the Court is required to be circumspect and separate the chaff from the grain and seek further corroboration from reliable evidence, direct or circumstantial.

99. When the testimony of PW-1 is examined in the light of above, this Court finds that there are issues with regard to genuineness of the alleged will and gift deed executed in favour of PW-1, by the deceased and, therefore, there is a cloud on the motive of the appellants. The gift and will, prima facie appears to be inconsistent with the order of consolidation court of the year 1966 passed in the title proceedings. PW-1 is the obvious beneficiary of these documents and is otherwise highly interested witness whose testimony does not appear to be trustworthy. The fact that he does not know the marital status of his grandfather who allegedly has executed will and gift in his favour, to the exclusion of other branch is questionable. He has also withheld the fact that other persons had witnessed the incident from the Investigating Officer. We have otherwise noticed that the testimony of PW-1 is inconsistent with the medical evidence on record. There are improvements in his testimony which are not explained. Upon careful evaluation of the evidence on record, we are not inclined to accept PW-1 as trustworthy and, therefore, his testimony is neither credible nor reliable. There are other serious issues with regard to identity of the body for which elaborate reasons have been given above. Even if we entirely ignore the defence version that the deceased had died earlier yet what can safely be inferred from the record of this case is that the prosecution case is open to doubt and once we suspect the credibility of the main prosecution witness it would not be safe for us to rely upon the prosecution case so as to convict the two accused appellants.

100. Though the trial court has convicted the accused appellants, but we find from the judgment of the court below that inherent contradictions in the testimony of PW-1 vis-a-vis medical evidence, as noticed above, have entirely been overlooked. The other circumstance with regard to identity of the dead body on the basis of prosecution evidence has also not been subjected to careful scrutiny. The trial court has completely omitted to consider that there existed an order of the consolidation court as per which the estate of the deceased was to devolve in equal proportion upon the informant and his brother as well as other branch of accused persons. We also find that PW-1 has clearly stated in his testimony that the deceased Dubari Pandey was never married. This fact in the testimony of PW-1 is contradicted by his own document i.e. will and gift deed dated 30.3.1995 and 24.4.1995 which records that the wife of deceased has already died. It is difficult to believe that being a grandson and inheriting the entire estate of the deceased, PW-1 would be unaware of the marital status of

the deceased. This aspect has also been clearly overlooked by the court below.

101. In view of the discussions and deliberations made above, we come to the inescapable conclusion on the basis of appraisal of evidence led by the prosecution that it has failed to establish the guilt of the accused appellants beyond doubt. Consequently, these two appeals are allowed and the conviction and death sentence awarded to the accused appellants Rakesh Pandey and Yashwant Chaubey vide judgment and order dated 10.2.2020/11.02.2020, passed by the Additional Sessions Judge, Court No. 1, Mau in Sessions Trial No. 75 of 1996, arising out of Case Crime No. 83 of 1996, under Sections 147, 148, 201 and 302/34/149 IPC, Police Station - Sarai Lakhansi, District - Mau, is reversed. The death reference No. 4 of 2020 is answered, accordingly.

102. The accused-appellants shall be set at liberty, forthwith, unless they are wanted in any other case, subject to compliance of Section 437A Cr.P.C.

(2023) 4 ILRA 1461
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.03.2023

BEFORE

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

Criminal Appeal No. 1335 of 2009
With
Criminal Appeal No. 1209 of 2009 & 1334 of 2009

Tahir & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri P.C. Srivastava, Sri A.M. Zaidi, Sri Abhay Kumar Srivastava, Sri Ajay Kumar Singh, Sri Ashwani Kumar Pandey, Sri Brij Raj Singh, Dr. Arun Srivastava, Sri Haji Kamal Khan, Sri Mohd. Yaseen, Sri Nazrul Islam Jafri, Sri Rajesh Kumar Mishra, Sri Shahid Ali Siddiqui, Sri Sushil Kumar Pal, Sri Mohd. Samiuzzaman Khan

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Appeal- Conviction under Sections 302 read with Section 147, 148 and 149 IPC- eye witness- minor delay is not inordinate delay-not fatal for prosecution-delay in sending FIR to area magistrate is not material- three eye witnesses- no need to prove motive-overt act in pursuance of common object-every member of that assembly would be constructively liable-different roles do not matter-Section 149 creates a separate and distinct offence- all appellants proved to be members of alleged unlawful assembly- merit of case is not adversely affected by minor variations- testimony of witness cannot be disbelieved on the basis of minor discrepancies-prosecution succesfulin proving its case beyond the reasonable doubt- appeal dismissed. (Para 58, 60, 62, 76, 77, 78, 84, 124)

HELD:
In Anil Rai Vs. State of Bihar, (2001) 7 SCC 318 and in State of Punjab Vs. Hakam Singh, (2005) 7 SCC 408 it has been held that the delay in sending copy of the F.I.R. to the area Magistrate is not material where the F.I.R. is shown to have been lodged promptly and investigation had been started on that basis. The delay is not material in the event when the prosecution has given cogent and reasonable explanation for it. (Para 62)

For an overt act in pursuance of the common object of any member of an unlawful assembly, every member of that assembly would be constructively liable for such acts also where

such acts constitute offence. Hitting the deceased by the accused Hasan with the stick or stabbing by accused Nazuk and Nazim by razor and knife and use of firearm by Tahir, Bhaiyan and Pappu @ Kamina establishes that all the accused persons shared a common object. From the above evidence, presence and participation of every accused as member of the unlawful assembly is clearly established. (Para 76)

In this case, all the appellants proved to be member of the alleged unlawful assembly having deadly weapons except the accused Hasan who was having lathi in his hand. Lathi was used in putting down the deceased and attacks was made from the lathi. There might be no fatal injury because of the attack from lathi but being member of the unlawful assembly having common object of killing the deceased, accused Hasan is also liable to be convicted for the offence of murder under section 302 IPC with the aid of Section 149. (Para 84)

The prosecution has been succesful proving the case against all the accused persons beyond reasonable doubt under Sections 147, 148, 302 read with Section 149 IPC. The appellants could not create any doubt and could not establish any ground on which the conviction recorded under the aforesaid charges could be reversed. Though it is a case of brutal murder even then the trial court has awarded only minimum sentence which cannot be reversed. Thus this Court concludes that the appeals in respect of conviction and sentencing are devoid of merit and are liable to be dismissed. (Para 124)

Appeal dismissed. (E-14)

List of Cases cited:

1.State of Rajasthan Vs Daud Khan, 2015 0 Supreme (SC) 1041

2. Anil Rai Vs St. of Bih., (2001) 7 SCC 318

3.St. of Pun. Vs Hakam Singh, (2005) 7 SCC 408

4.Nagraj Vs St., (2015) 4 SCC 739

5.Wakkar Vs St. of U.P, 2011 (2) ALJ 452 (SC)

6.Nathuni Yadav Vs St. of Bih., (1998) 9 SCC 238

7. Lalji Vs State, AIR 1989 SC 754

8. Bhudeo Mandal Vs St., AIR 1981 SC 1219

9.Fatte Vs State, AIR 1979 SC 1504

10.Vishambar Bhagat Vs State, AIR 1971 SC 2381

11.Maslati Vs St. of UP, AIR 1965 SC 202

12. State Vs Krishan Chand, AIR 2004 SC 4671

13.Bhagwan Jagannath Markad Vs St. of Mah., (2016) 10 SCC 537

14.Ramesh Vs St. of UP, (2009) 15 SCC 513

15. Maqsoodan Vs St. of UP, (1983) 1 SCC 218

16.Nankaunoo Vs St. of UP, (2016) 3 SCC 317

17.Ramesh Harjan Vs St. of UP, (2012) 5 SCC 777

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

19.Mukesh Vs State (NCT) of Del. & ors., AIR 2017 SC 2161

20.Khem Ram Vs St. of Himachal Pradesh, (2018) 1 SCC 202

21. Dashrath Singh Vs St. of UP, (2004) 7 SCC 408

22.St. of Pun. Vs Hakam Singh, (2005) 7 SCC 408

23.Rahul Mishra Vs St. of Utta. AIR 2015 SC 3043

24.V.K. Mishra Vs St. of Uttar., (2015) 9 SCC 588

25.Makbool Vs St. of Andhra Pradesh, AIR 2011 SC 184

26.Shiv Shankar Singh Vs St. of Jhar., 2011 CrLJ 2139 (SC)

27.Dhanaj Singh Vs State of Pun., (2004) 3 SCC 654

28. Jagdish Murao Vs St. of UP, 2006 0 Supreme (SC) 775

29.Maruti Rama Naik Vs St. of Mah., 2003 0 Supreme (SC) 863

30.Sampath Kumar Vs Inspector of Police, Krishnagiri, 2012 0 Supreme (SC) 214

31.St. of UP Vs Parasuram Yadav, 2005 0 Supreme (All) 1309

32.St. of Raj. Vs Daud Khan, 2015 0 Supreme (SC) 1041

33.Khima Vikamshi Vs St. of Guj., 2003 0 Supreme (SC) 363

34.Ganesh Bhawan Patel & anr. Vs St. of Guj., 1978 0 Supreme (SC) 323

35.Mahavir Singh Vs St. of Har., (2014) 6 SCC 716

36.Harendra Vs St. of Assam, AIR 2008 SC 2467

37.Himanchal Prashasan Vs Om Prakash, AIR 1972 SC 975

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

1. These criminal appeals have been preferred by the appellants against the common judgment and order of conviction and sentence passed by the Court of Special Judge (SC/ST Act), Bareilly, passed in Sessions Trial No.249 of 2002, under Section 302 read with Sections 147, 148, 302, 149 IPC, Section 3(2)(5) of the Scheduled Caste (SC) and Scheduled Tribe (ST) (Prevention of Attrocities) Act, 1989 (which shall be called in later part of judgment as SC/ST Act) and Section 25 and 4/25 Arms Act, Police Station Kila, District Bareilly on 19.02.2009 in which the trial court convicted the accused persons only under Sections 147, 148, 302 and 149 IPC and acquitted from the charges under Section 4/25, Section 3/25 Arms Act and Section 3 (2) (5) SC/ST Act, hence they are being decided together.

2. In brief, facts of the case are that on 29.09.2001 the complainant/informant, Ramesh Chandra Bharti, PW-1 moved a written complaint on 24.09.2001 at 08:25 p.m. that on 24.09.2001 at 07:00 p.m. he (complainant) was returning to his house with his brother Suresh Chandra Bharti from their shop and when they reached in front of the shop of Dr. R.K. Sharma, Om Prakash, Hawaldaar and Ganga Ram of his locality met them, he stopped and started talking. In the meantime, his brother moved forward about 5-6 steps where Tahir, Bhaiyan, Pappu with pistols, in their hands, Nazuk and Nazim with knives and Hasan with batten (*danda*) stopped him. Tahir and Hasan caught hold of Suresh and threw him down with intention to kill him, Tahir, Bhaiyan and Pappu @ Kamina fired bullets from hand held pistols, Nazuk and Nazim attacked with knives and Hasan beaten him with a stick. His brother fell on the spot, there was chaos, people walking on the road spared by firing by the accused, the people closed their shops and doors and windows of their houses. Out of fear, when they challenged, the accused ran away towards the New Basti. They recognized the accused persons committing the offence and running away well in the light of the electric bulbs. With the help of the people, he took him to the district hospital where the doctor declared him dead, thereafter he went to the concerned police station keeping the dead body to the mortuary. He requested to take action against the accused persons.

3. After the F.I.R. was lodged, the Investigating Officer (which shall be called

later on as 'I.O.') started the investigation. The I.O. took the blood stained soil, empty cartridge of 315 bore from the place of occurrence in his possession and arrested the accused Pappu @ Kamina on 26.09.2001, recovered country-made pistol of 315 bore and live cartridges of the same bore. The inquest report Ex. K-19 was prepared on the same day from 21:30 p.m. to 23:00 p.m. The *postmortem* was done by Dr. G.D. Katiyar on 25.09.2001 at 03:15 a.m. He found firearm wounds, incised wounds and abrasions. According to him, death of the deceased was occurred due to shock and hemorrhage on account of *ante mortem* injuries. The I.O, C.O. (City) Mr. Dinesh Singh collected the post mortem report Ex.Ka-4, prepared the spot map Ex.K-16, recorded the statements of the complainant and the witnesses, arrested the accused persons, recovered country-made pistols and knives from their custody, prepared spot map with regard to recovery of weapons, took permission to prosecute the accused persons under Action 25 Arms Act and filed the charge sheets as Ex.K-12, Ex.K-29, Ex.K-30, Ex.K-31 and Ex.K-32 against five accused persons under Sections 25 and 4/25 Arms Act and charge sheet Ex.K-18 against all the six accused persons under the aforesaid Sections of the I.P.C. and the S.C./S.T. Act.

4. The prosecution has examined the following witnesses:-

(i) PW-1, Ramesh Chandra Bharti, complainant/informant; (ii) PW-2, Om Prakash; (iii) PW-3, Ganga Ram; (iv) PW-4, Sewak Ram; (v) PW-5, Dharampal; (vi) PW-6, Dr. G.D. Katiyar; (vii) PW-7, Head Constable Ram Singh; (viii) PW-8, I.O. Nawab Singh; (ix) PW-9, S.I. Gurunam Singh, I.O. U/S 25 Arms Act; (x) PW-10, Dinesh Singh, C.O.-II, Bareilly, who conducted the case as main I.O; (xi) PW-11, Sanjai Kumar Singh, S.O, who conducted inquest; (xii) PW-12, S.I. Nek Ram Singh, who investigated the case U/S 25 Arms Act; and (xiii) PW-13, S.I. Anwar Afaq who prepared the recovery memo of country-made pistol.

5. Prosecution has produced and proved the following documents in support of the prosecution case:-

(i) Ex.K-1, written complaint by the complainant, PW-1; (ii) Ex.K-2, recovery memo of razor; (ii) Ex.K-3, recovery memo of knife; (iv) Ex.K-4, copy of chik FIR and *postmortem* report; (v) Ex.K-5 and Ex.Ka-6, G.D; (vi) Ex.K-7, chik FIR u/s 25 Arms Act; (vii) Ex.K-8, G.D; (ix) Ex.K-9 G.D. Corban Copy and Ex.K-10,recovery memos; (xi) Ex.K-11, spot map; (xii) Ex.K-12, charge sheet under Section 25 Arms Act; (xiii) Ex.K-13, prosecution sanction; (xiv) Ex.K-14, recovery memo of blood stained and plain soil; (xv) Ex.K-15,recovery memo of country-made pistol and empty cartridge; (xvi) Ex.K-16, spot map; (xvii) Ex.K-17, spot map; (xviii) Ex.K-18, charge sheet under Sections 147, 148, 302, 149 IPC and Sections 3(2)(5) of SC/ST Act; (xix) Ex.K-19, inquest report; (xx) Ex.Ka-20 TO Ex. K-23, papers annexed with the inquest (xxi) Ex.K-24, speciment seal; (xxv) Ex. K-25, spot map; (xxvi) Ex.Ka-26 to Ex.Ka-28, prosecution sanction; (xxix) Ex.K-29 to Ex.Ka-32, charge sheets; (xxxiii) Ex.K-33, chik F.I.R; (xxxiv) Ex.K-34, Carban copy G.D.

6. The appellant has taken ground that the trial court has not considered the material available on record and illegally convicted and sentenced them. The sentence is against the weight of evidence

on record. It is not based on cogent finding and the impugned order is illegal and bad in law. No offence under Sections 302, 149, 139 IPC is made out and there is nothing on record to prove the appellants guilty for the alleged offence. Hence, the impugned judgement and order be set aside and the appellants be acquitted.

7. In Criminal Appeal No.1209 of 2009, appellant Hasan and in Criminal Appeal No.1334 of 2009, appellants Nazuk and Nazim have taken similar grounds, hence there is no need to repeat the same again.

8. In brief, the evidences of the witnesses are produced herein below:-

9. PW-1, Ramesh Chandra Bharti, younger brother of the deceased Suresh Chandra Bharti, has deposed that he is washerman by caste. On 24.09.2001 at about 07:00 p.m. he and his brother Suresh Chadra Bharti were going to their house after shutting down their tent shop. When they reached at the crossing of the road, Om Prakash, Ganga Ram, Narendra @ Hawaldar met them. He started talking with them. In the meantime, his brother went forward for 5 to 6 steps. When he turned, he saw that Tahir and Hasan threw down his brother on the ground. Tahir, Bhaiyan, Pappu @ Kamina fired at his brother and Nazuk and Nazim attacked with knives. Accused Hasan attacked with stick. There was no one other than these six people. Bhaiyan and Tahir had a quarrel with the deceased and they had threatened to see him. His brother had told this fact to him and his family, but they did not pay any attention to this incident. Apart from him Om Prakash, Narendra and Ganga Ram had also seen the incident. The injured was taken to hospital where the doctor declared him dead. The witness recognized his signature and proved the written complaint Ex.A-1 and also deposed that the accused are the residents of his locality. He knew them well. In cross-examination, this witness had deposed that the witnesses had seen the incident with him. Shops were opened, shopkeepers did not see the incident as they were busy in their work. There were total 3-4 shops out of which one was of Dr. R.K. Sharma, one belonged to Nathu. There was a shop of Kallu. There was a tailoring shop. This incident took place at a distance of about 50 steps to the south from Kallu's shop. From the Nathu's shop, the incident site was about 60 steps west. His clothes were also stained with blood. He brought the injured to his shop in e-rikshaw and had taken to the District Hospital in a police jeep. He himself said that first of all, he informed the police station where S.S.I. Tejendra Kumar Chaudhary said first you should take your brother to the District Hospital, it took about ten minutes to reach P.S. Quila. He went inside where the report was written. He did not talk with the Head *Muharrir* but told S.S.I. with whom he was not acqainted, he had not given any information to Quila Chauki.

10. He did not show the blood on his clothes to the I.O. In panic even later he did not give those clothes to the police. He took a rickshaw and was sitting in it carrying his injured brother. Jeep was found at tiraha, from there he got down from rickshaw and went through the jeep. This tiraha is 100-125 steps north from his shop. His injured brother had fainted. Three-four persons of his locality had put on his brother at rickshaw, he was panicked so he could not tell their name.

11. On being asked by the doctor he had told him his name. Complaint was read

over by the Inspector. He came home from the police station and saw that several persons were present on the spot. He was interrogated by the police. He could not say whether they took over the blood stained soil at that time or not. His house would be about 100-150 steps away from the place of occurrence towards the west direction. The police had taken blood stained soil in front of him from the place of the incident, when he reached it was quarter to nine in the night. The people/persons present in the house were weeping. The police came to call him and alongwith the police he went to the district hospital without staying at the place of the incident. He himself said that he went to the hospital from his vehicle, many policemen specially police officer had come to his house. He had written the complaint sitting at the police station. He alone reached at the hospital from home, there Om Prakash, Rajendra, Om Pal, Ganga Ram were present. They were present at the time of the inquest also. He had signed the inquest report. He confirmed the opinion of panchas that the deceased had died due to injury caused by knife and the fire arms. He had written and signed it. The injury was also caused from the stick. He could not know whether he had informed the police officials as to from which weapons, the bullets were fired. The injury was caused by stick, which is not written in the inquest. He remained in the hospital up to 10:00-11:00 p.m. He and the deceased both used to sit at the tent house and did not do any other work. It used to open at 09:00 a.m. and used to be closed at 06:30 - 07:00 p.m. In the evening there was no work at his shop on the day of the incident, so labourers and contractors were not present there.

12. Most of the time he and the deceased used to go together after closing the shop. Some times the brother used to go home early. Even four days before the incident his brother Suresh had gone home alone. The deceased had a fight four days before the incident with some of the accused. Except that, he did not know about a fight that happened ever.

13. The houses of the accused persons are in between 05 to 200 steps away from his house.

14. He received the information regarding arguments between the accused and the deceased same day. After hearing the complaint, he said that the information regarding the earlier fight has not been mentioned. He has also not informed this fact to the I.O. At the time of incident when he looked back for the first time, the accused were in the west direction from him and they were killing his brother. Near the place of occurrence, there was a house of Zakir, Muntyaz sons of Mukhtiyar, Tahir, Tufail and Sajjad. There were also the houses of Nanhey, Munni and Asgar where the people lived in the houses. In the state of panic, he did not see anyone in these houses at the time and place of the incident.

15. There was two feet wide slab over the drain near the place of occurrence. At that time he and his deceased brother were present on the slab, but had not crossed it. There was no blood on this slab. Because of night he could not see whether the blood had spilled on it or not.

16. The I.O. had prepared the map before him. This slab falls on turning west from the south north road. May be 15 step from this north south road.

17. When he saw Suresh Chandra for the first time, he was lying on the ground

and the accused were killing him. He was thrown on the ground after being beaten with a stick, he cannot tell the number of attacks by sticks, length and thickness or shape of the stick. The whole incident happened in 2-2½ minutes, he did not see the injuries on his brother's body at the time of the incident but had seen many injuries on him in the hospital. He could not count how many shots were fired on the spot. The shots were fired from a distance of 1, 1 ½ - 2 steps. The bullet injuries on Suresh Chandra's body had occurred after falling on the ground. Except for the sticks, all other injuries were inflicted on him only after he fell on the ground. Two accused persons had attacked 7 - 7, 8 - 8 times with knife. They were killing by stabbing the knife again and again. After hitting Suresh Chandra with fire, Nazuk and Nazim caught Suresh Chandra and killed him with a knife. They had not dropped the deceased on the ground after inflicting knife and bullet injuries. Later on no attack was done with stick. After the incident the accused fled away in the north direction towards the New Basti. He did not try to catch the accused persons, as they had revolver, he had not seen the accused persons brandishing the knife after the incident. He had seen the people of neighborhood, who were closing the doors and windows of their houses, people were coming on the road at the time of the incident. Before the incident, bothers Nasir and Sakir used to live in his neighbourhood. He did not know whether they had sold their house or not. He did not know that there was dispute and quarrel between the deceased and both of them. It may be correct but it was wrong to say that due to terror of the deceased, they had left their houses. The witness denied that the deceased was involved in illegal trade of VCR and liquor and would have also taken Rs.5,000/- from the accused Pappu in some installments and could not repay the money. This witness admits that before the incident in the marriage of Kallu's daughter who is father of the accused Nazuk, articles from his tent house were sent. The witness denied that Kallu did not pay the full amount for the articles due to which the deceased had a fight with Kallu. He expressed ignorance regarding police case against Pappu. He admits that the witnesses are from his community, but denied any kinship with them. This witness had denied suggestions given by accused side.

18. This witness was independently cross-examined for the accused Hasan in which he deposed that in the inquest, the cause of death has not been mentioned having been caused by the stick.

19. PW-2, Om Prakash an independent eye-witness, has deposed that he knew the informant, his brother and the accused persons very well. The accused persons Nazim, Nazuk, Tahir, Bhaiyan, Pappu and Hasan were the residents of Quila Cantt. The incident was dated 24.09.2001, it was about 07:00 p.m. He met Ramesh Chandra near Dr. R.K. Sharma's shop at tiraha. They started conversation, on asking he told that he was going after closing the shop. He asked about Suresh Chandra, he told that he had gone ahead. After this, he heard the sound of gun firing when he looked after, Suresh Chandra was being stabbed by Nazim and Nazuk. Pappu, Tahir and Bhaiyan were making fires at Suresh Chandra with pistols and Hasan was hitting with a stick. Apart from him Ramesh, Ganga Ram and Narendra were also present there and when they tried to make-a-noise there was a chaos. Shutters started falling, the shopkeepers started closing their shops and people started

closing doors and windows of their houses. After that, the accused fled away towards the north of new basti. He saw that Suresh Chandra was suffering like a fish lying on the track of Dr. R.K. Sharma's shop. He got Suresh Chandra loaded in rickshaw on the advice of Ramesh Chandra. He did not go with rickshaw but Ramesh went to the District Hospital with the Rickshaw. Later on when he reached the district hospital, Suresh Chandra was dead and his panchnama had been filled up.

20. In the cross-examination the witness denied any kinship with the informant and the deceased, and admitted that there are 5-6 houses between his and Ramesh Chandra's house. He deposed that in relation to this case, the I.O. had taken his statement. He did not tell the C.O. that he met Ramesh Chandra and had a conversation with him. These facts were also not mentioned in his statement under Section 161 Cr.P.C. He admitted that he and Ramesh belong to same community. There was a distance of 40 steps between the house of the accused and his house. After the incident he tried to catch the accused but they fled away from the place of the incident. They immediately called the police which had arrived there at around 07:00-07:15 p.m, eye-witnesses Ganga Ram and Narendra were present amongst his acquaintances. These were people who saw the incident. Ganga Ram and Narendra went with him to the district hospital in a rickshaw.

21. He deposed that he was the shop keeper during the days of the incident, Narendra was the driver. Ganga Ram works as a washerman in a kiosk (wooden made shop) which was closed at the time of the incident. Narendra was driving his own tempo from Railway Junction to C.B. Ganj, Fatehganj. He used to come back with tempo at around 05:00-06:30 p.m. and leave home at around 07:00 a.m. in the morning. His own grocery shop is about 100 steps away towards the west direction from the place of the incident. It used to close at about 10½-11 p.m. At night he met Ramesh on the spot and thereafer they met in the hospital at around 09:30 p.m. According to this witness, he had not picked-up the injured from the spot though it was mentioned in his statement under Section 161 CrPC, which he denied.

22. He heard the sound of firing and looked back, but it was not written in the statement under Section 161 CrPC. On being asked he said that he could not say the reason. The witness further replied that he recognized all the accused persons by their names and faces. At the time of the incident sun had set. The incident took place about half an hour after the sun had set. The dead body was shifted from emergency ward to mortuary before he reached. The mortuary ward was opened at that time and it was about 09:00-9:30 p.m. He asked to sign the inquest report which was being filled up at that time and he signed on it.

23. At the time of the incident, Suresh was wearing pant-shirt and also at the time of the inquest. Slippers of the deceased were left at the place of the incident. The dead body was barefoot at the time of the inquest. He did not remember the day of the incident, but knew the date.

24. He was alone when Ramesh met him before the incident and within a minute, Ganga Ram and Narendra also come there. Ganga Ram and Narendra came there and stood quietly while he was talking to Ramesh. The place where he was

standing would be 5-6 steps away from the spot in the west direction. From there he, Ramesh, Ganga Ram and Narendra saw the incident. There was a trijunction near the incident site, where the road went in the north - south and west directions, where the road turn in the west direction, there was a drain with slab in the north - south direction.

25. On being questioned regarding manner of attack, this witness deposed that the accused, who fired at Ramesh from pistol, were standing about 2-2½ steps west of Suresh. Suresh was first fired after that he was stabbed. He could not tell the number of firing, and injuries occurred to the deceased. The incident happened within 1-1½ or 2 minutes. The witness denied the kinship with the deceased. He had also denied the suggestions given by the defence counsel.

26. This witness had denied that Hasan was wrongly implicated in this case.

27. PW-3, Ganga Ram deposed that it was 24.09.2001 at about 07:00-07:15 p.m, Ramesh accompanied by his brother Suresh were going towards their home after closing their shop. He met with them at the crossing bridge. Om Prakash and Narendra were also there. At that time Suresh went about six steps ahead of them, he started talking to Ramesh. All the accused persons already known to him came there, Hasan and Tahir dropped Suresh in front of Dr. R.K. Sharma's shop and started hitting him after surrounding. Bhaiyan, Tahir and Pappu @ Kamina had pistols, Nazuk and Nazim had knives and Hasan had a stick. Suresh had received bullet, knife and stick injuries. There was chaos when the bullets were fired. Shop keepers and hockers started closing their shops. He picked up Suresh and got him loaded on rickshaw. After this he went to Suresh's house to inform about the incident. He saw and recognized the accused in the street light. The inquest of the dead body was prepared before him and he recognized his signature on it.

28. On being cross-examined the witness expressed ignorance about the recovery of weapons from the accused persons at the time of their arrest, but answered that they were arrested after 5-6 days from the incident. This witness denied that at the time of incident he was working in Gold soap factory, Nainital Road, Bareilly. He further deposed that at that time he used to sell *nan-khatai* (biscuits), before that he used to iron the clothes. This witness further deposed that he did not take Suresh to the District Hospital but after getting him loaded on a rickshaw, he went to his house to inform about the incident. This witness could not remember whether he had given any statement to the I.O. or not but deposed that many policemen talked to him about this incident. On the second day of the incident, the police interrogated him. This witness disowned his statement under Section 161 Cr.P.C that Suresh was taken to the district hospital from the spot where the doctors declared him dead. According to this witness, no policeman met with him in the night of the incident, but he affirmed giving information of the incident at the house of Suresh. After giving information, he went to his house where he stayed about 1-1½ hours and after that he went to the district hospital by rickshaw alone and reached there at around 09:00 to 09:15 p.m. On the request of Remesh, he had signed the inquest report at about the quarter past 11:00 p.m, it might have been 10:00 O'clock, he did not have a watch, no one

had read the inquest to him. He stayed in the hospital at about 11:00 p.m. in the night.

29. Next day, the I.O. visited the spot at about 11:00-12:00 O'clock. The I.O. did not prepare any map in front of him, there were a tea shop, a doctor's shop, tailor and a grocery shop near the incident site. All those shops were opened at the time of the incident. No shop keepers had come to the spot at the time of the incident. Natthu Khan's grocery shop was about 08-10 steps away from the place of the incident. All those shops were closed at the time of firing. On the east side, at a distance of about six steps, standing over the slab he was looking at Ramesh.

30. In the hospital, except the eye-witnesses, Om Prakash and Ramesh, no one else was present. He did not know the name of the Sub-Inspector present there. He denied the statement recorded by the I.O. that the inquest was prepared by the Inspector, Rajendra Singh Chaudhary before him and Onkar Gangwar, Rajendra Sharma and Ramesh Chandra Bharti. The Inspector who prepared the inquest report had not asked him as to whether any eye-witness was present or not. The deceased died due to the injuries caused by the knife and the firearm. *Postmortem* report was not written before him. He was only asked to sign the inquest report. Duty of panch was not conveyed to him by the Inspector. On the day of occurrence, he had finished the ironing work by 06.30 p.m. After parking the cart (thela) before the house he walked towards the bridge for purchasing. When he reached there, Ramesh and Om Prakash were talking with each other. He could not remember the fact that when he reached at trijunction. Om Prakash, Hawaldar and Ramesh met there and started conversation. It was incorrect that when Ramesh met him, Suresh was also standing there, but he had gone 5-6 steps ahead at that time. He was not looking at Suresh while talking to Ramesh.

31. He had hardly talked to Ramesh for about half a minute when he heard the sounds of fire. While talking they were standing on the slab lying on the drain. The incident did not occur there. It happened in front of the shop of Dr. R.K. Sharma. There was blood on the spot. When Suresh was picked up and put on the rikshaw, blood also fell. He saw blood where Suresh was killed. About 6 steps towards the west there was shop of Dr. R.K. Sharma. The road near the incident side was running north, south and west. The road where the incident took place ran to the west. This incident occurred at a distance of 1-2 steps from the door of Dr. Sharma's shop. The accused who fired were in front of Dr. Sharma's shop at about 1.5-2 steps away. The attackers had surrounded Suresh from all sides. When Suresh was fired upon, he tried to flinch but Hasan and Tahir caught and pushed him on the ground. He could not remember that he had stated that fact to the I.O. or not. Initially only one shot was fired at the deceased before he tried to escape. He could not tell whether that fire hit the deceased. He got rest of the firearm injuries when he fell on the ground. That fire hit the deceased but on which part of the body, he could not say. The incident was completed within 2-2.5 minutes. He did not see any person attacking by knife when Suresh was standing but saw causing the injuries by knife when Suresh fell on the ground on the back side. The deceased was picked up and put in the rikshaw in the same condition. He himself did not go with the rikshaw. Ramesh was sitting on the rikshaw with Suresh and there was no one

else. After the incident he did not have any conversation with Narendra and Om Prakash. He left the spot immediately. It was asserted that he stayed there for an hour or an hour and a half. The police did not come in front of him at the scene of the incident. He told the I.O. about the lights being switched off at the shop on the spot, though it was not found to be written in his statement under Section 161 CrPC. Further he replied that he could not tell how long ago the sun had set before the incident. But it was not the night and the lights were still on, light of Dr. Sharma's shop and others shops were on. It would be wrong to say that the lights were not on at the time of the incident. Suresh belonged to his fraternity but not of his family. It was wrong to say that Suresh used to run VCR illegally, sell liquor illegally and several cases against him were lodged by the police. PW-3 denied the suggestions of the defence.

32. PW-4, Sevak Ram Rathore is the witness of recovery of razor and knife from the accused Nazim and Nazuk though he had affirmed the recoveries on the pointing of both the accused persons but had denied that the recovery memos were prepared on the spot. He stated that recovery memos were prepared in the police station. Therefore, the witness had been declared hostile and was cross-examined by the prosecution.

33. PW-5, Dharampal had proved the recovery memo Ex.A-2 and Ex.A-3 regarding recovery of knives from Nazuk and Nazim. Since the appellants have been acquitted under the charges of Section 25 Arms Act and the State has not preferred any appeal against the judgment and order of the acquittal and this witness is only the witness of recovery his testimony is not relevent for our purposes.

34. PW-6, Dr. G.D. Katiyar who did autopsy of the deceased, found 22 injuries on the body of the deceased out of which injury nos.16 and 18 were firearm injury. Injuries nos.17 and 21 were abrasions. Rest 17 injuries were incised wounds on the vital and non-vital part of the deceased which were sufficient to cause death.

35. In the internal examination, this witness found that the brain was congested and there was 200 ml blood in the chest cavity. The membranes of the lungs were cut on both sides. There was 100 ml black coloured substance in the stomoch. The large intestine was perforated at many places on the left side. The left side of the liver was cut. A metalic bullet was found in ingulin region. A metalic bullet was also found on the right side of the abdomen, chest below the rib cage.

36. The witness opined that the injuries on the body of the deceased could occur at 7 p.m. on 21.09.2001. The injuries no.1 to 6, 8 to 15, 19 and 20 could come from the sharp-eged weapon like knives and razors. Injury nos.10 and 18 were possible from any firearm. Inury nos.7, 17, 21 and 22 could come from rubbing against the rough and hard surface. During the cross-examination, the witness deposed that in the month of September, rigor mortis (stiffness) after death may start from the upper part of the body and pass in 24 to 48 hours. The rigor mortis normally first passes through the upper part and then the lower part. He could not say whether the dark coloured liquid found in the stomoch of the deceased could be liquor. He had not mentioned the edge of the wounds. He did not mention the condition of tailing about any cut wound. If wounds were caused by hitting with knives or razor, tailing occur in the injuries. The spare etc which was

inserted into the body and taken out did not have tailing. The witness accepted that he did not mention the word *'firearm'* about injury nos.16 and 18 but had mentioned the word *'wound of entry'*. He did not give the direction of the wounds or stabbed wounds. At the time of deposition the bullets were not before the witness. He further deposed that no death report of the hospital was produced before him. There was the possibility of a gap of 4-6 hours in the period of death. The post mortem was done in the artificial light.

37. PW-7, was the H.C.M. deposed that on 24.09.2001 he had lodged F.I.R. in Case Crime No.1209 of 2001, under Sections 147, 148, 149, 302 IPC and Section 3(2)(V) SC/ST Act and disclosed in rapat no.3 at 20:25 p.m. on the same day in the original G.D. The witness had brought the original G.D. In the process of its prepearation a carbon copy was also prepared which was the available on the file. It was in his hand writing and signature. The chik F.I.R. paper no.3/1 and carbon copy of GD are exhibited as Ex.Ka-4 and Ex.Ka-5, respectively. He further deposed that on 26.09.2001, accused Pappu @ Kamina alongwith a truss and specimen seal was produced by the SHO Nawab Singh, it was entered in the GD. Its carbon copy was prepared in the same process which was correct as per the original. The witness proved it. It was exhibited as Ex.Ka-6.

38. On 26.09.2001 S.I, N.K. Sharma produced three properties, in three trusses which were entered at rapat no.46 at 21:18 hour and about which case at Crime No.1209 of 2001, under Sections 147, 148, 149, 302 and Section 3(2)(V) SC/ST Act was lodged. Two specimen seals were also produced. A carbon copy was prepared alongwith original GD in his hand writing and signature which he proved and had been exhibited as Ex.Ka-8. On 01.10.2001 at rapat no.12 at 08.00 p.m. accused Hasan in Case Crime No.1209 of 2001 was produced by the SHO Nawab Singh about which original GD and carbon copy in the same order was prepared by him. The witness proved the carbon copy GD as Ex.Ka-9.

39. In cross-examination, the witness admitted that no seizure or arrest memo was made in front of him. On 24.09.2001 after 09:25 p.m. no cognizable offence was lodged in the police station Kila. Only a case under the M.V. Act had been registered. The witness denied that he made the entries anti-timed.

40. PW-8, Nawab Singh, I.O. of the case, deposed that on 24.09.2001 he was posted as S.H.O, Police Station Kila, District Bareilly and had proved the recoveries of country made pistol of 315 bore and one cartridge of the same bore from the accused Pappu @ Kamina, Tahir and Bhayyan, knife and razor from Nazuk and Nazim respectively and had proved the preparation of recovery memoes which are exhibited as Ex. Ka-9, Ka-2 & Ka-3 and the recovered articles as material Ex. 1, 2, 3, 4, 5 & 6.

41. P.W.-9, S.I., Gurudayal Singh, I.O. Of the Case Crime No. 1215 of 2001 under Section 25 Arms Act had proved the map Ex. A-11 and charge-sheet against the accused Pappu @ Kamina Ex. Ka-12 and prosecution sanction Ex. Ka-13.

42. PW-10, Dinesh Singh C.O. Police deposed that on 24.09.2001 he was posted as C.O. City-II, Bareilly when at Case Crime No.1209 of 2001, under Sections

147, 148, 149, 302 IPC and under Section 3(II)(V)SC/ST Act, an FIR was lodged and copy of the F.I.R. and G.D. was copied by him in case diary. He reocrded the statement of the H.M. Ram Singh, reached on the spot and directed S.S.I. Rajendra Singh Chaudhary to conduct the inquest. There was blood and empty cartridges on the road. Being night and insufficient arrangement of light, the place of occurrence could not be inspected in the presence of the eye-witnesses. He took blood stained and simple soil from the place of occurrence, sealed it, prepared recovery memo and recognised his signature on recovery Ex.Ka-14. A recovery memo was also prepared regarding recovered empty cartridges. He recognised his signature on the concerned recovery memo Ex.Ka-15. He copied the recovery memo in C.D, recorded the statement of Sonu and Suraj Pal witnesses of recovery memo, entrusted the security of place of occurrence to Head Constable Chandra Bhan Sharma, recorded the statement of witness Hawaldar Naresh. On 25.09.2001 he tried to arrest the accused, recorded the statement of informant Ramesh Chandra Bharti, witness Ganga Ram Bharti and Om Prakash, prepared map view on the pointing of the informant, recognized his signature on map view Ex.Ka-16 recorded the statement of Om Pal Gangwar and Rajendra Sharma witness of inquest. He received information of the arrest of accused Pappu @ Kamina on 27.09.2001 that a country-made pistol and cartridge have also been recovered from him about which a case at Case Crime No.1215 of 2011, under Section 25 Arms Act had been registered, its G.D. was copied in C.D, recorded the statement of accused Pappu @ Kamina wherein he confessed the offence, obtained inquest and post mortem report and copied it in C.D. and also recorded the statement of Constable Roop Singh and Constable Ram Pal who had carried out the dead body to the Mortury. On 28.09.2001, on the basis of arrest of accused and recovery from Tahir, Nazuk, Nazim and Bhaiyan in Crime Nos.1216 of 2001, 1217 of 2001, 1218 of 2001, 1219 of 2001, cases under Section 25 Arms Act and Section 4/25 Arms Act had been registered, its recovery memo and G.D. were copied in C.D. and their statements were recorded wherein they confessed. When accused Nazim and Nazuk informed about the recovery of razor and chaku, S.H.O. Nawab Singh was sent for its recovery. It was recovered on their pointing. Both the recovery memos were copied in C.D, recorded their statement of accused Hasan on 01.10.2001. On 02.10.2001, he recorded the statement of S.H.O. Nawab Singh, S.S.I. Rajendra Singh, A.S.I. Anwar Afaq, S.I. N.K. Sharma, Constable Om Singh, Constable Dinesh Pal Singh, Constable Ranvijay Singh and Constable Chandra Bhan Sharma. He directed the S.H.O. P.S. Kila to send the recovered case properties for examination to FSL Agra. On 10.10.2001, he recorded evidence of witnesses of fard. He visited the place of recovery of knife and razor with H.C.P. Anwar Afaq and prepared map, recognized his signature on map Ex.Ka-7. After coming back, recorded the statment of Constable Ayyub Khan at police station Kila and finding sufficient evidence against the accused persons he submitted Charge Sheet No.130 of 2001 Ex.Ka-18, under Sections 147, 148, 149, 302 IPC and Section 3(II)(V) SC/ST Act. After getting the receipt of deposition of case property he kept the receipt on 09.11.2001. A sealed bundle was opened before this witness from which country-made pistol, cartridges were received. The empty cartridge of 315 bore was exhibited

as Material Ex.1. The bundle of blood stained and plain soil were exhibited as material Exs.22 and 23.

43. In cross-examination, on behalf of accused Hasan he replied that he neither arrested accused Hasan nor had recovered any weapon from his possession used in the murder. No stick or lathi was recovered from his possession. He denied that he did not find any evidence and filed false charge sheet against him.

44. On behalf of rest of the five accused persons, this witness was cross-examined together wherein he replied that he could not recollect as to which firearm was recovered from which accused. He could reply only by seeing the recovery memo. The C.D. was not in his hand writing. It was written by peshkar Shailendra Mishra on his dictation. He was still in service. It was not mentioned in C.D. that the entry therein was written by Shailendra Mishra. He admited that there was only signature on the charge-sheet, the C.D. was written by reader on his dictation. He denied the suggestion that he did not apply his mind. He denied that any part of the C.D. had been written by Nawab Singh or any other S.I. though it has not been mentioned in C.D. that which act was done when. He had taken into possession only plain and blood stained soil, khokha and empty cartridges of 315 bore. Neither any accused was arrested nor any other material was recovered before him. He was not present at the time of the inquest. He did not know when the case property was kept in malkhana. The witness denied that he submitted the charge sheet on fake and false facts.

45. PW-11, S.I. Sanjay Kumar Singh deposed that on 24.09.2001 he was posted as Sub-Inspector in the police station Kila, Bareilly. He had prepared inquest report Ex.Ka-19 in Mortury before the witnesses which was in his hand writing and signature. The witness also proved letter to C.M.O, letter to R.I, challannash, photonash which were exhibited as Ex.Ka-22 and Ex.Ka-23. After sealing the dead body he sent it through Constable Roop Singh and Constable Ram Pal for post mortem. He had prepared specimen seal Ex.Ka-24 in his writing and signature.

46. In cross-examination, the witness replied that before preparation of the inquest report he had read over the F.I.R. and was knowing about the eye-witnesses of the incident. He could not remember as to whether any eye-witness had been made witness of the inquest or not. He further deposed that Om Pal and Ganga Ram eye-witnesses were also the witness of inquest. The opinion of panch witnesses had also been written. Before signing the panchayatnama the duty of panchas was not told by him. It was wrong to say that some panch witnesses were not present during the inquest proceeding and their signatures were obtained later. The crime number was written on the inquest. Though the name of the accused was not written. The witness denied the suggesstions.

47. PW-12, S.I. Nek Ram Singh Pal deposed that in the year 2001 he was posted as S.I. at police Station Kila, Bareilly. He had investigated the Cases under the Arms Act wherein the accused persons have been acquitted.

48. PW-13, S.I. Anwar Afaq deposed that on 26.09.2001 he was posted as A.S.I. in the police station Kila. That day he alongwith S.H.O. Nawab Singh, S.I. Rajendra Singh, Constable Om Singh,

Constable Chandra Bhan Sharma were busy in search of the accused persons with government jeep on the information of informer at around 10:00 p.m. The accused Pappu @ Kamina was arrested with a country made pistol and cartridges on the road runing from Surkha Fatak to Vinod Soap Factory who confessed his crime and that the weapon having been used in the incident and also disclosed the names of accomplices. The witness further deposed that he had written the recovery memo Ex.Ka-9 on speaking of S.H.O. He recognized his signature. On 27.09.2001 in search of the remaining accused persons he alongwith S.H.O. and other police personnel arrested the accused persons Tahir, Bhaiyan @ Sharif Mohammad alongwith the accused Nazuk and Nazim. From the possession of Tahir a country-made pistol of 315 bore and one cartridge, from Bhaiyan @ Sharif Mohammad a knife, from Nazim a country-made pistol of 12 bore with two cartridges and from Nazuk a country-made pistol of 315 bore and one cartridge were recovered. He had written the recovery memo Ex. Ka-10 on the speaking of S.H.O. The witness has recognized his signature on it.

49. On 28.09.2001 on the poiting of accused Nazuk and Nazim the razor and knife used in the murder of the deceased Suresh were recovered. Its recovery memo was prepared by S.H.O. Nawab Singh. The witness also recognized his signature which have already been exhibited as Exs.Ka-2 and 3. The witness furhter deposed that the case property was before him in the court which was already exhibited as material Exs.1 to 21.

50. After closure of prosecution evidence, the statements of witnesses were recorded under Section 313 Cr.P.C. accused Tahir denied all allegations and the prosecution evidence and stated that the witnesses were the relatives and friends, therefore, they are falsely deposing. The police and doctor witnesses acted wrongly. Witnesses were testifying against him out of enmity and party rivalry. When he told the police not to implicate without reason to accused Pappu, he was also falsely implicated for arguing. Deceased Suresh was involved in business of V.C.R. and illegal liquor trade.

51. Accused Nazim also denied the allegations and the evidence. He further alleged that the deceased Suresh by spreading panic got sold the houses of Nazir and Shakir, therefore, they had enmity with him.

52. Accused Pappu @ Kamina also deposed that the police used to pressurize him for giving false testimony but he refused. He had taken money on installment from Ramesh which he could not repay, therefore, informant Ramesh had enmity with him.

53. Accused Nazuk also denied the allegations and prosecution evidence and stated that informant and the witnesses belong to same party and had ties with the police. In his sister's marriage, some material were supplied from the tent house of Ramesh and some money was due to him, therefore, Ramesh had enmity. A quarrel had also occurred between his father Kallu and the informant Ramesh.

54. Accused Bhaiyan @ Sharif denied the allegations and the prosecution evidence and stated that being relative of accused Kallu, he was falsely implicated.

55. Accused Hasan also denied the allegations and evidence produced by the prosecution and stated that he had been falsely implicated due to party rivalry.

56. From the side of defence DW-1 Zakir Husain had been examined who deposed that at the time of the incident he was at his house. When he heard the sounds of firing, he reached there and saw that there were razor in the hands of two miscreants and another having revolver were escaping after killing Suresh. He saw the incident from a distance of 7 to 8 steps. Since there was no light, therefore, it was not looking from afar. Bulb was not on. Apart him, Taiyab, Muntiyaz and Tufail etc. also reached there. He went to the shop of Ramesh and informed about the incident to him. Suresh was taken away by the informant in the rikshaw. Deceased was involved in illegal V.C.R. trading and also used to do other illegal business.

57. In cross-examination, this defence witness replied that he did not recognize the killers. He did not receive any summon. He had no knowledge about any report against Suresh. He had not come for testifying himself in favour of either side. He had come from the shop and had also watched the dial, hence the time was in his remembrance. There was only sound of firing. He had reached first and rest of the people came after 5-7 minutes. The shop of Ramesh was about 250-300 steps away from his house. Suresh had no shop. He used to work from home. His house would be 70 steps away from his house. He had only formal relation with Suresh. It was wrong to say that he was deposing falsely and had no knowledge of the incident.

58. Learned counsel for the appellants raised the following grounds during the argument:

(i) The mandatory requirement of Section 157(1) CrPC and paragraph 101 of Special Report Uttar Pradesh Police Regulations have not been complied with.

(ii) No previous FIR regarding altercation held 3-4 days ago had been registered with the police/Magistrate.

(iii) There was no evidence that the alleged offence had been committed in furtherance of common object.

(iv) There was no injury caused by blunt object.

(v) There was variation about the place of the incident. How the injured Suresh was brought to the hospital was doubtful.

(vi) The prosecution had withheld the medical documents of the district hospital, Bareilly.

(vii) The constables who carried the dead body to mortury were not examined.

(viii) The FIR was ante-timed.

(ix) The autopsy was conducted with inordinate delay.

(x) There was inordinate delay in recording the statement of the eye-witnesses.

(xi) There was material inconsistency in confirmity and contradiction in the witnesses of fact and the conduct of PWs-1, 2 and 3 was unnatural.

(xii) The medical report and evidence are inconsistent with the ocular evidence.

(xiii) No blood was found on the person or clothes of the informant Ramesh PW-1.

(xiv) The prosecution case was not proved beyond reasonable doubt.

59. Having heard learned counsels of the parties and persued the record, we may note that :-

60. As per prosecution case the offence was committed at about 07:00 p.m. on 24.09.2001 for which the F.I.R. was lodged on the same day at 08:25 p.m. at P.S. Kila which was only 3 farlang away from the place of the occurrence. As per prosecution story, the deceased was taken to the district hospital, Bareilly from the place of occurrence and after declaring him dead, the dead body was sent to the Mortury. The informant being brother and active member of the family lodged the F.I.R. one hour and 25 minutes after the occurrence, therefore, it cannot be said that there was any delay in lodging the F.I.R. The chik F.I.R. had been sent through post and it had been seen by the CJM, Bareilly on 26.09.2001. Though, it should have been produced within 24 hours after lodging the F.I.R, but in the facts and circumstances of the case there was no inordinate delay in sending the chik F.I.R. Due to night occurrence, the proceedings substantially could start on 25.09.2001 and the information reached to the C.J.M. on 26.09.2001. Therefore, such minor delay cannot be said to be inordinate delay and fatal for prosecution.

61. Learned counsel for the appellants relied on ***State of Rajasthan Vs. Daud Khan, 2015 0 Supreme (SC) 1041.*** There was delay of about 36-37 hours in receiving the copy. In paragraphs 26-29, the question regarding sending special report and copy of the F.I.R. to the Magistrate, has been discussed which are as under:

"26. The interpretation of Section 157 of the CrPC is no longer res integra. A detailed discussion on the subject is to be found in Brahm Swaroop v. State of U.P. (2011) 6 SCC 288 which considered a large number of cases on the subject. The purpose of the "forthwith" communication of a copy of the FIR to the Magistrate is to check the possibility of its manipulation. Therefore, a delay in transmitting the special report to the Magistrate is linked to the lodging of the FIR. If there is no delay in lodging an FIR, then any delay in communicating the special report to the Magistrate would really be of little consequence, since manipulation of the FIR would then get ruled out. Nevertheless, the prosecution should explain the delay in transmitting the special report to the Magistrate. However, if no question is put to the investigating officer concerning the delay, the prosecution is under no obligation to give an explanation. There is no universal rule that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable. In other words, the facts and circumstances of a case are important for a decision in this regard.

27. The delay in sending the special report was also the subject of discussion in a recent decision being Sheo Shankar Singh v. State of U.P. (2013) 12 SCC 539 wherein it was held that before such a contention is countenanced, the accused must show prejudice having been caused by the delayed dispatch of the FIR to the Magistrate. It was held, relying upon several earlier decisions as follows:

"30. One other submission made on behalf of the appellants was that in the absence of any proof of forwarding the FIR copy to the jurisdiction Magistrate, violation of Section 157 CrPC has crept in and thereby, the very registration of the FIR becomes doubtful. The said submission will have to be rejected, inasmuch as the FIR placed before the Court discloses that the same was reported at 4.00 p.m. on 13-6-1979 and was forwarded on the very next day viz. 14-6-1979. Further, a perusal of the impugned judgments of the High Court

as well as of the trial court discloses that no case of any prejudice was shown nor even raised on behalf of the appellants based on alleged violation of Section 157 CrPC. Time and again, this Court has held that unless serious prejudice was demonstrated to have been suffered as against the accused, mere delay in sending the FIR to the Magistrate by itself will not have any deteriorating (sic) effect on the case of the prosecution. Therefore, the said submission made on behalf of the appellants cannot be sustained.

31. In this context, we would like to refer to a recent decision of this Court in Sandeep v. State of U.P. (2012) 6 SCC 107 wherein the said position has been explained as under in paras 62-63: (SCC p. 132)

"62. It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157 CrPC instantaneously. According to the learned counsel FIR which was initially registered on 17-11-2004 was given a number on 19-11- 2004 as FIR No. 116 of 2004 and it was altered on 20-11-2004 and was forwarded only on 25-11-2004 to the Magistrate. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in Pala Singh v. State of Punjab, (1972) 2 SCC 640 wherein this Court has clearly held that (SCC p. 645, para 8) where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned be, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

63. Applying the above ratio in Pala Singh to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that aspect. In such circumstances we do not find any infirmity in the case of the prosecution on that score. In fact the above decision was subsequently followed in Sarwan Singh v. State of Punjab (1976) 4 SCC 369, Anil Rai v. State of Bihar (2001) 7 scc 318 and Aqeel Ahmad v. State of U.P. (2008) 16 SCC 372."

28. It is no doubt true that one of the external checks against ante-dating or ante-timing an FIR is the time of its dispatch to the Magistrate or its receipt by the Magistrate. The dispatch of a copy of the FIR "forthwith" ensures that there is no manipulation or interpolation in the FIR. If the prosecution is asked to give an explanation for the delay in the dispatch of a copy of the FIR, it ought to do so. However, if the court is convinced of the prosecution version's truthfulness and trustworthiness of the witnesses, the absence of an explanation may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case.

29. In so far as the present case is concerned, there was no delay in lodging the FIR. Hence the question of its manipulation does not arise. Additionally, the officer in charge of the police station, PW-21 Surender Singh was not asked any question about the delay in sending the special report to the Magistrate. An explanation was, however, sought from the

investigating officer PW-25 Rajinder Parik who tersely responded by saying that it was not his duty to send the special report to the court (or the Magistrate). In the absence of any question having been asked of the officer who could have given an answer, namely, the officer in charge of the police station, no adverse inference can be drawn against the prosecution in this regard, nor can it be held that the delay in receipt of the special report by the Magistrate is fatal to the case of the prosecution. This is apart from the consistent evidence of the eye witnesses, which we shall advert to a little later."

62. In ***Anil Rai Vs. State of Bihar, (2001) 7 SCC 318*** and in ***State of Punjab Vs. Hakam Singh, (2005) 7 SCC 408*** it has been held that the delay in sending copy of the F.I.R. to the area Magistrate is not material where the F.I.R. is shown to have been lodged promptly and investigation had been started on that basis. The delay is not material in the event when the prosecution has given cogent and reasonable explanation for it.

63. On the basis of the above discussion the defence argument about delay in compliance of Section 157(1) CrPC has no force and is accordingly, rejected.

64. Learned counsels for the appellants have argued that if prior to this incident any altercation had taken place between the deceased and the accused Tahir, Bhaiyan and Hasan no F.I.R. or complaint had been made, which shows that there was no motive with the accused to cause murder.

65. The informant PW-1 in the F.I.R. stated that due to bicycle collision, there was a scuffle between the deceased and the accused persons Tahir, Bhaiyan and Hasan and they had threatened the deceased with dire consequences but they did not pay any special attention to that matter.

66. This case is based on direct evidence for which motive is not necessary though in the statements under Section 313 Cr.P.C. accused persons themselves admit enmity and motive with the deceased. It is a case based on the evidence of three eye-witnesses, therefore, there is no need to prove motive.

67. The third argument is that the common object of the accused persons, the constitution of unlawful assembly before the incident and that there was a common object of such unlawful assembly regarding murder of the deceased had not been established. Therefore, individual act of the accused would have to be taken into consideration.

68. In the F.I.R., the informant setup previous enmity as motive behind the commission of the crime. As per prosecution, it was a case based on direct evidence of the eye-witnesses PWs-1, 2 and 3, brother of the deceased and member of the close vicinity. In cases based on direct evidence, motive does not have much significance, but in the cases based on circumstantial evidence motive becomes significant and of much consequence. The legal proposition was stated in ***Nagraj Vs. State, (2015) 4 SCC 739, Wakkar Vs. State of U.P, 2011 (2) ALJ 452 (SC), Nathuni Yadav Vs. State of Bihar, (1998) 9 SCC 238*** etc.

69. In this regard it is pertinent to mention Sections 141 to 149 I.P.C. which are as under:-

*"**141. Unlawful assembly.**--An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is--*

First.--To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second.--To resist the execution of any law, or of any legal process; or

Third.--To commit any mischief or criminal trespass, or other offence; or

Fourth.--By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.--By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.--An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

***142. Being member of unlawful assembly.**--Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.*

***143. Punishment.**--Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.*

***144. Joining unlawful assembly armed with deadly weapon.**--Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

***145. Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.**--Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extent to two years, or with fine, or with both.*

***146. Rioting.**--Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.*

***147. Punishment for rioting.**--Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

***148. Rioting, armed with deadly weapon.**--Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*

***149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.**--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of*

the committing of that offence, is a member of the same assembly, is guilty of that offence."

70. In view of the above sections, prosecution version and the evidence were discussed. From the begining to end, as per the F.I.R. there were six accused persons together out of which accused Tahir, Bhaiyan and Pappu @ Kamina were armed with country-made pistol while the accused Nazuk and Nazim were armed with knives and accused Hasan was armed with stick. From the evidence of PWs-1, 2 and 3 it is established that all the accused persons simultaneously played an active role in commission of the crime.

71. As per Section 141 I.P.C. if there is a requirement of common object of an assembly consists of five or more persons is designated an "unlawful assembly".

72. As per explanation to this section if initially an assembly is not unlawful at the time of its assemblance, it may subsequently become an unlawful assembly.

73. In this case, as per F.I.R. version and the evidence, the deceased was coming with his brother, informant PW-1 and when two other persons met him, the informant stopped but the deceased went few steps ahead where the alleged offence was committed. All the accused persons simultaneously attacked with the weapons which they had in their hands.

74. As per Section 142 I.P.C. if knowing the fact that the assembly is unlawful any person intentionally joins it or continues in it, he is said to be a member of such unlawful assembly. Accused Hasan was having only stick in his hand, therefore, an argument has been advanced for him that he cannot be said to be member of unlawful assembly and his role should be assessed considering the weapon in his hand. In the F.I.R. and in evidence of the eye-witnesses it is averred and deposed that accused Tahir and Hasan made the deceased fall on the ground. PW-1 has deposed in cross-examination that apart from bullet and knife, the deceased was also hit by the stick. PW-2 Om Prakash deposed in examination-in-chief that Hasan was hitting the deceased with the stick. In this regard no question in cross-examination has been asked. Hence, the evidence of PW-2 being unrebutted becomes conclusive regarding the role of the accused Hasan.

75. PW-3, Ganga Ram deposed in cross-examination that Hasan and Tahir made the deceased fall on the ground. Hasan had a stick. When Suresh was fired upon, he tried to run away after struggling, then Hasan and Tahir caught hold him and dropped him. Even from this witness no question has been asked and no suggestion has been given regarding hitting or non-hitting by the accused Hasan by stick. All the witnesses of fact PW-1, PW-2 and PW-3 have supported the version of F.I.R. unanimously and without any contradiction and have deposed that when deceased went 5-6 steps ahead and when they turned, they saw that Tahir and Hasan made the deceased fall on the ground and Tahir, Bhaiyan and Pappu @ Kamina started indiscriminate firing on the deceased. Nazuk and Nazim attacked him with a knife and Hasan attacked with the stick.

76. For an overt act in pursuance of the common object of any member of an unlawful assembly, every member of that assembly would be constructively liable for

such acts also where such acts constitute offence. Hitting the deceased by the accused Hasan with the stick or stabbing by accused Nazuk and Nazim by razor and knife and use of firearm by Tahir, Bhaiyan and Pappu @ Kamina establishes that all the accused persons shared a common object. From the above evidence, presence and participation of every accused as member of the unlawful assembly is clearly established.

77. Section 149 IPC does not create separate offence but only declares vicarious liability of all members for unlawful assembly for acts done in furtherance of common object of the assembly. There might be no fatal injury from the attack of the accused Hasan but since he was knowing that the rest of the persons were having deadly weapons which would be used in the murder of the deceased and due to their attack the deceased had died, Hasan would also be directly and vicariously liable being member of the unlawful assembly for murder. Though mere presence in unlawful assembly cannot render person liable unless there was common object and the appellant has shared it with other accused but in this case the accused Hasan has played an active role. Firstly, he dropped the deceased with co-accused Tahir and also hit him from the stick knowing that three other accused persons had firearms and rest two other accused persons had deadly weapon like razor and knife proposed to be used in killing of the deceased. Therefore, it can very well be concluded that accused Hasan would also be liable for commission of murder under Section 302 I.P.C. read with Sections 147, 148, 149 I.P.C. So far as the rest five accused persons are concerned, it has been proved beyond reasonable doubt that they all have inflicted fatal injuries to the deceased to achieve the common object of the unlawful assembly composed for killing of Suresh.

78. In ***Lalji Vs. State, AIR 1989 SC 754, Bhudeo Mandal Vs. State, AIR 1981 SC 1219,*** it has been held that Section 149 creates a specific and distinct offence. The vicarious liability of the member of the unlawful assembly will extend to (i) the acts done in pursuance of the common object of the unlawful assembly, and (ii) if such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. An accused person whose face false within the terms of this section cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly.

79. In ***Fatte Vs. State, AIR 1979 SC 1504*** it is held that every one must be taken to have intended to probable and natural results of the combination of the acts in which he joined. It is not necessary in all cases that all the persons forming an unlawful assembly must do some overt act.

80. In ***Vishambar Bhagat Vs. State, AIR 1971 SC 2381*** it has been held that where the accused had assembled together, armed with lathis and were parties to the assault on the complainant, the prosecution is not obliged to prove which specific overt act was done by which accused.

81. In ***Gajanand Vs. State, AIR 1954 SC 695*** the basis of liability has been discussed. In this case it has been held that under Section 149, the liability of other members for the offence committed during the continuance of the occurrence rests

upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour, at or before the seen of action.

82. In ***Maslati Vs. State of UP, AIR 1965 SC 202*** the Constitutional Bench of the Supreme court held:

"What has to be proved againsnt a person who is alleged to be a member of unlawful assmebly is that he was one of the persons constituting the assembly and he entertained alongwith the other members of the assembly the common object as defined by Section 141 IPC.... The crucial question to determine in such case is whether the assembly constituted of five or more persons and whether the said persons entertain one or more of the common objects as specified by Section 141."

83. In ***State Vs. Krishan Chand, AIR 2004 SC 4671*** it is held that it is a well established principle of law that when a conviction is recorded with the aid of Section 149, relevant question to be examined by the Court is whether the accused was a member of an unlawful assembly and not whether he actually took active part in the crime or not.

84. In this case, all the appellants proved to be member of the alleged unlawful assembly having deadly weapons except the accused Hasan who was having lathi in his hand. Lathi was used in putting down the deceased and attacks was made from the lathi. There might be no fatal injury because of the attack from lathi but being member of the unlawful assembly having common object of killing the deceased, accused Hasan is also liable to be convicted for the offence of murder under section 302 IPC with the aid of Section 149.

85. It is also argued for the appellant Hasan that in *post mortem* report no injury of lathi has been found. From perusal of the *post mortem* report it transpires that there are 22 injuries on the person of the deceased. It is quite possible that the injury caused by the stick would have been hidden under such series of injuries. Therefore, this argument has no force and is accordingly, rejected.

86. Learned counsel for the appellants argued that according to the PWs-1 and 2, the incident occurred on the slab while as per PW-3 and site plan the place of incident at some distance from the slab.

87. In this regard, this Court has examined the relevant part of the F.I.R. and evidence. As per F.I.R. when informant and the deceased reached on the intersection near Dr. Sharma's shop at 07 p.m. the informant, Om Prakash, Hawaldar and Ganga Ram of their locality met to him with whom he started talking, his brother went 5 to 6 steps away then he was stopped in front of Dr. Sharma's shop and Tahir and Hasan caught hold Suresh and dropped him on the ground, accused Tahir, Bhaiyan and Pappu @ Kamina started indiscriminate firing at him. Nazuk and Nazim attacked with knives and Hasan hit him with stick. The deceased fell on the spot and shouted for help.

88. On the pointing of the informant, a map Ex.Ka-16 was prepared by the I.O. in which the place of occurrence has been shown by letter "X' which is few steps away from the drain and is in front of and

to the north of Dr. Sharma's shop wherefrom blood stained and simple clay was taken. From the place "B' empty cartridge was recovered. Informant and rest of the witnesses are shown standing to the east on the slab at place "A'. The distance between "A' to "X' was found to be 8 steps and from the bridge the place of occurrence was about 6 steps. Thus the informant and the witnesses were only 8 steps away from the place of occurrence. As per F.I.R. when his brother went ahead 5 to 6 steps from him, accused persons started committing the alleged occurrence.

89. PW-1 in his examination-in-chief has deposed the same facts. In cross-examination similar evidence has been deposed by PW-1. This witness deposed that when for the first time he saw, he found that accused persons were standing to the west side from him and they were killing the deceased. He further deposed that there was 2 feet wide slab over the drain. At the time of incident, he and his brother were present on it, they had not crossed it. Upon that slab, no blood had been dropped. Due to night he could not see whether blood had fallen on the slab or not.

90. PW-2 has deposed that he saw that accused were committing the alleged crime and saw that the deceased was suffering like a fish laying on the track of R.K. Sharma. In cross-examination this witness has deposed that there was a trijunction near the incident site, where the road ran in the north-south and west direction, where the road turned in the west direction. There was a drain and a slab lying on the drain. The drain was in the north-south. This slab track was near the shop and the road was government owned. He called the slab lying in front of R.K. Sharma's shop as a track.

91. PW-3, Ganga Ram has deposed that Hasan and Tahir dropped the deceased in front of R.K. Sharma's shop accused persons surrounded him and started killig him. He was standing on the east side at a distance of about 6 steps from where the incident took place. There was a drain about 1.1/2 to 2 feet wide near the spot of the incident. Slab was lying on the drain, he was standing on it. He had hardly talked to Ramesh for about half a minute when he heard the sound of fire while talking. They were standing on the slab lying on the drain, incident did not happen on the slab. It happened in front of the shop of Dr. Sharma. There was blood oozing from the body of Suresh at the place of occurrence. The place where the incident took place was a road which goes to the west. From that on walking west, Dr. Sharm's shop would fall in the south direction. This incident took place at a distance of 1-2 steps from the threshold of the shop of Dr. R.K. Sharma. The miscreants were at right side in front of Dr. Sharm's shop. They were at a distance of 1.1/2 to 2 steps.

92. When we compare the evidence of prosecution witnesses with the map and the F.I.R, we find no variation or contradictions about the place of occurrence. A person who is being attacked tries his best to save his life. The deceased and the accused persons seems to be present in an area of not less than 5 to 8 feet. It is not the case that the deceased was killed during sleeping on a fixed place. The place of occurrence has also not been

denied by the defence and it it is not case of the defence that the place of occurrence is not the same as alleged by the informant and the witnesses. Even D.W-1 has accepted the same place of occurance. As per Ex.Ka-14 from the place of occurrence blood stained and plain soil had been collected. As per Ex.Ka-15 on the place of occurrence an empty cartridge of 315 bore was also found. The I.O. has also found the same place of occurrence where the deceased was killed. Therefore, only on the basis of the above noted suggestion or the argument it cannot be concluded that the place of occurrence has been changed.

93. Learned counsel for the appellants argued that how the injured was brought to the hospital is doubtful.

94. According to this Court, this is not a matter in issue as to how the deceased was brought to the hospital from the place of occurrence. Even if any variation is established in the manner in which the deceased was brought from the spot to the hospital, it will not affect the merit of the case.

95. Learned counsel for the appellants have argued that the medical evidence of district hospital, Bareilly has been witheld and had not been collected by the I.O.

96. Certainly any medical document regarding treatment of the deceased in the district hospital, Bareilly had not been produced but according to this Court such documents are not required for disposal of the case as it is fully proved that when the deceased was brought in the district hospital, the doctor declared him brought dead. The body was shifted to the mortuary for *post mortem*. Since no treatment was done in the district hospital, hence if any medical document of the district hospital has not been collected and annexed with the case diary, the same is not fatal for the prosecution.

97. Learned counsel for the appellants argued that the constables who carried the dead body to the mortury were not examined.

98. According to this Court, generally this fact that the dead body was entrusted for transportation after inquest for post mortem to which constable, is never a matter in issue. Since this fact has no importance for criminal justice, it is not necessary to examine such witnesses.

99. So far as the argument regarding ante-timing of the F.I.R. is concerned, it has already been discussed in the forgoing paragraphs of this judgment.

100. It is argued by the learned counsel for the appellants that autopsy was done with inordinate delay.

101. In this case PW-6, Dr. G.D. Katiyar has conducted the autopsy next day i.e. 25.09.2001 at 03:15 a.m. The occurrence took place at about 07:00 p.m. on 24.09.2001. In the night, after preparation of inquest report the dead body was sent to the Mortury and in the night of 24/25.09.2001, the *post mortem* of the dead body was conducted by Dr. G.D. Katiyar. There is no delay much less inordinate delay in the *post mortem.*

102. Learned counsel for the appellants argued that there is material inconsistency and contradictions in the evidence of the witnesses of fact and the conduct of PWs-1, 2 and 3 had been unnatural.

103. Earlier the statement of the witnesses of fact had been discussed. All the witnesses deposed in support of the prosecution version and no infirmity, inconsistency or material contradiction could be found in the evidence of the witnesses. Contrary to it, the evidences of PWs-1, 2 and 3 are in confirmity with that of each other. Neither there is any contradiction in respect of place of occurrence, manner of attack, identity of accused persons, weapons used by the accused persons, separately, loading of the deceased on the rikshaw nor about the light or any other fact connected with the commission of crime. All the witnesses of fact are local persons, their presence on the spot was quite natural. Since the accused persons were armed with deadly weapons and they committed the crime within two minutes and ran away from the spot, therefore, no occasion arose to the witnesses to save the life of the deceased or caught hold some of the accused persons.

104. In ***Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537, Ramesh Vs. State of UP, (2009) 15 SCC 513,*** it is held that minor contradictions in the testimonies of the prosecution witnesses are found to be there and in fact they go to support the truthfulness of the witnesses. In ***Maqsoodan Vs. State of UP, (1983) 1 SCC 218 (three-Judge-Bench),*** it is held that if there are minor inconsistencies in the statement of witnesses and F.I.R. in regard to the number of blows inflicted and failure to state who injured whom would by itself not make the testimony of the witnesses unreliable. This, on the contrary, shows that the witnesses were not tutored and gave no parrot like stereotype evidence.

105. In this case all three witnesses have given consistent evidence regarding the role played by each of the accused separately and also that which accused was having which weapon in his hand and in which manner they attacked at the deceased. Previous enmity is already admitted to the accused persons. No alibi has been taken. There is no inconsistency or any variation in the evidence of witnesses regarding date, time, place and number of accused persons. There is no variation regarding direction and arrival or departure of the accused persons.

106. In ***Nankaunoo Vs. State of UP, (2016) 3 SCC 317 (three-Judge-Bench),*** it was held that where the witnesses give consistent version of the incident, the consistent testimony of the witnesses should be held credible.

107. In ***Bhagwan Jagannath Markad*** (*supra*), ***Ramesh Harjan Vs. State of UP, (2012) 5 SCC 777, Leela Ram Vs. State of Haryana, (1999) 9 SCC 525, Mukesh Vs. State (NCT) of Delhi and others, AIR 2017 SC 2161 (three-Judge-Bench)*** it has been held that if there are no material discrepancies or contradictions in the testimony of a witness, his evidence cannot be disbelieved merely on the basis of some normal, natural or minor contadictions, inconsistencies, exaggerations, embelishments etc. The distinction between material discrepancies and normal discrepancies are that minor discrepancies do not corode the credibility of a party's case but material discrepancies do so.

108. On the basis of above discussion since no material inconsistency, inconfirmity or contradiction has been found in the evidence of PWs-1, 2 and 3,

this argument being not tenable and is accordingly, rejected.

109. Learned counsel for the appellants further argued that there are inconsistency between the medical report/evidence and the ocular evidence.

110. PWs-1, 2 and 3 all the witnesses of facts deposed that accused Tahir, Bhaiyan and Pappu @ Kamina indiscriminatly fired upon the deceased and Nazuk and Nazim had attacked with razor and knife. Hasan had attacked with the stick. A perusal of the *post mortem* reported indicated that incised wounds, firearm wounds, lacerated wounds and abrasions have been found on the person of the deceased which would occur if a person is attacked by the alleged weapons in the alleged manner.

111. If any person is attacked with razor and knife, incised wound would occur. If a person is forcefully dropped on the road/ground, abrasion might occur. If any person is hit by lathi, abrasion or lacerated wounds might occur. If a person is shot by firearm, entry or exit wound could occur. Even metalic bullets were recovered from the body of the deceased during autopsy. Thus, there is no discrepancy or inconsistency between the medical report and evidence and the occular evidence. Such injuries may occurr if any attack is made by the weapons which were in the hands of the accused persons. Hence, this argument also has no force and is accordingly, rejected.

112. Learned counsel for the appellants further argued that no blood was found on the body and clothes of the informant Ramesh.

113. PW-1, informant, Ramesh Chandra Bharti, brother of the deceased proved that after the incident he carried the deceased to the district hospital by rikshaw sitting thereon. Certainly, some blood would have fallen on the body and the clothes of the informant. In this regard, cross-examination has been made wherein the witness deposed that he could not show blood on his clothes to the I.O. in panic, even he did not give those clothes to the police. In this regard, no question had been asked from the I.O, PW-10. Generally when the proper evidence are already available, the I.O. does not take the custody of clothes of the witnesses. Since the presence of informant, PW-1 and rest of the witnesses is not doubtful, therefore, if the I.O. had not taken the blood stained clothes of the informant and the same had not been sent for the examination, is not fatal for the prosecution. It may be called an omission or an act of faulty investigation. Faulty investigation in itself is not the sole realm to be explored by the court.

114. In ***Khem Ram Vs. State of Himachal Pradesh, (2018) 1 SCC 202; State of Karnataka Vs. Suvarnamma (supra); Leela Ram (supra); Dashrath Singh Vs. State of UP, (2004) 7 SCC 408; State of Punjab Vs. Hakam Singh, (2005) 7 SCC 408,*** it has been held that any irregularity or deficiency in investigation by the I.O. need not necessarily lead to rejection of the prosecution case when it is otherwise proved. The only requirement is the use of extra caution in evaluation of evidence. A defective investigation cannot be fatal to prosecution where occular testimony is found credible and cogent.

115. In ***Rahul Mishra Vs. State of Uttarakhand, AIR 2015 SC 3043 (three-Judge-Bench) and V.K. Mishra Vs. State***

of Uttarakhand, (2015) 9 SCC 588 (paragraph-38) it is held that the I.O. is not obliged to anticipate all possible defences and investigate in that angle. In any event, any omission on the part of the I.O. cannot go against the prosecution. Interest of justice demands that such acts or omission of the I.O. should not be taken in favour of the accused or otherwise it would amount to placing a premium upon such omissions.

116. In ***Makbool Vs. State of Andhra Pradesh, AIR 2011 SC 184; Shiv Shankar Singh Vs. State of Jharkhand, 2011 CrLJ 2139 (SC); and Dhanaj Singh Vs. State of Punjab, (2004) 3 SCC 654,*** it is held that non-sending of blood stained earth and clothes of the deceased or injured to chemical examination for examination is not fatal to the case of prosecution if the occullar testimony is found credible and cogent.

117. In this case these precedents completely apply in favour of the prosecution.

118. On the basis of above discussion this Court has come to the conclusion that if the clothes of the informant was not taken by the I.O. and the same was not sent for the examination or the fact regarding blood on his person was not noted by the I.O. is neither material nor fatal for the prosecution. Hence, this argument is also rejected.

119. In the last, learned counsel for the appellants have argued that the prosecution could not prove the case beyond reasonable doubt.

120. It is a case based on the ocular evidence. The witnesses proved that the deceased was killed by the accused persons on the alleged date, time and place of occurrence. They also proved that which accused was having which weapon and those weapons were used in commission of the crime. Some of weapons have been recovered on their pointing. The doctor who did autopsy found the injuries which may occur by the attack from the weapons which were in the hands of the accused persons. Thus, it cannot be said that the prosecution has been failed in proving the case beyond reasonable doubt. No doubt much less no reasonable doubt can be created by the defence. Reasonable doubt is not a fetish.

121. The following judgements relied by the learned counsel for the appellants do not apply in the facts and circumstances of the instant case:

(I) Jagdish Murao Vs. State of UP, 2006 0 Supreme (SC) 775.

(II) Maruti Rama Naik Vs. State of Maharashtra, 2003 0 Supreme (SC) 863.

(III) Sampath Kumar Vs. Inspector of Police, Krishnagiri, 2012 0 Supreme (SC) 214

(IV) State of UP Vs. Parasuram Yadav, 2005 0 Supreme (All) 1309.

(V) State of Rajasthan Vs. Daud Khan, 2015 0 Supreme (SC) 1041

(VI) Khima Vikamshi Vs. State of Gujarat, 2003 0 Supreme (SC) 363.

(VII) Ganesh Bhawan Patel and another Vs. State of Gujarat, 1978 0 Supreme (SC) 323.

122. Contrary to the above citations referred from the side of appellants in ***Mahavir Singh Vs. State of Haryana, (2014) 6 SCC 716 (para 16),*** the Supreme Court has settled the legal proposition that in the event a witness is not cross-examined

with regard to a particular issue, the correctness or legality of that issue cannot be questioned. Undoubtedly, it is the prosecution's duty to prove its side of story. However, in the light of Section 3 of the Indian Evidence Act, the Apex Court has observed in ***Harendra Vs. State of Assam, AIR 2008 SC 2467 and Himanchal Prashasan Vs. Om Prakash, AIR 1972 SC 975*** that benefit of doubt should be given only on the basis of logical, reasonable and honest conclusion.

123. From the above discussion, it has been established that in this case a prompt F.I.R. has been lodged against the named accused persons describing their specific role who killed the deceased having previous enimity after forming an unlawful assembly to achieve the common object of such assembly, which has been proved by the independent eye-witnesses beyond reasonable doubt. The witnesses are proved to be sterling witnesses. Though the trial court has acquitted the accused persons under the charge of the Arms Act against which no appeal has been preferred by the State or the informant. But a charge under the Arms Act is different from the charges under the Indian Penal Code regarding commission of the main crime. In this reference the pronouncement of ***Nankaunoo Vs. State of UP, (2016) 3 SCC 317 (three-Judge Bench)*** is important in which the Apex Court has held that where the ample unimpeachable ocular evidence corroborated by medical evidence is available, mere non-recovery of weapon from the accused does not affect the prosecution case relating to murder.

124. The prosecution has been succesful proving the case against all the accused persons beyond reasonable doubt under Sections 147, 148, 302 read with Section 149 IPC. The appellants could not create any doubt and could not establish any ground on which the conviction recorded under the aforesaid charges could be reversed. Though it is a case of brutal murder even then the trial court has awarded only minimum sentence which cannot be reversed. Thus this Court concludes that the appeals in respect of conviction and sentencing are devoid of merit and are liable to be dismissed.

O R D E R

125. The appeals are **dismissed**.

126. Let the original file be sent back to the trial court for consignment alongwith a copy of this judgment.

(2023) 4 ILRA 1489
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.03.2023

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 3451 of 2022
With
Other Writ-A Cases

Kalamuddin & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Sujeet Kumar Rai, Sri O.P. Singh (Sr. Advocate), Sri Navin Sinha (Sr. Advocate)

A. Service Law – Circular dated 17.09.2021-issued by the Commissioner

and Registrar, Cooperatives U.P., Lucknow- outsourcing of contractual work being carried out by petitioners- Class III and Class IV employees-working for last 10 to 20 years on contractual basis-U.P. Cooperative Societies Act, 1965- U.P. Cooperative Societies Employees Service Regulations, 1975-U.P. Rajya Nirman Sahkari Sangh- State level apex society.

B. Whether writ petition against Sangh maintainable-question of maintainability raised to digress from the main issue-writ petitions held to maintainable-challenge to the circular of respondent no. 2 and consequential actions taken thereafter. (Paragraphs 53 and 68)

HELD:

If that is the case, then the conduct of the Respondent nos.3 to 6 after issuance of such Circular dated 17.09.2021 belies the arguments of their learned counsels. If at all the respondent no.2 had no control over the Respondent Nos.3 to 6 then it is quite improbable that they would have issued tender notice on GeM portal inviting bids from service providers. This Court is of the considered opinion that the question of maintainability has been raised only to digress from the main issue as to whether the Respondent No.2 could have issued such Circular dated 17.09.2021. It is evident also that the petitioners are indeed going to be affected if such Circular is to be given effect to by the Respondent nos.3 to 6. Therefore, this Court holds that writ petitions are maintainable as they challenge the Circular of the respondent no.2 and consequential actions taken thereafter by respondent nos.3 to 6. (Para 68)

C. Whether the writ of mandamus can be issued to enforce contractual rights-power to make contractual employment- implicit in the power to make a regular permanent appointment-contract of personal services sans statutory flavour-in cases like termination of services-no writ can be granted-however, instant case is different-contractual engagement of petitioners-controlled by executive orders, circulars and policy statements of respondents-expression of policy by the authority which is the State-court can certainly interfere if such decisions found to be arbitrary and irrational-no decision by the State that the employees cannot be engaged directly on contractual basis-impugned orders, therefore, arbitrary and liable to be quashed-right of the petitioners to be engaged afresh as per past practice stands revived-eclipse cast by the circular date 17.09.2021 removed-petition disposed of. (Paragraphs 69, 82, 85, 90,92, 93, 94, 95 and 96)

HELD:

Now coming to the case of Grid Co. (supra), considering the facts of the case the Court had observed that the power to make contractual employment is implicit in the power to make a regular permanent appointment unless the Statute under which this authority is exercised forbids making such an appointment. The appointment order had specifically described the appointment to be a tenure appointment limited to a period of three years subject to renewal on the basis of performance. The Appellant Corporation had also extended the tenure suggesting that the appointment was a tenure appointment, extendable at the discretion of the Board of Directors. The Court held that renewal of Contract employment depended upon the perception of the management as to the usefulness of the respondent and the need for an incumbent in the position held by him. This discretion lay entirely in the Board of Directors there was no element of any unfair treatment or unequal bargaining power between the appellant and the respondent no. 1 to call for an oversympathetic or protective approach towards the latter. Contractual appointments work only if they seem mutually beneficial to both the contracting parties and not otherwise. There was no material to show any unreasonableness, unfairness, perversity or irrationality in the action taken by the Corporation. (Para 82)

It is true that the law as quoted above that a Contract of personal service which is not imbued with any statutory flavour cannot be enforced and that the Writ as prayed for in cases of termination cannot be granted, has consistently held the field. (Para 85)

However, the contractual engagement of the petitioners is controlled by executive orders, Circulars and policy statements of the

Respondents issued from time to time also. These orders like the Circular dated 17.09.2021, have been issued by the respondent no.2 as an expression of policy by an authority which is the State, and consequential action of the Sangh which is a body discharging a public function and a public duty, would also bind such respondents as a Code of Conduct enforceable in law. The petitioners would derive a right to assail and question the action of the respondents notwithstanding the fact that their engagement is contractual. In other words, this Court can certainly interfere if the policy decision in pursuance of which impugned Invitation to Bid on GeM portal has been taken is arbitrary and irrational. (Para 90)

There does not exist any conscious decision at any level either in the State Government or in the respondent Cooperative Society that contractual employees are not to be directly engaged or ought to be engaged only through an outsourcing Agency. In the absence of any such decision, the impugned orders are clearly arbitrary and liable to be quashed. In paragraph-4 of the Government Order dated 25.08.2022, it it has been clearly specified that the currently working outsourced employees should be retained as employees through outsourcing Agency. Identifying an outsourcing Agency for supply of 622 employees to replace the currently working 622 contractual employees with a further stipulation that the existing workers should now be engaged through an outsourcing Agency selected through GeM portal appears to be a wholly whimsical decision having no rational basis. (Para 92)

None of the affidavits filed on behalf of the respondent Sangh refer to any such decision taken by the Government. The Commissioner and Registrar, only interpreted the Government Orders and the Sangh called for information regarding number of employees directly working on Contract and on the basis of information that there were 622 such employees, tender notice was issued on the GeM portal for providing 622 employees and for selection of an outsourcing Agency for their engagement. The decision to issue the tender notice on the GeM portal and not to renew the Contract of the petitioners is a mechanical decision based upon misunderstanding of the Circular and the Government Orders issued from time to time. (Para 93)

Although, no writ of mandamus can be issued to the Respondent nos.3 to 6 in this regard by the Court under Article 226 of the Constitution, this Court having already held that the interpretation of the Circular dated 17.09.2021 by the Respondent no.2 as given by the Respondent nos.3 to 6 being irrational and misconceived, the right of the petitioners to be engaged afresh as per past practice stands revived. The eclipse cast by the Circular dated 17.09.2021 is removed. (Par a 95)

Petition disposed of. (E-14)

List of Cases cited:

1. Writ Petition No.31208 (MB) of 2019, [M/s RMS Techno Solution VS. Addl. Chief Secretary Revenue & ors.

2.St. of Karnataka Vs Uma Devi reported in 2006 (4) SCC 1

3.Vijay Bihari Srivastava Vs U.P. Postal Primary Cooperative Bank Ltd. & anr. (2003) 1 UPLBEC 1

4.Anil Kumar Pandey & ors. Vs St. of U.P. & ors. 2016 (7) ADJ 495 (Full Bench)

5.S.S. Rana Vs Registrar, Circle Officer Cooperative Society & anr. (2006) 11 SCC 634

6.Radha Charan Sharma Vs U.P. Cooperative Federation, 1982 UPLBEC 89 (FB)

7.U.P. State Cooperative Land Development Bank Vs Chandra Bhan Dubey 1999 (1) SCC 741

8. Thalappalam Service Cooperative Bank Ltd Vs St. of Kerala & ors. 2013 (16) SCC 82

9.St. of U.P. & ors. Vs Principal Abhay Nandan Inter-College & ors. Civil Appeal 865 of 2021, decided on 27.09.2021

10.University of Delhi Vs Delhi University Contract Employees Union & ors., 2021 SCC Online SC 256

11.St. of Karnataka & ors. Vs M.L. Kesri & ors., 2010 (9) SCC 247

12.St. of Guj. & ors. Vs P.W.D. Employees Union & ors. 2013 (12) SCC 417

13.Nihal Singh & ors. Vs State of Pun. & ors. 2013 (14) SCC 65

14.Sheo Narayan Nagar & ors. Vs St. of U.P. & ors. 2018 (13) SCC 432

15.Narendra Kumar Tiwari & ors. Vs St. of Jhar. & ors. 2018 (8) SCC 238

16. Official Liquidator Vs. Dayanand & ors. 2008 (10) SCC page 1

17. National Aluminium Company Ltd. Vs Deepak Kumar Panda 2002 (6) SCC 223

18.Grid Co. Ltd. & anr. Vs Sadananda Dolloi & ors. 2011 (15) SCC 16

19. Sreelekha Vidyarthi Vs St. of U.P. 1991 (1) SCC 212

20.Satish Chandra Anand Vs U.O.I., AIR 1953 Supreme Court 250

21.Writ-A No. 4845 of 2021: Sunita Singh Vs St. of UP & ors.

22. Sheela Devi Vs St. of U.P. & ors. 2010 SCC Online ALL 1142

23.M.K. Gandhi Vs Director of Education (Secondary) U.P., Lucknow, 2005 SCC Online ALL 728

24.Roychan Abraham Vs St. of U.P. & ors., 2019 SCC Online ALL 3935 (FB)

25. Ramakrishna Mission Vs Kago Kunya, 2019 (5) SCALE 559

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

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddhartha Khare, learned counsel for the petitioners, and Sri Ajit Kumar Singh, Additional Advocate General assisted by Sri Sudhanshu Srivastava for the respondent no. 1 and 2, and Sri O. P. Singh, learned Senior Advocate assisted by Sri Sujit Kumar Rai for the respondent no. 5 and 6, and Sri Navin Sinha, learned Senior Advocate again assisted by Sri Sujit Kumar Rai for the respondent nos. 3 & 4.

2. All of the above petitions are connected and are being taken up together as they involve identical issues. There are a total of 378 petitioners before this Court. All of them have challenged Circular dated 17.09.2021 issued by the Commissioner and Registrar Cooperatives U.P. Lucknow and also the communication of the Deputy General Manager (Administration) of U.P. State Nirman Sahkari Sangh Limited Lucknow (hereinafter referred to as "Sangh") and the notice dated 22.02.2022 issued by the Superintendent Engineer, and have prayed for a Mandamus to be issued to the respondents not to interfere in the working of the petitioners as Sahyogis/Clerks/Junior Engineers /Assistant Engineers, and to pay them their regular monthly emoluments and not to cause any break in the continuity of the service of the petitioners, and to continue the petitioners till the requirement of work continues to exist. A further prayer has been made to restrain the respondents from replacing the petitioners by Contract employees engaged through service providers.

3. We will take the facts of the leading case of ***Kamal Uddin and Others Vs. State of U.P. and Others,*** as they cover almost all the grounds and other Writ Petitions are also of similar nature. In the Writ Petition it has been submitted that U.

P. Rajya Nirman Sahakari Sangh/ U.P. State Construction Cooperative Sangh Ltd Lucknow, is an Apex Level Cooperative Society registered under the provisions of the U.P. Cooperative Societies Act, 1965. Its service conditions of employees are governed by U.P. Cooperative Institutional Service Board which has framed a set of Regulations known as U.P. Cooperative Societies Employees Service Regulations, 1975.

4. In paragraph 6 of the Writ Petition it is claimed that the Sangh is an instrumentality of the State and is under its total administrative and financial control. The majority of the funding of the Sangh is borne by the State Government. The recruitment and other conditions of the service of employees are governed by Statutory Regulations framed under Section 122 of the 1965 Act. (This has been specifically denied in the counter affidavit of the Sangh).

5. It has further been submitted that all the Writ Petitioners are working either as Sahyogis/Class IV employees or as Clerks or as Junior Engineers or Assistant Engineers for a long time on basis of contracts signed annually. Some of the petitioners have been working since 1999 while others have been engaged in 2010, but most of them have been working for the past 10 to 20 years on the basis of such contractual arrangement where contracts are entered into on different dates in the month of April each year and extend upto 31st March of the next year. Some copies of contracts entered into initially by each category of such petitioners have been filed as exemplars. It has further been stated that initially a Class IV employee was engaged in the year 2002 on a consolidated payment of Rs.2000/- which has increased from time to time and now is Rs.11,500/-. Similarly a Clerk was initially engaged on a consolidated fee of Rs.3,000/- and the monthly pay has now increased to Rs.13,000/-. A Junior Engineer was engaged in 2010 on monthly pay of Rs.9,375/- which has now increased to Rs.15,063/-. An Assistant Engineer was engaged in the year 2009 on monthly pay of Rs.10,000/- which has now increased to Rs.23,500/-. Details of all the petitioners allegedly continuously working, from the time of their initial engagement, though on the basis of annual contracts signed each time, have been specified in a tabular charts filed as annexures no. 12A, 12B, 12C and 12D to the Writ Petition.

6. On 17.09.2021 (Annexure-13) the Commissioner and Registrar Cooperatives U.P. i.e. the Respondent No.2 issued a Circular addressed to the Managing Director of all Apex Level Societies and District Cooperative Societies referring to Government Orders for obtaining outsourced employees through GeM Portal. It referred to Government Orders dated 18.12.2019, 25.08.2020 and 18.06.2020. It has been stated that the main Government Order issued in this regard for adoption of GeM Portal as devised by the Government of India is the Government Order dated 25.08.2020 (Annexure-14). Acting in pursuance of such Circular correspondence was undertaken by the officers of the Sangh, and on information so collected it was revealed that a total number of 622 employees were working on contractual basis in different Divisions of the Sangh. In pursuance of such correspondence, the Superintendent Engineer issued a GeM Bid Invitation Notice inviting bids from service providers for supplying 622 contractual employees. The actual bid document was released on the GeM Portal on 24.02.2022

inviting bids up to 08.03.2022. The bid documents mentioned the department's name as Cooperative Department U.P., and the manpower required through outsourcing has been specified to match with the number and category of employees such as the petitioners who have been engaged on contractual basis and have been working since long with the Sangh. This clearly demonstrated the intention of the respondents to dispense with the services of the petitioners subsequent to 31.03.2022 and to replace them by persons engaged through an outsourcing Agency/service provider, to be decided by evaluating the bids uploaded on the GeM Portal. The petitioners are being sought to be replaced *en bloc* by employees engaged again on Contract through service provider by way of outsourcing.

7. In paragraph-34 of the Writ Petition, it has been submitted that the impugned action is with the intention to deprive the petitioners of any benefit accruing to them on the basis of their substantial length of service despite the fact that the State Government has from time to time issued orders with regard to Regularisation of such employees. Details of some such Regularisation/ Absorption Rules have been mentioned in the sub-paragraphs as U.P. Regularisation of Ad hoc Appointments (on posts within the purview of UP Cooperative Institutional Service Board) Regulations, 1985; U.P. Regularisation of Service of Persons Working on Daily Wages or on Work Charge or on Contract Basis (on posts within the purview of U.P. Cooperative Institutional Service Board in Cooperative Societies) Regulations, 2017; and Government Order dated 24.02.2016 permitting Regularisation of daily wage employees/work charged employees/ employees on Contract in Government Departments/Autonomous Bodies/ Public Sector Corporations/ Local Bodies/Development Authorities and Zila Panchayats; and U.P. Regularisation of persons working on daily wages or on work charge or on Contract in Government Departments and Group "C' and Group "D' posts (outside the purview of U.P. Public Service Commission) Rules, 2016.

8. It has been stated further that several of the petitioners stand squarely covered by the Regularisation Rules as mentioned in paragraph-34, but till date no steps have been taken for their Regularisation. The remaining petitioners though specifically not covered by the aforesaid Regularisation Rules nevertheless, on account of their continued working directly as contractual employees, have a legitimate expectation of being ultimately regularised in future. The legitimate expectation has been sought to be thwarted by replacement of the petitioners with contractual employees engaged through service provider in pursuance of the impugned order Annexure -13. Each of the petitioners possess the requisite qualification for the work performed by them and one set of contractual employees should not be replaced by another set of contractual employees. In the present case the respondents intend to replace directly engaged contractual employees by contractual employees engaged through service provider selected through the GeM Portal. Arrangement of obtaining contractual employees through an outsourcing Agency imposes additional financial burden upon the Sangh in the form of commission payable to the service provider, as also the payment of GST on such Contract entered into with the service

provider. There does not exist any financial benefit to the Sangh by taking recourse to such device.

9. It has also been stated in paragraph-41, 42 and 43 of the petition that utilisation of GeM Portal should only be in case contractual employees are required through a service provider. There existed no occasion for the GeM Portal to be utilised when contractual employees are engaged directly by the respondent Apex Level Cooperative Society. The Sangh has proceeded to mechanically act upon the Circular dated 17.09.2021, without any clarification sought from the respondent No. 2 whether it permits employees directly engaged through Contract to continue. There does not exist any rational reason for replacing directly appointed contractual employees who have worked for past several years by employees to be engaged again on Contract but through service provider.

10. Initially, when the writ petition was filed, this Court was pleased to grant an interim order dated 25.03.22 which noted that the petitioners were all employees of U.P. State Nirman Sahkari Sangh and engaged on Contract basis for past several years and that the respondents were proceeding to now employ other persons through outsourcing. The respondents had stated that they were following the Government Order dated 25.08.2020 and had invited tenders for the purpose of engaging service providers through GeM portal as contemplated under the said Government Order. The argument raised by the petitioners was that if the Government Order is to be complied with, it could not be used as a tool to replace employees like the petitioners already engaged on Contract basis directly by the respondents. The Court was *prima facie* of the opinion that the petitioners have been discharging their duties for the past more than a decade and it would be quite unfortunate to replace them by outsourced employees or even direct them to apply through GeM portal. The Court, therefore, directed that till further orders status quo shall be maintained with regard to *"the nature of status of employment of the petitioners with the establishment and the future renewal of Contract will not be influenced in any manner by inviting outsourced agencies to provide work force through GeM portal"*. It was also clarified that the petitioners would not be replaced through outsourced agencies' workers. Similar interim orders were granted thereafter on 08.04.22 and 13.04.2022 and 26.04.2022 and 24.05.2022 in all the writ petitions further clarifying the same that even if there is no renewal of a Contract, if the petitioners have been continuing to work for a decade in the respondents' establishment on Contract on year to year basis, then they be not replaced by outsourced employees, nor they should be compelled to apply through GeM portal. The Court observed that the respondents were at liberty to take work or not from them but they were certainly not at liberty to replace them by outsourced employees. It was also clarified that the respondents should not engage any employee through outsourced Agency to take work. If there is work available with the respondents and if they want to engage employees, the petitioners shall be permitted to enter into Contract again. However, if additional work force is required over and above the petitioners and similar other employees, it would be open for the respondents to take employment through outsourced agencies.

11. The Respondents had filed two Special Appeals against such interim orders where, while condoning the delay in filing

the Special Appeal, the Court observed that the learned Single Judge had passed the interim order taking into account the fact that the petitioners had been engaged on contractual basis and had been working for last more than 10 years and, therefore, should be allowed to continue and in case there is requirement of additional workforce, it was left open to the authorities to engage persons to outsourcing Agency. It observed that interference in the interim orders passed by the Writ Court was not required as it was the admitted case of the appellant that persons who were already working, were not being replaced with other workforce to be engaged for outsourcing Agency. The Appellate Court disposed of the Special Appeals directing that the writ petitions should be taken up and decided expeditiously.

12. A Counter Affidavit has been filed on behalf of the Respondent Nos.1 & 2 wherein it has only been stated that the Circular 17.09.2021 issued by the Commissioner and Registrar Cooperatives, was in accordance with the Government Order dated 18.12.2019, issued by the Department of Personnel, and Government Order dated 25.08.2020 issued by the Micro, Small and Medium Industries Department Government of U.P., and Government Order dated 18.08.2020 was issued by the Department of Labour. The said Government Orders had not been challenged by the petitioners and only consequential orders had been challenged.

13. In response to the same, a Rejoinder Affidavit has been filed by the petitioners where they state that they have challenged the action of the Respondent Nos.3 & 4 which is independent of the validity of Government Orders. The Circular and the Government Order only constitute a decision that in case of requirement of materials or outsourcing of manpower, the GeM Portal is to be utilized. No Government Order contains any decision regarding engagement of contractual employees by the Sangh, and that they cannot be directly engaged by the Sangh. These Government Orders provided that in case manpower is to be engaged through outsourcing, then the GeM Portal has to be utilized. This is evident also from the fact that despite such Government Orders being circulated, there continue to exist several Corporations under the control of the State Government which continue to engage contractual employees directly, for example, the State Warehousing Corporation, the U.P. Construction Labour Development Federation etc.

14. In the Counter Affidavit filed by the Respondent Nos.3 to 6, it has been stated that the Government of India had issued an order on 17.12.2017 for taking manpower and other resources from the GeM Portal which was adopted by the State Government Order dated 23.08.2018. Thereafter, also the State Government had issued at least three Government Orders. The Said Government Orders had not been challenged in the writ petitions and only consequential Circular had been challenged. The petitioners had been permitted to work as contractual employees only till 31.03.2022 when their contracts expired, and still they had not applied for getting a fresh engagement through GeM Portal. Paragraph-6 of the writ petition has been specifically denied. It has been stated that U.P. Rajya Nirman Sahkari Sangh is a registered Apex level Cooperative Society and a body Corporate with autonomous existence on which the State Government has got no control. It is further stated that

the petitioners have been working for short periods of time for example for six months upto one year. The Tenure/Contract was not extended. Fresh Contract was required to be signed. No fresh Contract had been signed after 31.03.2022. With respect to several of the writ petitioners, it has been pointed out that they had not been working continuously as alleged, some of them had worked for one or two years only. Details of such employees with names have also been mentioned. The petitioners have never been *"appointed"* but having only been engaged on contractual basis for a fixed period with a monthly consolidated salary and had no right to continue beyond the term of the Contract.

15. In Paragraphs 19 & 20 of the Counter Affidavit, it has been stated that it is absolutely wrong to say that the answering respondents were going to dispense with the contracts by replacing the petitioners and engaging other persons through outsourcing. The respondents are not going to disengage the petitioners because as per the Government Order, contractual employees who were working on different posts earlier would be engaged as fresh contractual employees through GeM Portal as per the directions given by the Government. However, their engagement should not be made if their work and conduct is not satisfactory, and it would also be informed to the Agency who would take a decision about their fresh engagement. It is only to promote transparency in the employment of contractual workers that the Government of India had taken a policy decision that manpower should be purchased from the GeM Portal and once the policy has been determined by the Central Government which has been adopted at the State level, it has to be followed as the policy decision has not yet been challenged by the petitioners. The petitioners are not going to be disengaged as alleged as the Contract came to an end on 31.03.2022 itself, then there was no fresh Contract. Not entering into fresh Contract with the contractual employees does not mean termination of their employment, it only means cessation of their work on the current period of engagement having come to an end on 31.03.2022. The petition has been filed on mere apprehension as no cause of action has yet arisen. The argument that replacement of contractual employees with contractual employees would be arbitrary, would not apply here because the Contract of all the petitioners had come to an end on 31.03.2022 and now the Government of India had taken a policy decision to make engagement only through GeM Portal to maintain transparency in such engagement which cannot be said to be in violation of Article 14 of the Constitution.

16. In the Supplementary Counter Affidavit filed by the respondents along with a Stay Vacation application, it has been mentioned that after the end of the Contract of the petitioners on 31.03.2022, no work has been taken from them and no payment has been made. It has further been clarified that several of the writ petitioners had worked only for one year or two years on Contract basis and the averments made in the writ petition that they had continued for more than a decade is false.

17. In the Supplementary Rejoinder Affidavit filed by the petitioners they have referred to the Interim Orders granted on 25.03.2022 and on 08.04.2022, directing the respondents to maintain the status of the petitioners employment and not to engage contractual employees through outsourcing, against which two Special Appeals were

filed and dismissed on 04.07.2022. It has also been stated that complete information regarding periods of engagement of such petitioners has been mentioned in the Tabular Charts enclosed with the writ petition and that the respondents were resorting to artificial breaks between the end of one Contract and the signing of another fresh Contract. The petitioners working as Junior Engineers had deposited the security amount in the form of a Demand Draft of Rs.50,000/- and those working as Assistant Engineers had deposited a Demand Draft of Rs.1,00,000/- each. Such security amount was never returned at the end of the period of Contract and remained continuously in possession of the respondents. One Contract ended and another was signed indicating clearly that the breaks were artificial in nature. If such breaks were real then at the end of every Contractual term, the Security Money would have been returned and fresh Security Money would have been accepted on signing of fresh Contract.

18. In the Second Supplementary Counter Affidavit filed on behalf of the Respondent Nos.3 to 6 a reference has been made to the Circular dated 17.09.2021 which had referred to various Government Orders which provided mandatorily for engagement of manpower through outsourcing via GeM Portal. This Court by means of Interim Orders directed the respondents to maintain the status of employment of the petitioners, their future renewal of Contract would not be affected by inviting of bids of outsourcing Agencies to provide workforce through GeM Portal. Since Contempt Petitions were filed the Board of Directors had come to a decision to cancel the entire process of outsourcing or selecting Agencies through GeM Portal and the selected Agency's Contract was also terminated.

19. In the Second Supplementary Rejoinder Affidavit filed in reply to the Second Supplementary Counter Affidavit of the respondents, the petitioners have stated that the Circular dated 17.09.2021 is only a generally worded communication which has referred to some Guidelines having been sought by different Cooperative Societies with regard to outsourcing of employees. The said Circular has been wrongly interpreted by the Sangh to say that a direction had been issued that contractual employees would be employed only through outsourcing Agency selected through GeM Portal. Several direct contractual employees continue to be engaged in other Apex Level Cooperative Societies and Institutions. Petitioners have brought on record a Contract entered into between Sudhanshu Patel of Awsar Multi Solutions Private Limited on 14.03.2022 which would remain in force up to 14.01.2023. In Paragraph-7 of the Second Supplementary Rejoinder Affidavit a mention has been made of information downloaded from Google regarding the selected service provider namely Awsar Multi Solution Private Limited which has its registered address at 505A/5/1649, Adil Nagar, Kursi Road, Lucknow, which happens to be the residential address of Smt. Rekha Verma wife of Shri J.P. Verma, the Private Secretary to Sri Mukut Bihari Verma, the Cooperative Minister, in power till March, 2022. It has been averred that the outsourcing Agency was wholly fraudulent and the Directors of Awsar Multi Solution Private Limited included Roshan Verma and Kshitij Kumar Verma who were close blood relatives of Mukut Bihari Verma, the then Cooperative Minister. A copy of the

House Tax bill obtained from Lucknow Municipal Corporation with regard to the residential premises belonging to Rekha Verma have been filed as Annexure to the said affidavit.

20. This Court has perused IInd Supplementary Rejoinder Affidavit and IIIrd Supplementary Rejoinder Affidavit and the information downloaded from Google which has been filed as Annexure to the Second Supplementary Rejoinder Affidavit. It has come out from the same that Awsar Multi Solutions Private Ltd. is a private Company incorporated on 16.08.2021 with an authorized share capital of Rs.1,00,000/- and paid-up capital of Rs.10,000 only. The Company has two Directors Roshan Verma and Kshitij Kumar Verma.

21. In the IIIrd supplementary Counter Affidavit filed on behalf of the Respondent Nos.3 to 6 it has been stated that the interim order passed by this Court only directed for maintenance of status quo with regard to the nature of employment of the petitioners. It had not directed maintenance of status-quo with respect to their service. The nature of employment continues to remain contractual. It has also been reiterated that once the entire process of outsourcing has been cancelled by order dated 10.08.2022 nothing remained to be adjudicated. If and when additional manpower is required then the Sangh may consider fresh Contract to be entered into as per requirement of work. Also the Contract with Awsar Multi Solutions has been cancelled and the entire process of selection of service provider through GeM Portal has also been abandoned. However, there is no specific reply given by the respondents to the allegations made regarding the connection of Directors of Awsar Multi Solutions with the Private Secretary of the then Cooperative Minister or with the Minister himself.

22. It is the case of the petitioners as argued by Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddharth Khare that U.P. State Nirman Sahkari Sangh Limited Lucknow (hereinafter referred to as "Sangh") is an Apex level Cooperative Society governed by the provisions of U.P. Cooperative Societies Act 1965, and is within the purview of U.P. Institutional Service Board and the provisions of U.P. Cooperative Employees Service Regulations 1975. The State Government exercises all pervasive control over it and the Sangh, therefore, is covered by the definition of State under Article 12 of the Constitution. The Sangh had engaged 622 employees on contractual basis for discharging work of Sahyogis (Class IV); Clerks, Junior Engineers and Assistant Engineers and they had been working for a substantial period of time. As and when their contracts ended, they were engaged again through fresh contracts. Also, despite no interference in the interim order by the Division Bench, it was not complied with and none of the petitioners were permitted to function with effect from 01.04.2022 and no payments were made to them. On account of such willful disobedience, a contempt petition was filed which is pending consideration.

23. It has been argued that the nature of appointment of the petitioners is contractual but such contractual engagement is entered into by the respondent Apex level Cooperative Society directly with the petitioners and there is no intermediary in between, in the form of a service provider. At the time of engagement of Junior Engineers and

Assistant Engineers on contractual basis, a security amount of Rs.50,000 to 1,00,000 had been obtained from each of them. The said security amount deposited at the time of initial engagement has thereafter continued to remain with the respondents and it has not been returned or required to be resubmitted upon re-engagement of the petitioners. Also, only in eight cases out of 622 contractual employees, it has been stated that the services were not continuous but there were breaks in their continuity. Apart from the aforesaid eight employees, the respondents have not been able to point out any break between the initial engagement and continuance thereafter of the rest of the employees. Such employees who had not worked continuously, had still been working for substantial lengths of time of almost 20 years in some cases after their engagement.

24. It has also been argued that the petitioners have been working for more than two decades although on contractual basis. At the end of each year the respondent entered into a fresh Contract. Therefore, according to the respondents it should be treated as a fresh contractual engagement but according to the petitioners, it is a re-engagement of the petitioners and this is supported by the fact that the security amount deposited by Junior Engineers and Assistant Engineers of Rs.50,000/- and Rs.1,00,000/- respectively has not been returned or resubmitted. This fact goes a long way to demonstrate the actual nature of engagement of the petitioners.

25. The immediate cause of action for filing the writ petition arose as a Circular was issued on 17.09.2021 by the Commissioner and Registrar Cooperatives, U.P. Lucknow addressed to Managing Directors of all Apex level Cooperative Societies and Chief Executive Officers of all District Cooperative Banks, and Secretaries of all District Cooperative Federations, mentioning that some Cooperative Societies had sought Guidelines in pursuance of a Government Order issued on 25.08.2020 which required use of GeM portal developed by the Central Government for the purpose of purchase of material/manpower.

26. Communication was issued thereafter by the Deputy General Manager (Administration) on 19.01.2022 addressed to all Divisional In-charges of the respondent Sangh requiring information with regard to existing contractual employees for the purpose of outsourcing the same through GeM portal, a copy of which has been filed as Annexure-15 in Writ Petition No. 3451 of 2022.

27. In pursuance of such communication, a letter was written to the convener of GeM portal by the respondent-Sangh on 11.02.2022 intimating that there existed a total number of 622 employees working on Contract basis in the four categories as aforesaid, and requiring such employees to be engaged through GeM portal in accordance with paragraph 2 (4) of the Government Order dated 25.08. 2020.

28. A GeM portal Invitation to Offer was issued on 22.02.2022 thereafter by the Executive Engineer (Convener), inviting bids for engagement of 108 Assistant Engineers, 102 Junior Engineers, 241 Clerks and 171 Sahyogis, aggregating a total of 622 employees.

29. The petitioners fearing disengagement thereafter filed a Writ

Petition No. 3451 of 2022 before this Court and an Interim Order was granted by this Court initially on 25.03.2022, which has been reiterated and clarified as aforesaid in all the four writ petitions which were filed subsequently.

30. Further, it has been argued that the Circular dated 17.09.2021 as also the Government Orders dated 18.12.2019, 18.08.2020 and 25.08.2020 issued by the State Government with regard to utilization of GeM portal for purchasing manpower and resources, did not prohibit any Society from directly engaging contractual employees, nor did it require engagement of contractual employees through an outsourcing Agency.

However, the respondent Sangh has misconstrued the said Government Orders and Circular issued by the Commissioner and Registrar Cooperatives, to the detriment of the petitioners.

31. This Court during the course of hearing on 12.09.2022, had passed an order that the apprehension of the petitioners is that being directly engaged contractual employees of the Respondents Nos.3 to 6, they shall be disengaged and Contractual Employees shall be engaged through service providers to be selected through GeM Portal where as the Government Orders that have been referred to in the Counter Affidavit filed by the Respondent Nos. 1 and 2 referred to Government Orders of 18.12.2019, 18.08.2020, and 25.08.2020, all provide that contractual employees engaged through service providers/ outsourced employees shall be allowed to continue to work though the service providers may be changed from time to time, and such service providers may be selected through the GeM Portal. This Court had found nothing in the Government Orders that directly engaged contractual employees should be disengaged and the work being performed by such employees shall be outsourced and the outsourcing shall be handed over to the service providers selected through GeM Portal. Also, this Court had noticed the submission of the petitioners that contractual employees engaged directly by the Opposite Parties Nos. 3 to 6 were so engaged only after relevant sanction for such engagement was given by the Competent Authority. Their engagement prima facie could not be said to be illegal or irregular as they were engaged on the earlier Government sanction in this regard. The learned Additional Advocate General had stated that the intention of the Government Orders was limited only to outsourced employees to be engaged through service providers. These Government Orders had nothing at all to do with the contractual employees such as the petitioners, and the Government Order / scheme of the GeM Portal as initiated by the Government of India and adopted by the State of U.P., also talk of maintaining the continuity of outsourced employees. Contractual employees such as the petitioners have not been referred to at all in the said Government Orders.

32. This Court had observed that since the Government Orders had been issued by the Department of Personnel/Karmik, an affidavit be filed by an Officer not less than the rank of Special Secretary of the Karmik department, to clarify the intention of the Government Orders dated 18.12.2019, 18.08.2020 and 25.08.2020 stating clearly what the Government meant by the term "Outsourced Employees" as in the common parlance, outsourced employees are just

contractual employees, referred to by another name.

33. In the affidavit filed thereafter by the Special Secretary Karmik Department all the three Government Orders dated 18.12.2019, 18.08.2020 and 25.08.2020. have been filed as Annexures, and it has been stated that all the three Government Orders mentioned purchase of manpower through outsourcing, though the word "outsourcing' has not been defined or explained in these Government Orders. However, after perusal of these Government Orders, it is evident that an agreement would be entered into between the Administrative Department or the Subordinate Institutions and service provider of manpower. The Agreement/Contract would not be entered directly between concerned Department and the employees made available by the service provider Agency. The payment of remuneration of these outsourced personnel will be made to the service provider Agency. The service provider Agency would be liable for payment of remuneration as well as deductions for EPF / ESI etc., every month in the concerned Bank accounts. Such personnel engaged through outsourcing could not be changed at will of the service provider. The employees through outsourcing could be removed only after permission of the concerned department in case of indiscipline and involvement in criminal activities etc.

34. In Paragraph-11 of the said affidavit filed by the Special Secretary, it has stated that a writ petition relating to outsourcing had been filed before this Court at Lucknow registered as Writ Petition No.31208 (MB) of 2019***, [M/s RMS Techno Solution Versus Additional Chief Secretary Revenue and Others].*** This Court by its order dated 20.11.2019 had observed that a perusal of the scheme framed in the Government Orders impugned showed that even against sanctioned posts to be filled as per Rules, contractual employees are to be provided through service providers. In the case of State of Karnataka Versus *Uma Devi* reported in 2006 (4) SCC 1, the Supreme Court had directed the Government not to indulge in adhocism, rather it should be stopped within a period of six months. Despite a number of years having elapsed yet the Government was engaging persons on Contract basis through service provider. It also observed that the Supreme Court had commented over such engagement as Government should not run through Contract employees. The Division Bench took cognizance of the arrangement made by the State of U.P. that instead of filling up the posts on regular basis, it managed through contractual service of persons sent by service provider. The State Government was directed to explain whether it is permissible after the judgement of the Supreme Court in the case of *Uma Devi (Supra);* and as to why sanctioned posts are not being filled up on a regular basis. The Division Bench observed that till such explanation is given in proper terms, the State Government would not engage service providers to provide contractual employees, if it is against regular sanctioned posts.

35. It has been stated in the affidavit that in compliance of the interim order dated 20.11.2019, in *RMS Techo Solutions (supra),* engagement through outsourcing is not being made on regular/sanctioned posts in the Government Departments or their Subordinate Institutions.

In Paragraph-12 of such affidavit, it has been stated that there is no policy framed regarding recruitment through contractual basis by the Department of Karmik. The contractual employees engaged by various Departments and subordinate institutions for the work in the projects would be governed by the service conditions/terms mentioned in the Contract/Agreement such as their terms of Appointment, Engagement payment of salary etc. are being done by the concerned Department. In Paragraph-13 of the said affidavit it has been stated *"it is clear outsourcing of manpower and appointment or engagement on Contract basis are different from each other, and Government Orders dated 18.12.2019, 18.08.2020 and 25.08.2020 are applicable for outsourcing of personnel only. These Government Orders are not applicable on Appointments/Engagement of personnel and employees on Contract basis."*.

36. More or less, the view as mentioned in the Counter Affidavit and the Affidavit filed by the Special Secretary Karmik Department Government of U.P. has been reiterated in the arguments of the learned Additional Advocate General, Ajit Kumar Singh assisted by Shri Sudhanshu Srivastava, Additional Chief Standing Counsel. It has been argued that the Government Orders dated 08.12.2019, 18.08.2020 and 25.08.2020 were issued by the various Departments only for Government Departments and their Subordinate Institutions, and not for Cooperative Societies. It was because the Cooperative Societies/Federations themselves sought clarifications from the Commissioner and Registrar Cooperative Societies as to whether they should engage employees through service providers that the Commissioner and Registrar had issued a Circular dated 17.09.2021, saying that if necessary, Cooperative Societies/Federation may refer to the said Government Orders for engaging employees through service providers. It has been further argued that the State-respondents have not made the Government Orders dated 18.12.2019, 18.08.2020 and 25.08.2020 binding upon the Cooperative Societies as Cooperative Societies are Autonomous Bodies and run on their own funds, although some Cooperative Societies do have some amount of Government share also in their funds, but they have their own Committees of Management, and Board of Directors to take policy decisions for them.

37. During the course of arguments, Shri O.P. Singh, and Shri Navin Sinha, Learned Senior Advocates assisted by Shri Sujit Kumar Rai for the Respondents Nos.3 to 6, have argued that the Board of Directors of the Sangh have now taken a decision that all contracts entered with any service provider for example, Contract entered into on 24.11.2021, for engagement of 15, additional hands, shall be done away with. Therefore, even when selection process was completed in pursuance of GeM Portal bid dated 24.02.2022 no Contract has been entered into between the Federation and the service provider so selected. The earlier service provider Awsar Multi Solutions' Contract has also been cancelled. The learned Senior Counsel have referred to initial interim order granted on 25.03.2022 by this Court which was later on modified by interim order dated 08.04.2022, wherein directions to maintain status-quo with regard to petitioners nature of employment in the establishment and the future renewal of Contract were issued and the Court had directed that the respondents would not engage any employee through outsourcing

Agency to take work, and if there was work available with the respondents and if they wanted to engage new employees, the petitioners would be permitted to enter into Contract. However, if additional workforce was needed over and above the petitioners, it would be open for the respondents to take it from outsourced employees. It has been argued that despite such modification and clarifications issued by this Court in its orders, the Board of Directors of the Sangh had taken a decision on 10.08.2022, to do away with the method of engaging employees through outsourcing or engaging service providers all together.

38. Sri O.P. Singh, learned Senior Advocate, assisted by Sri Sujit Kumar Rai has argued that the petitioners before this Court have prayed for six main reliefs. The first relief relates to quashing of the Circular dated 17.09.2021 issued by the Commissioner and Registrar Cooperative, U.P. Lucknow and also the communication of the Deputy General Manager (Administration) of the Nirman Sangh, Annexures 13 and 15 to the writ petition. The consequential relief relates to quashing of the notice dated 22.02.2022 issued by the Superintendent Engineer of the Sangh inviting bids on the GeM portal. The third relief relates to restraining the respondents from taking any action on the basis of such impugned orders/letters/notices.

With regard to first relief as claimed, it has come out from the affidavits filed by the State Respondents that the Commissioner and Registrar had only issued Guidelines to various Cooperative Societies that in case they resort to outsourcing of manpower, they must follow the Government Orders issued from time to time, and the service provider must be selected only through GeM portal and the employees engaged through Contract should be selected from Sewayojan Portal. Government Orders are applicable only to Government departments and do not have any binding effect on Cooperative Societies like the Sangh which is independent and autonomous body. The Communication of the Deputy Manager (Annexure 15 to the writ petition) and the notice dated 22.02.2022 (Annexure 17 to the writ), have also been challenged but now the Board of Directors has taken a considered decision and cancelled the process of outsourcing. The Managing Director has issued the order dated 10.08.2022 in this regard. After cancellation of the process of outsourcing the reliefs as claimed for do not survive and nothing remains to be adjudicated. The other reliefs sought by the petitioners in the nature of restraining the respondents from interfering in the working of the petitioners or breaking their continuity and to pay them salary and other benefits, cannot be given as the Contract entered into between the respondent nos. 3 to 6 and the petitioners came to an end on 31.03.2022 and no fresh Contract has thereafter been signed. The petitioners are neither regular employees, nor temporary employees, nor ad hoc employees. They are only contractual employees and bound by the terms of the Contract. Since there is no Contract between the parties they have no legitimate right to continue to work and claim salary. Also, the petitioners have prayed that they should not be replaced by other contractual employees engaged through service provider. Such relief also need not be granted as the process of outsourcing and selection of service provider has already been cancelled by order dated 10.08.2022 hence no question arises to replace the petitioners by employees engaged through a service provider.

39. It has also been argued that the petitioner's contracts were for a fixed term. They were never renewed. On expiry of term, the question of availability of work and of funds was considered and fresh contracts were signed again for a fixed period. Also it has been argued that the petitioners have placed reliance upon judgements relating to termination of Contract arbitrarily, however such judgements do not apply in the case of the petitioners as the petitioners contracts have not been terminated. The petitioners Contract were for a fixed term and they came to an end on 31.03.2022 and the employment of the petitioners automatically seized.

40. It has been argued by the counsel for the respondents that the petitioners have submitted that while cancelling the outsourcing process nothing has been disclosed about future course of action. In this regard, it has been argued that when the Contract came to an end, the Sangh was not bound to make any fresh contracts with any of the petitioners. Sangh may or may not engage fresh employees through Contract, taking into account availability of work. In case regular employees of the Sangh can sufficiently discharge the work at hand it may not be necessary to engage any fresh employees.

41. In response to the argument made by the learned counsel for the petitioners regarding wilful disobedience of Interim Orders passed by this Court, it has been submitted that the Hon'ble Court while granting interim relief to the petitioners was cautious and had only directed maintenance of status quo with regard to nature and status of employment and not with regard to their service. It was clarified that future renewal of Contract would not be influenced in any manner by inviting outsourcing agencies through GeM portal. The Sangh has taken a decision not to resort to outsourcing. The Interim Orders further stated that in case additional hands were required, the Sangh was free to engage such additional hands through outsourcing. 15 such additional hands were engaged through service provider but in view of the interim order dated 20.09.2019 granted by the Division Bench of this Court at Lucknow, in writ petition *RMS Techno Solutions Versus Additional Chief Secretary Revenue and others*, the Contract with the service provider has been cancelled. Now the Sangh will proceed to work with its regular employees and in case of any additional manpower needed to complete the projects in hand, it will consider engaging persons through fresh Contract.

42. In reply to the argument raised by Shri O. P. Singh, learned Senior Advocate regarding the writ petition having become infructuous on the issuance of the Order dated 10.08.2022, by the Managing Director, it has been argued by Sri Ashok Khare that the order of the Managing Director only records reasons for passing of the same. The sole reason mentioned therein is the grant of Interim Orders by the High Court and the rejection of Special Appeals by the Division Bench. The order of the Managing Director contains no decision, not to outsource employees and not to utilise the GeM Portal for engagement of outsourced contractual employees. Even in the absence of the order of the Managing Director dated 10.08.2022, the tender bids could not have been acted upon because of the Interim Orders granted by this Court. There is nothing on record placed by the respondents that they will not issue a fresh

tender bid on the GeM Portal for the same purpose as soon as the interim orders are vacated. The intention of the respondents is clear from the fact that despite issuance of order dated 10.08.2022, the petitioners have not been permitted to discharge their duties nor any salary has been paid to them. This Court in its orders had clarified that it was for the respondents to either take work from the petitioners or not to take such work but they could not engage fresh employees through GeM Portal for the work which was being done by the petitioners. Even though there does not exist any absence of work as the respondents themselves have identified the requirement of 622 Contract employees which is equal to the number of existing employees, to be employed now through outsourcing Agency, the services of the petitioners were not renewed/they were not re-engaged on account of the understanding of the respondent Sangh that contractual engagement is to be made only by outsourcing and the outsourcing agencies to be identified through the GeM Portal. On account of the issuance of the order dated 10.08.2022, the proceedings initiated for identification of service provider through GeM Portal has been cancelled and on such account the sole existing reason even though misconceived, has also ceased to exist. Despite this, the petitioners have not been permitted to resume duties nor the payment of salary has commenced. There continues to exist requirement of work and there does not exist any allegations of unsatisfactory working against the petitioners. As such the order dated 17.09.2021 appears to be wholly irrational. At the start of the litigation this Court had stayed the misconceived reason with regard to misinterpretation of the Circular issued by the Commissioner and Registrar, Cooperatives, U.P., however, this misconceived reason has also ceased to exist during the pendency of the Writ Petition on account of issuance of the order of the Managing Director dated 10.08.2022.

43. It has also been argued that the absurdity of the situation is further apparent from the stand of the respondents as contained in the counter affidavit, that the services of the petitioners were not to be disengaged despite inviting bids for selection of service provider on the GeM Portal. In paragraphs No. 19, 20 and 23 of the counter affidavit filed by the respondents No. 3 to 6, this fact has been clearly mentioned. If that be so, it is apparent that only because of some irrational motive the respondents are not permitting the petitioners to function. The only reason perhaps for such behaviour is that the petitioners have approached this Court by means of the present Writ Petition and have been granted interim orders by the High Court.

44. It has been argued that the repeated argument raised by the respondents on the strength of the order passed by the Managing Director on 10.08.2022 that the Writ Petition has become infructuous is clearly misleading and mischievous and an attempt to preclude the scrutiny of the High Court, with no other commitment as to future course of action.

45. Despite passing of such order dated 10.08.2022, the Managing Director has not permitted the petitioners to discharge their duties. Their salary has also not been released to them. Therefore, the repeated claim of the respondents on the strength of the order passed by the Managing Director dated 10.08.2022, that

the writ petitions have become infructuous is misleading and an attempt to preclude scrutiny by the High Court of the impugned orders, with no commitment as to future course of action.

46. It has also been argued that the impugned orders are even otherwise arbitrary as the petitioners have been working on Contract for the past several years and they cannot now be sought to be replaced by other contractual employees. Replacement of one set of Contract employees by another set of contractual employees is highly questionable and impermissible.

47. In the written submissions filed on behalf of respondent Nos.1 & 2, a preliminary objection has been raised with regard to the maintainability of the writ petition on the ground that the Sangh does not have ingredients of an "authority" within the meaning of Article 226 of the Constitution and reliance has been placed upon judgement rendered by the Full Bench of this Court in ***Vijay Bihari Srivastava Vs. U.P. Postal Primary Cooperative Bank Ltd. and another (2003) 1 UPLBEC 1;*** and ***Anil Kumar Pandey and others versus State of U.P. and others 2016 (7) ADJ 495 (Full Bench);*** and ***S.S. Rana Vs. Registrar, Circle Officer Cooperative Society and Another (2006) 11 SCC 63.***

48. It has also been stated in the written submissions that the petitioners who were engaged on Contract on year-to-year basis cannot seek a writ in the nature of mandamus for continuity and regularization in view of the law settled by the Constitution Bench in ***Secretary of State, Karnataka versus Uma Devi, 2006 (4) SCC 1.***

49. The Government Order dated 18.12.2019 in Clause 3 (4) and the Government Order dated 25.08.2020 in Clause 2(4) and the Government Order dated 18.08.2020 in Clause 2(5) provide for continuity of only personnel already working on outsourcing basis. The Government Order provides for selection of service provider through GeM portal and engagement of already working outsourced employees through the selected service provider via GeM portal. The said Government Orders mandate registration of personnel to be engaged by the service provider on the Sewa Yojan portal.

50. Additionally, it has been submitted that these Government Orders are not applicable to Cooperative Societies and they are applicable only if they are adopted by the Board of Directors. The Circular dated 17.09.2021 issued by the Commissioner and Registrar Coperatives, U.P. was only issued as a guidance to all Apex level as well as Central Cooperative Societies of U.P. to follow the mandatory provisions of the Government Orders dated 18.12.2019, 18.08.2020, and 25.08.2020, issued by different Departments of the Government of U.P., for selection of the service provider and engagement of outsourced employees through the service provider. It has been mentioned in the said Circular that such procedure has to be followed mandatorily in different Departments of the Government of U.P. and their subordinate institutions. However, such Circular does not require all Cooperative Societies to engage manpower only through service provider via GeM portal.

51. The affidavit filed by the Special Secretary, Department of Personnel, clarifies that the outsourcing of manpower

and direct engagement of employees on contractual basis are two different things from each other and the Government Orders as aforesaid are applicable for outsourcing of personnel only in the various Departments of the State of U.P. and their subordinate institutions.

52. Additionally, it has been stated that the writ petitions have become infructuous in view of the decision of the Board of Directors of the Sangh for cancelling the entire proceedings of selection of service provider via GeM portal as well as cancelling the Contract of the selected service provider by its Resolution dated 10.11.2022.

53. After considering the pleadings and arguments, three questions arise for this Court for consideration. They are:-

(i) Whether Writ Petition under Article 226 against the Sangh an Apex level Society is maintainable?

(ii) Whether a writ of mandamus can be issued for enforcement of contractual rights?

(iii) Whether the petitioners are entitled to any relief and if so, what relief can be granted to them by this Court?

54. The question of maintainability of the writ petition against an Apex level Cooperative Society has been raised for the first time in the written submissions. No reference to the same was made during the course of arguments by any of the counsel appearing for the respondents. However, since it has been raised and the question of jurisdiction is one which the Court has to see on its own even if it is not raised by any of the parties, this Court shall now consider the judgements cited in this regard.

55. In ***Vijay Bihari Srivastava*** (supra), the Court was considering a case where the petitioner was appointed as Secretary in U.P. Postal Primary Cooperative Bank Ltd in pursuance of a Resolution passed by the Committee of Management, which was approved by the Annual General Body and the petitioner was confirmed on the post of Secretary thereafter. Later on, he was directed to handover the charge of the post of Secretary to another person and was reverted to the post of Accountant. Being aggrieved against the said order, the petitioner moved this Court in a writ petition for mandamus to be issued to the opposite parties to allow the petitioner to function on the post of Secretary in the Bank and not to revert the petitioner from the post on which he was substantively appointed without following the procedure as laid down in Regulation 84 & 85 of the U.P. Cooperative Societies Employees Service Regulations 1975, and also to quash the decision of the Committee of Management for taking over the charge of the petitioner from the post of the Secretary and handing over the charge of the post of Accountant to the petitioner. When the matter came up before a Division Bench, it raised the question as to whether a Full Bench decision in ***Radha Charan Sharma Vs. U.P. Cooperative Federation, 1982 UPLBEC 89 (FB),*** can be ignored by a Division Bench in view of subsequent decision of the Supreme Court in ***U.P. State Cooperative Land Development Bank Vs. Chandra Bhan Dubey 1999 (1) SCC 741;*** and as to whether a writ in the nature of Certiorari would lie against a Cooperative Society and whether it comes within the meaning of the words "other authority" occurring in Article 226 of the Constitution of India. It is the observations made by the Full Bench while considering

the latter questions which are relevant for the controversy involved in this petition.

56. The Full Bench referred to several decisions of this Court as well as of the Supreme Court relating to Societies Registration Act and the Cooperative Societies Act. It referred to Judgement of the Supreme Court in *U.P. State Cooperative Land Development Bank Ltd versus Chandrabhan Dubey 1999 (1) SCC 741;* where it was observed that a juristic personality like a Cooperative Society which is registered under the Act but is otherwise free of Government control will not be an "authority" within the meaning of Article 12, but held that on the facts of the case, that in the service rules framed by such Cooperative Society, the Managing Director and the Chief General Manager were officials of the State Government sent on deputation to the appellant, and found that it would be difficult to imagine a situation where the Government sends one of its employees on deputation to head a Body or Institution, not controlled by that Government, even though the employee may be paid out of the funds of that Body or Institution, unless there is a specific provision of law so entitling the Government. Moreover, the service conditions of its employees particularly with regard to disciplinary proceedings against them were statutory in nature, the exercise of power of dismissal had to be in accordance with the statutory regulations with the approval of the statutory body hence the Court had held that the State Government had all pervasive control over the Society, and its employees had statutory protection and, therefore, the appellant being an authority of the State would be amenable to jurisdiction of the High Court under Article 226 of the Constitution. The Full Bench in ***Vijay Bihari Srivastava*** (supra) observed in paragraph 35 thus: -

"In the light of foregoing discussions, we answer the question as to whether a writ petition in the nature of Certiorari will lie against a Cooperative Society, or it comes within the meaning of the words "other authority" occurring in Article 226 of the Constitution, as follows:

A writ petition in the nature of Certiorari will lie against a Cooperative Society only when such Society has ingredients of an ''authority' within the meaning of Article 226 of the Constitution and not otherwise. The following Guidelines are culled out from the various decisions of the Supreme Court, referred to above: (1) . The Constitution of the Managing Body/committee constitutes the functionaries of the government. (2) . There is an existence of deep and pervasive control of the management and policies of the Cooperative Society by the Government. (3) The function of the Cooperative Society is of public importance and closely related to the Governmental Functions.(4). The financial control is by the government or it provides financial aid Controlling its affairs. (5). The violation of statutory Rules applicable to the Society in regard to the service matters of its employees, and (6). Statutory violations or non-compliance of it by an authority under the act."

57. It was further observed in paragraph 37 as follows: -

"37. It is also not necessary that all factors enumerated above, be exhausted to determine that a Society is an authority

within the meaning of Article 226 of the Constitution. It is also clarified that mere regulatory provision in the Cooperative Society by the Registrar or other authority, shall not make the Managing Body/Committee as an authority as observed in paragraph 40 of the report in ***Pradeep Kumar Biswas*** *(supra). The Court may, however decline to entertain the writ petition if it finds that the petitioner has alternative remedy to ventilate his grievances."*

58. In the case of ***S.S. Rana Vs. Registrar, Cooperative Societies Another 2006 (11) SCC 634,*** the Supreme Court observed as under: -

"12. It is well settled that general regulations under an Act, like Companies Act or the Cooperative Societies Act, would not render the activities of a Company or Society as subject to the control of the State. Such control in terms of the provisions of the Act are meant to ensure proper functioning of the Society and the State or Statutory Authorities would have nothing to do with its day to day functions.

13. The decision of the seven Judges bench of this Court in Pradeep Kumar Biswas (supra) whereupon strong reliance has been placed has no application in the instant case. In that case, the Bench was deciding a question as to whether in view of the subsequent decisions of this Court, the law was correctly laid down in Sabhajeet Tiwari versus Union of India and others (1975) 1 SCC 485, and it is not whether the same deserved to be overruled. - - -"

59. A Full Bench of this Court in ***Anil Kumar Pandey and 17 others Vs. State of U.P. and others, 2016 (7) ADJ 495;*** decided the following questions: -

"1. Whether a writ petition under Article 226 of the Constitution of India would be maintainable against a Cooperative Cane Development Society at the instance of its employee, for the alleged breach of the provisions of the U.P. Cane Cooperative Service Regulations 1975, which govern his service conditions.?

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3. Whether the U.P. Cane Cooperative Service Regulations 1975 are statutory in nature having been issued under Section 122 of the U.P. Cooperative Societies Act 1965 or are merely in the nature of administrative instructions.?

60. The Court observed in Anil Kumar Pandey (supra) as follows -

"The Regulations which have been framed in the exercise of powers conferred by Section 122 of the Act are Traceable to a source of statutory power. These Regulations are framed by the Cane Commissioner as an "Authority' to whom the functions of doing so have been delegated by the State Government under Section 122. Hence, the Regulations cannot be regarded merely as administrative instructions. The Regulations have been made in pursuance of the statutory power conferred by section 122.

The answer to question (1) was then given in the following terms:-

"---In so far as question one is concerned, the issue would have to be resolved having due regard to the tests which have been laid down in the judgement of five Judges of this Court in ***Vijay Bihari Srivastava's*** *case. Moreover, the issue of maintainability is distinct from whether the discretion should be exercised under Article 226 in a given case. Even if a petition is maintainable, the Court may, in the facts of a particular case, decline to*

entertain it under Article 226 as, for instance, where disputed questions of fact arise or an efficacious alternative remedy is available."

61. In ***Thalappalam Service Cooperative Bank Ltd Versus State of Kerala and others 2013 (16) SCC 82,*** the Supreme Court while considering the question of Cooperative Societies and whether they are amenable as *"other authorities"* to writ jurisdiction, observed while referring to the judgement in ***U.P. State Cooperative Land Development Bank Ltd versus Chandrabhan Dubey*** (supra) that-

"before an institution can be a statutory body, it must be created by or under the Statute and owe its existence to a Statute. This must be the primary thing which has got to be established. Here a distinction must be made between an institution which is not created by or under a Statute, but is governed by certain statutory provisions for the proper maintenance and administration of the institution. There have been a number of institutions which are not created by or under any Statute, have adopted certain statutory provisions, but that by itself is not in our opinion, sufficient to clothe the institution with a statutory character - - ."

"15. We can, therefore, draw a clear distinction between a body which is created by a statute and a body which, after having come into existence, is governed in accordance with the provisions of a Statute. Societies with which we are concerned, fall under the latter category that is governed by the Societies Act and are not statutory bodies, but only body corporate within the meaning of Section 9 of the Kerala Cooperative Societies Act, having perpetual succession and a common seal and hence have the power to hold property, enter into Contract, institute and defend suits, and other legal proceedings and to do all things necessary for the purpose, for which it was constituted. Section 27 of the Societies Act categorically states that the final authority of a Society lies in the General Body of its members and every Society is managed by the Managing Committee constituted in terms of the bylaws as provided under Section 28 of the Societies Act. Final authority so far as such types of Societies are concerned, as the Statute says, is the general body and not the Registrar of Cooperative Societies or the State Government."

"17. Societies are....of course, subject to the control of the statutory authorities like Registrar, Joint Registrar, the Government etc., but it cannot be said that the State exercises any direct or indirect control over the affairs of the Society which is deep and all pervasive. Supervisory or general regulation under the Statute over the Cooperative Societies, which are a body corporate, does not render activities of the body so regulated as subject to such control of the State, so as to bring it within the meaning of the "State" or in the instrumentality of the State."

62. The aforesaid judgment affirmed the observations of the Supreme Court in ***S.S Rana vs. Registrar Cooperative Societies and Another 2006 (11) SCC 634.*** While referring to S.S. Rana, it observed that-

"In that case this Court was dealing with the maintainability of the writ petition against Kangra Central Cooperative Society Bank Ltd, a Society registered under the provisions of Himachal Pradesh Cooperative Societies Act 1968. After examining various

provisions of the Himachal Pradesh Cooperative Societies Act, this Court held as follows:

"9. It is not in dispute that the Society has not been constituted under an Act. It functions like any other Cooperative Society... regulated in terms of the provisions of the Act, except as provided in the bylaws of the Society. The State has no say in the functions of the Society. Membership, acquisition of shares and all other matters are governed by the bylaws framed under the Act. The terms and conditions of service of an officer of the Cooperative Society, indisputably, governed by the Rule 456, to which reference has been made by Mr. Vijai Kumar, does not contain any provision in terms were of any legal right as such is conferred upon an officer of the society.

10. It has not been shown before us that the State exercises any direct or indirect and control over the affairs of the Society, or, deep and pervasive control. The State furthermore is not the majority shareholder. The State has the power only to nominate one Director. It cannot, thus, be said that the State exercises any functional control over the affairs of the Society in the sense that the majority Directors are nominated by the State. For arriving at the conclusion that the State has a deep and pervasive control over the Society, several other relevant questions are required to be considered, namely, (1) how was the Society created? (2) whether it enjoys any monopolistic character? (3) do the functions of the Society partake to statutory functions or public functions ? And (4) can it be characterised as public authority?

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12. It is well settled that general regulations under an Act, like the Companies Act or the Cooperative Societies Act, would not render the activities of a Company or a Society as subject to control of the State. Such control in terms of the provisions of the Act are meant to ensure proper functioning of the Society and the State or statutory authorities would have nothing to do with its day to day functions."

63. The learned counsel for the State Respondent has placed reliance upon the judgement of a Coordinate Bench of this Court in Writ-A No. 2329 of 2019: Krishna Mohan versus State of U.P. and 3 others, decided on 14.02.2019 where after considering the law as aforesaid, it was observed that merely regulatory control cannot be said to be all pervasive control and primary level Cooperative Societies cannot be said to come within definition of ''authority' under Article 12 of the Constitution and writ jurisdiction cannot be exercised against them at the instance of their employees.

64. This Court has considered judgments cited by the learned counsel for the State Respondents as aforesaid, but is of the considered opinion that none of the said judgments has dealt with a case where the Circular issued by a State Respondent, in this case, the Commissioner and Registrar, Cooperatives, U.P., was under challenge. It is settled law that no judgement can be a binding precedent for an issue which it has not considered at all. One additional fact, may change the binding nature of a precedent. The Court should not place reliance on a judgment without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance has been placed. Observations of Courts are neither to be

read as Euclid's theorems, nor as provisions of the Statute and they cannot be read out of context.

65. This Court having considered the judgments relied upon by the counsel for the parties finds that although a statement has been made in the writ petition that the Sangh is under the complete control of the State Government and substantial funding is done by the Government, such averment has been denied in the the counter affidavit.

66. Neither of the parties has filed any documentary evidence to substantiate their rival claims. The question of maintainability of the writ petition against the Sangh has not been raised at the stage of arguments either. It is only in the written submissions of the State Respondents that the issue of maintainability has been raised. This Court has found that the Circular of the Respondent no.2 has been challenged as it proposed to issue Guidelines to the Cooperative Societies at different levels to purchase manpower only from the GeM Portal devised by the Government and only in accordance with the various Government Orders issued from time to time. The employees were to be engaged only from the Sewayojan Portal of the Employment Exchange.

67. The learned counsel for the respondents Nos. 1 & 2 have clarified during the course of arguments that such Circular issued by the Respondent no.2 was not binding and the Government Orders it relied upon were meant for Government Departments and their subordinate entities and not for Cooperative Societies.

68. If that is the case, then the conduct of the Respondent nos.3 to 6 after issuance of such Circular dated 17.09.2021 belies the arguments of their learned counsels. If at all the respondent no.2 had no control over the Respondent Nos.3 to 6 then it is quite improbable that they would have issued tender notice on GeM portal inviting bids from service providers. This Court is of the considered opinion that the question of maintainability has been raised only to digress from the main issue as to whether the Respondent No.2 could have issued such Circular dated 17.09.2021. It is evident also that the petitioners are indeed going to be affected if such Circular is to be given effect to by the Respondent nos.3 to 6. Therefore, this Court holds that writ petitions are maintainable as they challenge the Circular of the respondent no.2 and consequential actions taken thereafter by respondent nos.3 to 6.

69. Questions (ii) and (iii) shall be dealt with by me together. The counsel for the State Respondents has also placed reliance upon two judgements of the Supreme Court regarding right of contractual employees to continuity and regularization. The first such case relied upon is Secretary, State of Karnataka and others versus *Uma Devi* and others, 2006 (4) SCC 1 and paragraph 43 to 47 thereof.

The Supreme Court observed as follows: -

"43. - - - - - therefore, consistent with the scheme for public employment, this Court by laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointed. If it is a contractual appointment, appointment comes to an end at the end of the Contract if it were an engagement or appointment on daily wages or casual basis, the same

would come to an end when it is discontinued. ------- It is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad-hoc employees who by the very nature of their appointment, do not acquire any right. The High Court sitting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.-------"

The Supreme Court further observed in paragraph-45 as follows:-

"45. While directing that appointments, temporary or casual, be regularized or made permanent, the Courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. *It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment.* While accepting the employment with open eyes, it may be true that he is not in a position to bargain - not at arms length - since he might have been searching for some employment so as to eke out his livelihood and takes whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. -- -."

It was observed in paragraph-46 & 47 as follows:-

"46. ------Moreover, the invocation of the doctrine of legitimate expectation, cannot enable the employees to claim that they must be made permanent or they must be regularized in the service though they had not been selected in terms of the rules for appointment. The fact that in certain cases the Court had directed regularization of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation - - ."

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant Rules of procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such person cannot invoke the theory of legitimate expectations for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in some cases in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. *It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent.*- - It is also obvious that this theory cannot be invoked to seek a positive relief of being made permanent in the post."

(emphasis supplied)

70. The counsel for the Respondents have also placed reliance upon judgement rendered by the Supreme Court in ***State of U.P. and Others versus Principal Abhay Nandan Inter-College and others*** Civil Appeal 865 of 2021, decided on 27.09.2021. The Supreme Court was considering a challenge to the judgement of the Division Bench of the Allahabad High

Court holding Regulation 101 framed under the Intermediate Education Act 1921 as amended, as unconstitutional. The Court considered the provisions of the Intermediate Education Act 1921 and the Regulations framed thereunder as amended from time to time and the Payment of Salaries Act 1971. The Court noted that in January 2008, with a view to regulate and curtail staff expenditure, a policy decision was taken by the State of U.P. not to create any new post in Class IV category and wherever it may be necessary, work may be carried out through outsourcing. Thereafter, recommendation was made by the Sixth Central Pay Commission in March 2008 that it would be appropriate to have outsourcing of Class IV employees instead of making any new recruitment in all Government departments. Regulation 101 was amended accordingly in 2009 and Government Orders were also issued on 08.09.2010 and 06.01.2011, making outsourcing applicable to all Government Departments and aided schools, deciding not to go for fresh recruitment of Class IV employees and further directing that any arrangement concerning the post to be vacated may be made only through outsourcing. Regulation 101 was once again amended by Government Order dated 04.09.2013 notified on 24.04.2014. The effect of the said amendment was to make the post of Class IV employees which was hitherto supposed to be filled up by institutions, unavailable for such recruitment and work of Class IV employees was to be taken only through outsourcing. The permanent posts were accordingly abolished, thereby replacing the method of appointment by way of outsourcing. An exception was carved out only for dependents of those employees who had died in harness.

71. By the Seventh Central Pay Commission Report, the recommendations made in the Sixth Central Pay Commission report were reiterated with a word of caution in its implementation. But, the need to go for outsourcing, keeping in view the financial constraints and efficiency, was once again reiterated. In paragraph 3.72 and paragraph 3.83 of the Report reference was made to broad guidance to be provided in the rules on identification of contractors and the tendering process. It referred to 3 kinds of contractual appointments. The first related to tasks of routine nature, typically those relating to housekeeping, maintenance related activities, data entry, driving and so on, which are normally bundled and entrusted to agencies. These agencies would then depute the necessary persons to carry out the tasks. The Commission also took the view that *"....a clear guidance from the Government on jobs that can and should be contracted out would be appropriate. While doing so, the concerns of confidentiality and accountability may be kept in view. Further, to bring about continuity and to address the concerns regarding exploitation of contractual manpower, uniform Guidelines/model Contract agreements may be devised by the government- -."*

72. The Supreme Court observed that the primary concern for doing away with recruitment on the post of Class IV employees and for replacing the process with utilisation of service through outsourcing was that of financial difficulty, followed by efficiency. The Court observed also that it was a policy decision introduced carefully after considering all relevant materials and based on the opinion of experts in the field of finance and administration and after widespread

consultations with stakeholders. It being based on recommendations of the Sixth Central Pay Commission and the Seventh Central Pay Commission, was not amenable to challenge by invoking jurisdiction under Article 226 of the Constitution. The Court observed in paragraph 37 as follows:-

"A policy decision is presumed to be in public interest, and such a decision once made is not amenable to challenge, until and unless there is manifest or extreme arbitrariness, the constitutional Court is expected to keep its hands off."

The Court further observed in paragraph-39 that-

"once a Rule is introduced by way of a policy decision, a demonstration on the existence of manifest, excessive and extreme arbitrariness is needed before it can be set aside. The parametres required for testing the validity of an Act of Legislature are expected to be followed by the Court. The Court will not adopt a doctrinaire approach. The representatives of people are expected to operate on democratic principles. The presumption is that they are conscious of every fact, which would go to sustain the constitutionality of the law. A law cannot operate in a vacuum. In the concrete world, when the law is put into motion in practical experiences, bottlenecks that would flow from its application, are best researched by the lawgivers. Solutions to vexed problems made manifest through experience, would indeed require a good deal of experimentation, as long as it passes muster in law. It is no part of a Court's function to probe into what it considers to be more wise or a better way to deal with the problem....".

73. The Supreme Court further observed that outsourcing is in fact doing away with the post altogether i.e., abolishing a post. No Court can direct creation of post. The deliberation done by the Division Bench in interpreting the word outsourcing was outside the scope of judicial review and ought to have been avoided. The Supreme Court observed in paragraph 43 thus:-

"...Outsourcing as a matter of policy has been introduced throughout the State. It is one thing to say that it has to be given effect to with caution, as recommended by the Seventh Central Pay Commission, and another to strike it down as unconstitutional. Outsourcing per se is not prohibited in law. It is clear that a recruitment by way of outsourcing may have its own deficiencies and pitfalls, however, a decision to take outsourcing cannot be declared as ultra vires of the Constitution on the basis of mere presumption and assumption. Obviously, we do not know the nature of the scheme and safeguards attached to it...".

74. It observed in paragraph 45 also:-

"....We are also not dealing with the Scheme per se, and therefore, are in dark on the conditions of service.....One cannot simply presume that outsourcing as a method of recruitment would necessarily be adopting Contract labour and that there exists an element of unfair trade practice, as sought to be contended by the respondents.

75. Counsel for the Respondents has placed reliance upon judgement rendered by the Supreme Court in ***University of Delhi versus Delhi University Contract Employees Union and others 2021 SCC***

Online SC 256, and paragraph 7 thereof and argued that while considering judgement rendered in *Uma Devi* and subsequent judgements rendered by Division Benches thereafter *in State of Karnataka and others versus M.L. Kesri and others 2010 (9) SCC 247; State of Gujarat and others versus P.W.D. Employees Union and Others 2013 (12) SCC 417; Nihal Singh and others versus State of Punjab and others 2013 (14) SCC 65; Sheo Narayan Nagar and others versus State of U.P. and others 2018 (13) SCC 432; and Narendra Kumar Tiwari and others versus State of Jharkhand and others 2018 (8) SCC 238;* the Supreme Court reiterated the law as settled in *Uma Devi* and its paragraph 47, 49 and 53 and explained the observations made by Division Bench in *M.L. Kesari* on the basis of judgement rendered in the case of *Official Liquidator versus Dayanand and others* 2008 (10) SCC page 1. It observed that even if an advertisement was issued for engagement of contractual employees to be made on some sort of selection, the more qualified and meritorious persons do not apply because they know that the employment will be for a fixed term with a fixed salary and their engagement will come to an end with the conclusion of the project. As a result, only mediocres respond to such advertisements and join such contractual positions. It observed that all the decisions relied upon by the Employees' Union related to employees who had put in more than 10 years of service and could claim the benefit in terms of paragraph 53 of the decision in *Uma Devi*. The one time measure of regularisation had been elaborated in *ML Kesari.* Each department and each instrumentality had to undertake a one-time exercise and prepare a list of all casual, daily wage or ad hoc employees who had been working for more than 10 years without the intervention of Courts and tribunals, and subject them to a process of verification as to whether they were working against vacant posts and possessed the requisite qualification for the post and if so, regularise their services. After the decision in Umadevi, several departments and instrumentalities had not commenced the one-time regularization process. Some departments on the other hand had undertaken the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in the Courts or due to sheer oversight. In such circumstances, the employees who are entitled to be considered in terms of paragraph 53 of the decision in *Uma Devi* would not lose their right to be considered for regularisation, merely because the one time exercise was completed without considering their case, or because six months period mentioned in paragraph 53 of *Uma Devi* had expired. If any employer had held the one-time exercise in terms of *Uma Devi* but did not consider the cases of some employees who were entitled to the benefit but who had not put in 10 years of continuous service as on 10.04.2006, the employer should consider their cases also, as a continuation of the one-time exercise. The one-time exercise would be concluded only when the employees who are entitled to be considered in terms of paragraph 53 of *Uma Devi* are so considered. The object behind this direction in paragraph 53 of *Uma Devi* was twofold. First is to ensure that those who have put in more than 10 years of continuous service without the protection of any interim orders of Court or Tribunal, before the date of decision in *Uma Devi*, are considered for regularisation in view of their long service. Second is to ensure that departments/instrumentalities

do not perpetuate the practice of employing persons on daily wage/adhoc/casual basis for long periods and then periodically regularise them on the ground that they have served for more than 10 years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment.

76. The Supreme Court observed in paragraph 12 of the decision in *University of Delhi* (supra) that at the time of judgement rendered in *Uma Devi* most of the Contract employees had put in just about 3 to 4 years of service. But as of now, most of them had completed more than 10 years on Contract basis. Though the benefit of regularisation cannot be granted, a window of opportunity must be given to them to compete with the available talent through public advertisement. A separate and exclusive test meant only for Contract employees would not be an answer as that would confine the zone of consideration to Contract employees themselves. In such a case, an advertisement for open recruitment and selection should be made by the University by giving the benefit of age relaxation to those employees who were engaged before the judgement in *Uma Devi*, and by giving them the benefit of 10 marks in the ensuing selection process and for every additional year they had put in, one additional mark may be given to them subject to a ceiling of eight additional marks.

77. The learned counsel for the petitioner on the other hand has placed reliance upon ***National Aluminium Company Limited versus Deepak Kumar Panda 2002 (6) SCC 223*** paragraph 2 & 4; the Court was considering a case where the respondent was appointed as a French interpreter by the Company in 1985 on contractual basis after holding an interview on a consolidated pay initially for one year which engagement was later extended on an annual basis for almost five years. The reasons disclosed at the time of his disengagement were that he had failed to produce original certificate of higher qualification of graduation in French and that despite giving several opportunities in this regard he had failed to furnish the same. The Company disclosed other misconduct of staying away from duty without waiting for sanction of leave. It also contended that the contractual appointment having come to an end, the respondent had no legally enforceable right to continue in service. The Court considered the said ground regarding failure to produce reliable proof of having requisite qualification in detail and observed that it was not as if the respondents' services were not extended for any other administrative reasons. In fact, it was an undisputed fact that juniors to the respondent employed on similar terms were continued in service and thereafter absorbed on regular basis. The Court held that the Company was not justified in treating the respondent as unqualified as they had taken work from him for five years.

The learned Senior Counsel for the Petitioner has argued that this Court had to test the ground taken by the Respondents in discontinuing the Petitioners engaged on contractual basis, while keeping other employees again on contractual basis but through a service provider.

78. The learned Counsel for the petitioners has also placed reliance upon ***Grid Co. Ltd and another versus Sadananda Dolloi and others 2011 (15) SCC 16*** and paragraphs 1, 22 to 39 thereof. The appellant Corporation terminated the

services of the respondent by giving three months notice and salary as stipulated in the Contract. The Supreme Court considered the true nature of the appointment of the respondent and as to whether it was a regular appointment or simply contractual in nature and also the question that if the appointment was contractual whether the termination thereof was vitiated by any legal infirmity to call for interference under Article 226 of the Constitution. While considering the second question the Court observed in paragraph 25 as follows:-

"25. It is true that judicial review of matters that fall in the realm of contracts is also available before the superior Courts, but the scope of any such review is not all pervasive. It does not extend to the Court substituting its own view for that taken by the decision making authority. Judicial review and resultant interference is permissible where the action of the authorities is malafide, arbitrary, irrational, disproportionate or unreasonable but impermissible if the petitioners challenge is based only on the ground that the view taken by the authority may be less reasonable than what is a possible alternative. The legal position is settled that judicial review is not so much concerned with the correctness of the ultimate decision as it is with the decision making process unless of course the decision itself is so perverse or irrational or in such outrageous defiance of logic that the person taking the decision can be said to have taken leave of his senses."

79. While referring to the judgement in ***Sreelekha Vidyarthi versus State of U.P. 1991 (1) SCC 212,*** the Supreme Court observed in *Grid Co.* (supra) the difference between public and private law activities of the State. The Court had reasoned that unlike private individuals, the State while exercising its powers and discharging its functions, acts for the public good and in public interest. Consequently, every State action has an impact on public interest which would in turn bring in the minimal requirements of public law applications in the discharge of such functions. The Court declared that to the extent, the challenge to State action is made on the ground of being arbitrary, unfair and unreasonable hence offensive to Article 14 of the Constitution, judicial review is permissible. The fact that the dispute fell within the domain of contractual obligations did not, declared the Court, relieve the State of its obligation to comply with the basic requirements of Article 14. Not being impressed with the argument that the Contract itself stated that it was based upon the pleasure doctrine, the Court Had observed that :-

"....an additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions."

80. The Supreme Court in Grid Co. (supra) however referred to the decision in ***Satish Chandra Anand versus Union of India, AIR 1953 Supreme Court 250,*** where the petitioner an employee of Directorate General of Resettlement and Employment, was removed from contractual employment after being served the notice of termination. The Contract of service in that case was initially for a period of five years which was later extended. A Five Judges Bench hearing the matter dismissed the petition, challenging the termination primarily on the ground that the petitioner could not prove a breach of a Fundamental Right since no right

accrued to him as the whole matter rested in Contract and termination of the Contract did not amount to dismissal, or removal from service nor was it a reduction in rank. The Court found it to be an ordinary case of a Contract being terminated by notice under one of its clauses. It quoted paragraph 10 and 11 of the judgement rendered in Satish Chandra Anand (supra) as follows: -

"10. There was no compulsion on the petitioner to enter into the Contract he did, he was as free under the law as any other person to accept or reject the offer which was made to him. Having accepted, he still has open to him all the rights and remedies available to other persons similarly situated to enforce any rights under his Contract which have been denied to him, assuming there are any, and to pursue in the ordinary Courts of the land such remedies for a breach as are open to him to exactly the same extent as other persons similarly situated. He has not been discriminated against and he has not been denied the protection of any laws which others similarly situated could claim....,

11. ...the petitioner has not been denied any opportunity of employment or of appointment. He has been treated just like any other person to whom an offer of temporary employment under these conditions was made. His grievance, when analysed, is not one of personal differentiation but it is against an offer of temporary employment on special terms as opposed to permanent employment. But of course the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who choose to accept those terms and enter into the Contract are bound by them, even as the State is bound".

81. The Court observed the development of law since the time of Satish Chandra Anand to Sreelekha Vidyarthi and observed in Grid Co. (supra) paragraph 38 as follows :-

"38. Conspectus of the pronouncements of this Court and the development of law over the past few decades does show that there has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the Contract was permissible and the employee could claim no protection against such termination even when one of the contracting parties happened to be the State. Remedy for a breach of a contractual condition was also by way of civil action for damages/compensation. With the development of law relating to judicial review of administrative actions, a Writ Court can now examine the validity of a termination orders passed by a public authority. It is no longer open to the authority passing the orders to argue that its action being in the realm of Contract is not open to judicial review."

82. Now coming to the case of Grid Co. (supra), considering the facts of the case the Court had observed that the power to make contractual employment is implicit in the power to make a regular permanent appointment unless the Statute under which this authority is exercised forbids making such an appointment. The appointment order had specifically described the appointment to be a tenure appointment limited to a period of three years subject to renewal on the basis of performance. The Appellant Corporation had also extended the tenure suggesting that the appointment was a tenure appointment, extendable at the

discretion of the Board of Directors. The Court held that renewal of Contract employment depended upon the perception of the management as to the usefulness of the respondent and the need for an incumbent in the position held by him. This discretion lay entirely in the Board of Directors there was no element of any unfair treatment or unequal bargaining power between the appellant and the respondent no. 1 to call for an oversympathetic or protective approach towards the latter. Contractual appointments work only if they seem mutually beneficial to both the contracting parties and not otherwise. There was no material to show any unreasonableness, unfairness, perversity or irrationality in the action taken by the Corporation.

83. The learned counsel for the petitioner has also placed reliance upon judgement rendered by a Coordinate Bench on 12.08.2021 in Writ-A No. 4845 of 2021: ***Sunita Singh versus State of UP and others,*** wherein the Court was considering maintainability of writ petition filed by teachers appointed on contractual basis in Kasturba Gandhi Balika Vidyalaya. The Coordinate Bench considered three Full Bench decisions given by this Court in Sheela Devi Vs. state of U.P. and others 2010 SCC Online ALL 1142, relating to maintainability of writ petitions by Anganwadi Workers, and *M.K. Gandhi Vs. Director of Education (Secondary) U.P., Lucknow,* 2005 SCC Online ALL 728; and *Roychan Abraham Vs. State of U.P. and others,* 2019 SCC Online ALL 3935 (FB), where Full Bench considered whether the writ petition would be maintainable against the action taken by private unaided schools.

84. The Full Bench in Sheela Devi Vs. State of U.P. and others, while considering the maintainability of writ petition by Anganwadi workers, observed thus -

"26. The above decisions of the Supreme Court clearly demonstrate that the ambit and scope of Article 226 has been liberalised, interpreted and expanded by the Courts. A petition is maintainable if the petitioner seeks relief in accordance with law and his real grievance is against the action or an order passed by a statutory authority or an authority vested with the performance of public functions. In short a writ petition would always be maintainable under Article 226 of the Constitution against an order passed by any person in discharge of public duty or by public authority that is, an officer of the Government."

The Full Bench of this Court in Roychan Abraham was called upon to consider the correctness of another decision of the learned judges of the Court rendered in *MK Gandhi versus Director of Education*. In *M.K. Gandhi*, the Full Bench had held that the employees of an educational institution whose services were governed solely by non-statutory bylaws could not maintain a writ petition. The Full Bench in *M.K. Gandhi* held that a private educational institution was not State. The decision in *M.K. Gandhi*, when taken in appeal to the Supreme Court, was upheld to the aforesaid extent. A further direction which had come to be issued there in namely for the CBSE to take further steps against the concerned institution was set aside. In *Roychan Abraham*, the Full Bench elaborately noticed the various decisions rendered by the Supreme Court as well as this Court with respect to bodies which discharge a public function or perform a public duty. Upon noticing the body of

precedents which had grown on the subject, the Full Bench observed that:-

".....legal right of an individual may be founded upon a Contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law - be it a legislative Act of the State, or an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question is required to be determined in each case having regard to the nature of and extent of authority vested in the State.- - - Even if it be assumed that an educational institution is performing public duty, the act must have direct nexus with the discharge of public duty. It is undisputedly a public law action which confers a right up on the aggrieved to invoke extraordinary jurisdiction under Article 226 for a prerogative Writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through petition under Article 226..."

85. It is true that the law as quoted above that a Contract of personal service which is not imbued with any statutory flavour cannot be enforced and that the Writ as prayed for in cases of termination cannot be granted, has consistently held the field.

The Full Bench then went on to observe that while it was true that even a private institution imparting education is amenable to judicial review under Article 226 of the Constitution by virtue of the fact that it discharges a public function, that the decision *M.K. Gandhi* must be understood as confined to the facts of the case. It was noted that *MK Gandhi* essentially answers the question whether a writ petition would be maintainable for violation of non-statutory bylaws and for enforcement of a private Contract. The Court went on to observe that *MK Gandhi* cannot be understood as having propounded the principle that private educational institutions do not render a public function. Ultimately it was held that the decision in *MK Gandhi* did not merit being reviewed.

86. The Supreme Court in the case of ***Ramakrishna Mission Versus Kago Kunya, 2019 (5) SCALE 559*** held that: -

"43. - - - If a person or authority is State within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, with a caveat that even in such cases Writ would not lie to enforce private law rights. There are a catena of judgements on this aspect and it is not necessary to refer to those judgements as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. Private law is that part of a legal system which is a part of Common Law that involves relationships between individuals, such as law of Contract or torts. Therefore, even if petition would be maintainable against any authority, which is State under Article 12 of the Constitution, before issuing any Writ, particularly Writ of mandamus, the Court has to satisfy that action of such an authority which is challenged, is in the domain of public law as distinguished from private law." - - -, even if the body discharges a public function in a wider sense, there is no public law element involved in the enforcement of a private Contract of service....."

87. The Supreme Court held further: -

"Thus, contracts of a purely private nature would not be subject to Writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the Contract of service is governed or regulated by a statutory provision. Hence when an employee is a workmen governed by Industrial Disputes Act 1947, it constitutes an exception to the general principle that a Contract of personal service is not capable of being specifically enforced or performed. - -"

88. In ***Suneeta Singh versus State of U.P. and others,*** a Coordinate Bench of this Court observed that:-

"the three well-known and repeatedly articulated exceptions to a Contract of service not being specifically enforceable are (A) where a civil servant is removed from service in violation of Article 311 or a law made under Article 309 of the Constitution, (B) where a workmen is removed in violation of protections accorded by industrial legislation, and, (C) where an employee of a body is dismissed in breach of a statute or a statutory rule. ...The precedents following an undeviating thread have stuck to the three exceptions noticed above..... contractual engagement of the petitioners would have been liable to be tested solely on the aforesaid principles but for the fact that their engagement is also controlled and governed by executive orders, Circulars and policy statements issued by the respondents from time to time. These orders were made in the exercise of executive power of the State or as an expression of policy by an authority which is State, and are actions of a body which discharges a public function or performs a public duty would bind those authorities to the same extent as any statutory rule, regulation or a code of conduct enforceable in law. - - - It is this distinguishing feature that would confer a right on the petitioners here to assail and question the actions of the respondents notwithstanding the fact that their engagement is contractual. The directives and orders and Circulars issued by the respondents govern and control a whole gamut of activities relating to KGBV, including the selection and appointment of teachers and staff, the terms of engagement, curriculum and pattern of instructions. .... to put it in other words, the challenge to orders of termination or variation in terms of engagement would have to be established and found to be in violation of a provision or stipulation contained in those executive orders and Circulars issued by the respondents so as to warrant writ being issued notwithstanding their employment being otherwise and principally governed by the terms of the individual contracts - - ."

89. In answer to the question nos. (ii) and (iii), this Court has gone through various judgments of Supreme Court and of this Court viz. *Uma Devi, Delhi University, Satish Chandra Anand, Shreelekha Vidyarthi, National Alluminium Company Ltd., Grid Co. Ltd., Roshan Lal Tandon, Ramkrishna Mission, Sheela Devi, M.K. Gandhi, Roychan Abraham and Suneeta Singh (supra),* and this Court is of the considered opinion that for specific performance of Contract of personal

service, the law is settled that there are only three exceptions, which are:

(a) where a civil servant is removed in violation of Article 311 or Rules made under Article 309;

(b) Where a workman is removed in violation of protection accorded by industrial legislation;

(c) where an employee of the State or its instrumentality is dismissed in violation of statutory rule or regulation.

90. However, the contractual engagement of the petitioners is controlled by executive orders, Circulars and policy statements of the Respondents issued from time to time also. These orders like the Circular dated 17.09.2021, have been issued by the respondent no.2 as an expression of policy by an authority which is the State, and consequential action of the Sangh which is a body discharging a public function and a public duty, would also bind such respondents as a Code of Conduct enforceable in law. The petitioners would derive a right to assail and question the action of the respondents notwithstanding the fact that their engagement is contractual. In other words, this Court can certainly interfere if the policy decision in pursuance of which impugned Invitation to Bid on GeM portal has been taken is arbitrary and irrational.

91. In the affidavit sworn by the Special Secretary, Department of Personnel, filed in compliance of order passed by the High Court on 20.09.2022, it has been stated that there is no prohibition regarding direct engagement of contractual employees. In paragraph-12 and 13 of the affidavit of the Special Secretary, it has been stated that there does not exist any policy of Personnel Department with regard to recruitment of contractual employees and such contractual engagement by department/subordinate institutions for work will be governed by service conditions/terms mentioned in the Contract/agreement as entered into by the concerned Department. It has also been stated that the Government Orders dated 18.12.2019, 18.08.2020 and 25.08.2020 are applicable for outsourcing of personnel only and the said Government Orders are not applicable on appointment/engagement of personnel on contractual basis. There exists no such prohibition for direct engagement of contractual employees and this fact is buttressed by the circumstance that in all other Apex level Cooperative Societies/Public Sector Undertakings, contractual employees have been re-engaged for the Financial Year 2022-23.

Hence, this Court is of the considered opinion that it is a misunderstanding on the part of the respondent Cooperative Sangh that there existed a prohibition against direct engagement of contractual employees and that there was a mandate that all contractual employees were to be engaged only through an outsourcing Agency which would be chosen only through the GeM portal. Such reasoning constituted the basis of the impugned Orders and the action of the respondents in not re-engaging the petitioners for the year 2022-23.

92. There does not exist any conscious decision at any level either in the State Government or in the respondent Coperative Society that contractual employees are not to be directly engaged or ought to be engaged only through an outsourcing Agency. In the absence of any such decision, the impugned orders are clearly arbitrary and liable to be quashed.

In paragraph-4 of the Government Order dated 25.08.2022, it it has been clearly specified that the currently working outsourced employees should be retained as employees through outsourcing Agency. Identifying an outsourcing Agency for supply of 622 employees to replace the currently working 622 contractual employees with a further stipulation that the existing workers should now be engaged through an outsourcing Agency selected through GeM portal appears to be a wholly whimsical decision having no rational basis.

93. None of the affidavits filed on behalf of the respondent Sangh refer to any such decision taken by the Government. The Commissioner and Registrar, only interpreted the Government Orders and the Sangh called for information regarding number of employees directly working on Contract and on the basis of information that there were 622 such employees, tender notice was issued on the GeM portal for providing 622 employees and for selection of an outsourcing Agency for their engagement. The decision to issue the tender notice on the GeM portal and not to renew the Contract of the petitioners is a mechanical decision based upon misunderstanding of the Circular and the Government Orders issued from time to time.

94. This Court has on consideration of rival submissions found that although the petitioners have no right to challenge and have also not challenged the Government Orders issued by the Labour Department and the Department of Micro, Small and Medium Industries, so far as purchase of manpower from service provider selected through GeM Portal is concerned as applicable to Government Departments and subordinate institutions; the question which can and has been raised by them, is with regard to interpretation of the Circular of the Respondent no.2 by the Respondent nos.3 to 6. It is evident from a perusal of the Circular that Guidelines have been given by the Commissioner and Registrar Cooperatives U.P. that in case manpower is to be purchased for outsourcing, it has to be done through the GeM Portal by inviting bids from service providers. The affidavits filed by the Respondents clearly indicate that the Circular dated 17.09.2021 did not anywhere provide that no directly engaged contractual employee, even if he is rendering satisfactory service, can be continued by signing of a fresh Contract with him on the expiry of the current term of the Contract.

95. There is no prohibition in the Circular dated 17.09.2021 for the Cooperative Societies from engagement of contractual employees directly. The interpretation given by the Respondent nos.3 to 6 to the aforesaid Circular is misconceived and irrational, as is evident from the facts that several Apex level Cooperative Societies are still continuing to engage employees directly through individual contracts which have been brought on record by the petitioners and which averment has not been specifically controverted by the respondents. The consequential actions taken by the Respondent nos.3 to 6 viz. annexure 15 and 17 to the writ petition, are entirely unwarranted and liable to be set aside. This Court, however, finds that the Respondent nos.3 to 6 through their Board of Directors have already taken a decision to cancel the proceedings undertaken for outsourcing. The Managing Director has issued the consequential order also in this regard. The writ petitioners may or may not be engaged

contractually again depending upon their past performance and satisfactory conduct earlier by the Respondent nos.3 to 6. Although, no writ of mandamus can be issued to the Respondent nos.3 to 6 in this regard by the Court under Article 226 of the Constitution, this Court having already held that the interpretation of the Circular dated 17.09.2021 by the Respondent no.2 as given by the Respondent nos.3 to 6 being irrational and misconceived, the right of the petitioners to be engaged afresh as per past practice stands revived. The eclipse cast by the Circular dated 17.09.2021 is removed.

96. Accordingly, the writ petitions stand ***disposed of.***
